

**Draft report**  
**of the European Experts Group**  
**on Trafficking in Human Beings**

to be discussed at the Consultative Workshop in the framework of  
the EU Forum for the Prevention of Organised Crime

(Brussels, 26 October 2004)

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## **Preamble**

*(to be added)*

## **Executive summary**

*(to be added)*

# Chapter 1

## Introduction

### 1.1 The Brussels Declaration

On 18-20 September 2002, the European Conference on Preventing and Combating Trafficking in Human Beings – Global Challenge for the 21<sup>st</sup> Century – brought together more than 1,000 participants representing EU Member States, Accession and Candidate Countries, third countries as well as international, inter-governmental and non-governmental organisations (IOs, IGOs, NGOs) and the institutions of the European Union. The Brussels Declaration on Preventing and Combating Trafficking in Human Beings was the final outcome of the conference. Although elaborated outside the institutional decision making structures of the EU, it became another important milestone in the fight against human trafficking. The European Commission announced to make use of the Brussels Declaration (BD) as the main basis of its future work. On 8 May 2003, the Council of the EU adopted Conclusions concerning the Brussels Declaration.<sup>1</sup> The European Parliament referred to the Brussels Declaration in a number of documents.<sup>2</sup>

The Brussels Declaration aimed at further developing European and international co-operation, concrete measures, standards, best practices and mechanisms and got broad support from participants of the conference. In particular, Recommendation 2 of the Brussels Declaration stipulates that, “at European level, an Experts Group, comprising representatives from governments, IGOs, NGOs, international bodies, researchers, the private sector such as the transport sector, and other stakeholders should be set up by the European Commission.”

### 1.2 Setting up and mission of the Experts Group on Trafficking in Human Beings

On 25 March 2003, the Commission adopted the Decision setting up a consultative group, to be known as the Experts Group on Trafficking in Human Beings (hereinafter referred to as “the Group”).<sup>3</sup> By Decision of 27 August 2003, the Commission appointed the members of the

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<sup>1</sup> Official Journal of the European Union (OJ) C series 137, 12.6.2003, p. 1.

<sup>2</sup> Resolution of the ACP-EU Joint Parliamentary Assembly (ACP countries: Africa, Caribbean and Pacific), adopted on 15 October 2003 in Rome, on children’s rights and child soldiers in particular, OJ C 26, 29.1.2004, p. 17, in particular pp. 18, 25; European Parliament Resolution on Progress in 2002 in implementing an area of freedom, security and justice (Articles 2 and 39 of the EU Treaty), OJ 62E, 11.3.2004, p. 176, in particular p. 178. Furthermore, Opinion of the Committee of the Regions on the ‘Communication from the Commission to the European Parliament and the Council in view of the European Council of Thessaloniki on the development of a common policy on illegal immigration, smuggling and trafficking in human beings, external borders and the return of illegal residents’, OJ 23, 27.1.2004, p. 33.

<sup>3</sup> OJ L 79, 26.3.2003, p. 25.

Group,<sup>4</sup> establishing the Group's terms of reference as follows: the Commission may consult the Group on any matter relating to trafficking in human beings (THB). The Group shall issue opinions or reports to the Commission at the latter's request or on its own initiative, taking into due consideration the recommendations set out in the Brussels Declaration. In particular, a report of the Group based on the recommendations of the Brussels Declaration should be submitted to assist the Commission with a view to launching further concrete proposals at EU level. The Commission, in turn, intends to issue a Communication on trafficking in human beings in the first half of 2005.

### 1.3 Working method

From September 2003 until November 2004 the Group had eleven meetings.<sup>5</sup> In the first meeting, the Group elected Ms Marjan Wijers as president and Ms Hana Snajdrova and Mr Marco Gramegna as vice-presidents.

The Group decided to set up the following working parties taking into account the structure of the Brussels Declaration as well as the specific knowledge and interest of individual members: Prevention, Victim Protection and Assistance, Police and Judicial Co-operation. Consequently, most of the Group's meetings were split into plenary and working party sessions. Regular reports about the development in the working parties kept the plenary updated and on the same level of information.

According to Article 7 of the Commission Decision of 25 March 2003 the Group invited additional experts<sup>6</sup> to hearings on 23 February, 18 May 2004 and 28 June 2004, taking into consideration their competence for particular issues as well as the fact that these persons disposed of professional experience and specific information not provided by publicly accessible sources.

A first draft of this report was finalised in September 2004 and has been discussed on 26 October 2004 with a wider audience in a meeting of the Workshop on Trafficking in Human Beings under the auspices of the EU Forum for the Prevention of Organised Crime. Also the draft was put on the website of the Commission to enable a wider range of interested parties to comment on it. [A final meeting took place on ... 2004 in order to conclude the drafting of the report in the light of the workshop meeting and other comments received. On 2004, the Group adopted the report and submitted it to the Commission.]

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<sup>4</sup> OJ C 205, 30.8.2003, p. 3. Details about the professional background of the members can be found under: [http://europa.eu.int/comm/justice\\_home/fsj/crime/trafficking/fsj\\_trafficking\\_expert\\_group\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/crime/trafficking/fsj_trafficking_expert_group_en.htm)

<sup>5</sup> 29-30 September 2003, 12-13 November 2003, 12-13 January 2004, 23-24 February 2004, 5-6 April 2004, 17-19 May 2004, 28-29 June 2004, 26-27 July 2004, 13-14 September, 25-27 October, 29-30 November.

<sup>6</sup> Mr Roger Plant, International Labour Organization; Ms Ruth Morgan Thomas, Network of Sex Work Projects; Mr Pier Luigi Vigna, *Direzione Nazionale Antimafia*; Mr Steve Harvey, Europol; Prof. Gert Vermeulen, The Institute for International Research on Criminal Policy of Ghent University; Mr Gérard Stoudman, Geneva Centre for Security Policy.

In accordance with its mandate to issue opinions on its own initiative as set forth in Article 2, para 2 of the Commission Decision of 25 March 2003, the Group adopted one opinion “On reflection period and residence permit for victims of trafficking in human beings.”<sup>7</sup>

#### **1.4 The report**

In accordance with the Group’s mandate this report shall contribute to the development of further action aiming at the most effective implementation of the Brussels Declaration at EU level and at Member States level. The report aims to indicate ways to strengthen EU action against trafficking in human beings and, where appropriate, to launch new initiatives, programmes and activities. The Brussels Declaration, however, has been understood as a “platform” and not as a “fence”. Further means and sources have been taken into consideration, in order to benefit from new developments and findings in particular areas.

Taking into account the current context at international and European level, the report follows the structure of the Brussels Declaration and consists of three major parts focusing on prevention, on victim assistance and protection and on law enforcement aspects. The latter not only includes police and judicial co-operation but also prioritisation, specialisation, coordination and co-operation in the area of law enforcement as well as substantive criminal law and criminal proceedings. The importance of overarching issues, in particular of the human rights of the victims and the specific needs of children, has been underlined in a separate chapter but also recognised for the entire report and reflected in all parts.

Trafficking in human beings has been understood as defined in the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the UN Convention against Transnational Organized Crime and in the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings.<sup>8</sup> Nevertheless the Group felt the need to look more closely at those elements of the definition that still might need some clarification in the light of different approaches to trafficking in human beings.

The Group is fully aware of the fact that much more could be said about many issues touched upon in the report. However, given the limited time it was not realistic to draft the report in an encyclopaedic style. Therefore, the Group decided to concentrate on the identification of key questions, priorities, possible gaps at EU and national level and on recommendations of central relevance; a number of concrete proposals, which are linked to these recommendations, are elaborated in the explanatory papers. For the same reasons the Group concentrated on the development in the EU and its Member

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<sup>7</sup> The opinion has been submitted to the Commission on 16 May 2004. It can be found at the Commission’s website ([http://europa.eu.int/comm/justice\\_home/fsj/crime/trafficking/fsj\\_crime\\_human\\_trafficking\\_en.htm](http://europa.eu.int/comm/justice_home/fsj/crime/trafficking/fsj_crime_human_trafficking_en.htm)).

<sup>8</sup> OJ L 203, 1.8.2003, p. 1. The Framework Decision does not cover trafficking in human beings for the removal of organs.

States. The wider scope and the impact of trafficking in human beings on third countries, especially other European States have been fully recognised. But taking into consideration the Group's mandate as well as time constraints the Group decided to look at third countries in the specific light of political, legislative, financial and operational means and instruments of the EU and its Member States.

## Chapter 2

### Trafficking in human beings: Definition and current context

#### 2.1 Definition of trafficking<sup>9</sup>

Until recently, one of the fundamental problems in responding to trafficking in human beings has been the lack of international consensus on the definition of trafficking. Moreover, there has been a persistent confusion about the distinction between trafficking, smuggling and illegal migration. At international level these problems have largely been addressed by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (hereinafter referred to as UN Trafficking Protocol), which contains a worldwide recognized definition.

The Protocol provides a clear definition of trafficking in persons. The definition contains three distinct, but interconnected elements:

- 1) the recruitment, transport, transfer, harbouring or receipt of a person;
- 2) by use of threat, force, coercion, abduction, fraud or deception, abuse of power or a position of vulnerability or giving or receiving payments or benefits to achieve the consent of a person having control over another person;
- 3) for the purpose of the exploitation of prostitution of others or other forms of sexual exploitation, forced labour or services, slavery, practices similar to slavery, servitude or the removal of organs.

While on the face of it this definition appears clear, in practice the working and use of the definition has been problematic and raises a number of questions.

#### *The element of movement and the distinction between trafficking and smuggling*

Firstly, in relation to the element of movement, a clear distinction is made in the Convention between trafficking of human beings and smuggling of migrants, which is the subject of another Protocol supplementing the above-mentioned Convention.<sup>10</sup>

The purpose of smuggling is the illegal crossing of borders, whereas the aim of trafficking is the exploitation of the trafficked person. In other words, smuggling concerns primarily the protection of the state against illegal migration, while

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<sup>9</sup> See also Explanatory paper 1.

<sup>10</sup> Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: “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.”

trafficking primarily concerns the protection of the individual person against exploitation and abuse. A distinguishing criterion therefore between smuggling and trafficking is the existence of a victim, that is, a person whose individual rights have been violated. The offence of smuggling, on the contrary, as such does not violate individual rights but the political interest of the state whose borders are violated. However, often smuggled persons are themselves victims of human rights violation (for example the right to life).<sup>11</sup>

More problematically, at the time of movement it is often unclear whether a person is trafficked or smuggled. Neither the victims themselves, nor border officials, may know the ultimate purpose for which the person is moving, nor the ultimate conditions they will find themselves in. In addition the movement element of the Trafficking Protocol does not require cross border movement, trafficking can also happen internally within countries.

Unsurprisingly States, in their desire to maintain border controls, have tended to concentrate on the transportation and movement elements of the definition of trafficking, and have attempted to combat trafficking by establishing more restrictive immigration and border control regimes. Yet this is inherently problematic, as at the time of transportation, movement, or border crossing, it is unlikely that the purpose for which the movement is occurring, i.e. exploitation will be clear. Indeed often a person may move between a number of different people, and in a number of different situations. People may enter a country legally, but subsequently become trafficked.<sup>12</sup> It is only at the point of outcome – when the person reaches exploitation, that it can be clear that trafficking has taken place. Until such point, movement may be for other (legitimate or illegitimate) reasons.

Concentration on the movement elements of the Trafficking Protocol is also problematic when trying to address the forced labour outcomes of trafficking. Recent International Labour Organization (ILO) research in Eastern Europe has begun to build up a database of returning migrants who had been in forced labour situations, which has sought to distinguish between migrants trafficked into forced labour, and others in forced labour situations. This begs two questions. Firstly, how had the non trafficked forced labourers got into that situation? One could argue that on a legal interpretation of Article 3(a) of the Protocol any transportation, harbouring or receipt, etc., for example of a worker from their place of sleep to the work place, could be considered as trafficking. And, secondly, what is the use of the Trafficking Protocol if it seemingly makes these distinctions between forced labourers, simply on the basis of elements of movements, harbouring, etc. What this makes clear is that such distinctions are utterly problematic, when trying to consider policy interventions to prevent either trafficking or forced labour.

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<sup>11</sup> A poignant example is the case of the smuggled Chinese migrants who were found dead after having suffocated in the container in which they were transported across the channel.

<sup>12</sup> For example, individuals may legally enter as spouses, students, tourists or domestic workers and then be subjected to forced labour or slavery-like conditions. In this case they often only become illegal when they remove themselves from the power of their husbands or employers.

Finally, concentration on the movement element and thereby border controls, while understandable, has led in cases to restrictive border controls for those who may otherwise be freely able to move, and to confusion between trafficking, smuggling and illegal immigration. For many migrants, “trafficking” is perceived as an anti migrant framework that hinders, not assists in protection of their rights.

### *The element of coercion*

The second element of the protocol is the presence of coercion, deception, abuse of authority or any other form of abuse. This element makes it clear that, in order to qualify as trafficking, the exploitative outcome must be such that it constitutes forced labour or services, slavery or slavery like practices, rather than merely unpleasant or exploitative working conditions. For the majority of the forms of forced labour, slavery or slavery like practices listed in the protocol, this added element to the definition is unnecessary. The fundamental characteristic of slavery is that “it deprives a person of his or her freedom of movement and the ability to make decisions for him or herself as well as many other fundamental freedoms”.<sup>13</sup> Thus slavery, slavery like practices and forced labour include lack of consent – an individual by the nature of the conditions, cannot be deemed to have consented to them.

As such in many cases this added element of the definition can cause confusion, because where workers may have seemed to consent to what is actually forced labour or slavery like practices, some may consider that they are not trafficked. In considering the relevance of actual or seeming consent the following conclusions can be drawn: Firstly, a free decision such as a freely given consent implies the realistic possibility of not giving the consent or, more precisely, of refusing any individual act the victim shall do or tolerate. The question, whether or not a decision was a free one, has to be asked and answered for each individual act. Secondly, the consent of the victim must have been given with respect to all relevant circumstances of an act. Real consent is only possible and legally recognizable, when all relevant factors are known and a person is free to consent or not. Thirdly, the reasons for which consent is refused cannot matter and it depends on the concerned person’s decision whether or not she/he would like to share these reasons with somebody else.

Thus, although a person can consent to migrate, to carry false papers, to participate in prostitution or to work illegally abroad, this does not imply that the person also consents to the forced labour exploitation and thus cannot be a victim of trafficking. In this context, it is important to note that the inclusion of fraud, deception and the abuse of power or of a position of vulnerability recognises that trafficking can occur without

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<sup>13</sup> UN Doc E/CN.4/Sub.2/1999/--, p. 9. Art. 1(1) of the 1926 Slavery Convention defines slavery as “the status of condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.” “Forced labour” is defined as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily” (Art. 2(1) of the 1930 ILO Convention No. 29 Concerning Forced Labour).

any use of (physical) force. This is also reflected in the *Travaux Préparatoires*<sup>14</sup> that state that “the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.

However, the elements of coercion in the definition are useful in highlighting the forced labour outcome, and to distinguish it from unpleasant, harmful or exploitative working conditions.<sup>15</sup> Especially in relation to forced prostitution and other forms of sexual exploitation, the element of coercion within the definition is particularly useful to distinguish that it is the coercive and exploitative conditions, rather than the type of work or services itself, that gives rise to it falling under forced labour within the Trafficking Protocol.<sup>16</sup>

In this context it is important to note both the UN Trafficking Protocol and the EU Council Framework Decision on combating trafficking in human beings make a clear distinction between trafficking and prostitution as such.<sup>17</sup> Neither instrument implies a specific positive or negative position on (voluntary, non-coerced adult) prostitution as such, leaving it to the discretion of individual states how to address prostitution in their domestic laws.

Against this background, different legal systems, whether decriminalising, legalising, regulating or tolerating (non-coerced adult) prostitution as well as systems criminalizing (the exploitation of) prostitution, prostitutes or the use of the services concerned, comply with the said instruments. Consequently, the question of the definition of trafficking has to be distinguished from questions about the political and/or legal approach to prostitution that is followed or required in order to tackle the problem of trafficking in human beings.<sup>18</sup>

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<sup>14</sup> The interpretative notes (*Travaux Préparatoires*) (A/55/383/Add.1 Addendum) are to be found at <http://www.odccp.org/crime-cicp-convention-documents.html>

<sup>15</sup> However, this does not completely solve the question where from a perspective of criminal law the line should be drawn between (extremely) poor working conditions which should be addressed by e.g. labour law, and conditions which qualify as “exploitation” in the sense of the definition of trafficking and which should be addressed by criminal law.

<sup>16</sup> The same goes for the purpose of “removal of organs” in the Trafficking Protocol definition. Also this purpose is not inherently coercive but only becomes trafficking if one of the means is used (plus the element of movement).

<sup>17</sup> In the case of the UN Trafficking Protocol the terms “exploitation of the prostitution of others” and “sexual exploitation” were intentionally left undefined to allow all states, independent of their domestic policies on prostitution, to ratify the Protocol. The interpretative notes to the UN Protocol read that “The *Travaux Préparatoires* should indicate that the Protocol addresses the exploitation of prostitution of others and other forms of the sexual exploitation only in the context of trafficking in persons. The terms “exploitation of the prostitution of others” and “sexual exploitation” are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.”

<sup>18</sup> The Experts Group follows this approach. It wants to recognise that different (legal and social) stances towards prostitution exist without, however, taking a stance itself.

### *The distinction between “innocent” and “guilty” victims*

Another problem attached to the emphasis on the aspect of movement and coercion – i.e. the process through which a person is brought into the forced labour or slavery-like situation –, rather than on the forced labour outcome itself, is that it easily leads to a distinction between innocent and guilty victims. This problem is particularly visible in relation to trafficking into forced prostitution and other forms of sexual exploitation.<sup>19</sup> A common distinction made in this context is the one between “real” or “innocent” victims and “guilty” ones, meaning that only the first group is perceived to be deserving of protection against forced labour.<sup>20</sup> The “real” victims then are those who can prove that they were forced to become a prostitute, whereas the “guilty” ones are those who were engaged in prostitution before, knew they would be and/or are willing to continue to do so under non-coerced conditions. In this interpretation “force” is understood to refer only to the way a woman became to be a prostitute, rather than addressing the forced labour or services outcomes.<sup>21</sup>

The effect of this distinction is that in many cases, instead of the offender standing trial, it is the victim who has to prove her “innocence”, thus shifting the focus from the acts of the trafficker to the morality of the victim. In practice this acts as a serious barrier for women trafficked into the sex industry – no matter whether or not they were previously engaged in prostitution – to come forward and act as witnesses. Another consequence is that many cases of trafficking involving prostitutes are not prosecuted because the abuses she suffered are considered to be her own fault, that is, the natural consequences of her willingness to be a prostitute.<sup>22</sup> The distinction therefore leads to a serious shortcoming in the trafficking framework to address forced labour and services situations in the sex industry. Like many migrants, many of those engaged in the sex industry, willingly or unwillingly, therefore do not consider the trafficking framework to be helpful in protecting their human rights.

### *Forced labour exploitation as the crucial element*

The above analysis raises the question as to the purpose of the Trafficking Protocol. Within the context of trafficking there is no need as such to criminalize recruitment, transportation, harbouring, receipt or transfer of a person. While these acts in themselves may be subject to other criminal sanctions, (e.g. immigration violations), these are violations against the State, rather than against the individual.

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<sup>19</sup> This analysis is also the case, to a lesser extent, for many in forced labour conditions, who may be perceived to lack the necessary ‘innocent victim’ status as they may well have consented to illegal border crossing, smuggling, and to working in exploitative, but not forced labour, conditions. Consider for example, the migrant cockle pickers in the United Kingdom, or migrant Chinese workers in France.

<sup>20</sup> It is not for no reason that the typical defence of a trafficker is that the woman concerned knew what she was going or expected to do, thus assuming that prostitutes can be abused with impunity.

<sup>21</sup> The term “forced labour or services” is used here to indicate the Group’s neutral position on the question whether or not the provision of sexual services can be considered work.

<sup>22</sup> See e.g. Doezeema, J., “Choice in prostitution”, in *Conference book: Changing Faces of Prostitution*, League of Finnish Feminists, Helsinki, 1996.

Similarly, acts of coercion, force, deception, etc., by themselves, do not require criminalizing within the trafficking context. Many acts of force or coercion will already be clearly defined criminal acts in domestic law (for example rape, assault, obtaining goods or services by deception). As individual offences, without the forced labour outcome, they add nothing to the trafficking context.

It is only when the purpose, or outcome of these two elements, the forced labour exploitation, is present that these elements of the Trafficking Protocol are relevant. Thus the key element to the Trafficking Protocol is the forced labour outcomes, encompassing forced labour and services, slavery, slavery like practices and servitude. It is these human rights violations against the individual that the Trafficking Protocol seeks to redress. While in some cases it can be difficult to determine whether conditions are merely illegal and extremely exploitative, rather than forced labour or services, slavery, slavery like practices or servitude, there is a wealth of history of international law, standards and interpretation of these concepts to rely on, which can provide sufficient certainty for criminal law and sanctions.

It is worth noting the variety of elements that are included within forced labour or services, slavery, slavery like practices and servitude. While there are clear international standards, much trafficking work, laws and interventions have tended to concentrate on those trafficked for the purposes of forced prostitution or sexual services. It is only recently that attention is being paid to those trafficked for all forms of forced labour or services (including forced prostitution or sexual services), slavery, slavery like practices or servitude, that are clearly encompassed within the definition.<sup>23</sup>

Elements of movement and force should be seen in the context of acts that enable the forced labour and services, slavery, slavery like practice or servitude to occur. Without this end product, although other violations of human rights, domestic or international laws may occur, these are dealt with by other international laws and treaties, and are not, by themselves trafficking, or suitable to be tackled under the Trafficking Protocol. The clear human rights violations which the Trafficking Protocol seeks to redress are the forced labour and services, slavery, slavery like practices and servitude, rather than illegal migration or smuggling, or forms of force or coercion, or mere exploitative working practices. Interpretations of the Trafficking Protocol that concentrate on the process of bringing a person into exploitation, rather than the final forced exploitation that they face, are in their nature flawed and limited. There is serious deficiency in the concept of trafficking if it focuses on the process of bringing another person into a situation of exploitation and does not address the use of forced labour, slavery, practices similar to slavery or servitude as such, where this has not been preceded by the other elements stipulated in the definition. From a human rights perspective, there is no reason to distinguish between forced labour involving “illegal migrants”, “smuggled persons” or “victims of trafficking”.

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<sup>23</sup> For example, see in particular the work of the ILO “Special Action Programme to Combat Forced Labour.”

Thus to effectively counter trafficking, policy interventions should focus on the forced labour and services, slavery and slavery like outcomes of trafficking – no matter how people arrive in these conditions –, rather than on the mechanisms of trafficking itself.<sup>24</sup> States should criminalize any exploitation of human beings under forced labour, slavery or slavery like conditions, in line with the major human rights treaties that prohibit the use of forced labour, slavery, servitude, etc.

If such policies were followed, then many of the current confusions of the trafficking definition – whether a case was smuggling or trafficking, whether a case was trafficking or forced labour and whether a victim was perceived as “innocent” or “guilty” would become redundant. By policy makers concentrating primarily on the forced labour outcome the Trafficking Protocol can overcome its current definitional and practical operational difficulties and has the potential of a tool to more effectively tackle the human rights violation of trafficking in human beings.

### *The human rights dimension*

The Brussels Declaration, like other relevant international or EU documents, addresses the impact of trafficking in human beings on the human rights of the victims. However, while there is agreement concerning the negative impact of trafficking in human beings on the human rights of the victims and while elements of the definition clearly constitute human rights violations,<sup>25</sup> trafficking in human beings as such is mostly not explicitly characterised as human rights violation.<sup>26</sup>

According to the Preamble of the UN Trafficking Protocol a comprehensive international approach is required that includes measures “to protect the victims of trafficking, including by protecting their internationally recognized human rights”. Article 2 of the Protocol states that its purposes are “to protect and assist the victims of such trafficking, with full respect for their human rights.” In 2002, the United Nations High Commissioner for Human Rights (UNHCHR) issued the “Recommended Principles and Guidelines on Human Rights and Human Trafficking”. The first principle requires that “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.” Guideline No. 1 points out that “violations of human rights are both a cause and consequence of trafficking in persons.”

The 2002 Organisation for Security and Co-operation in Europe (OSCE) Declaration on Trafficking in Human Beings states that the latter constitutes “an abhorrent violation of the dignity and rights of human beings”.

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<sup>24</sup> Of course this does not take away that, in order to address forced labour and slavery like conditions, it is also important to look at the mechanisms through which people arrive in such situations.

<sup>25</sup> For example the purposes of forced labour, slavery and servitude.

<sup>26</sup> Although the purposes of trafficking, in particular forced labour, slavery, practices similar to slavery and servitude, are recognized as human rights violations.

Article 5(3) of the Charter of the Fundamental Rights of the European Union states: “Trafficking in human beings is prohibited”. Recital No. 3 of the Framework Decision on THB stresses that “trafficking in human beings comprises serious violations of fundamental human rights.” Later it adds that “the dignity and human rights of the victims must be respected at all times.”

All these formulations<sup>27</sup> reflect a rather traditional concept of human rights. This concept presumes that only states can violate fundamental (human or civil) rights. This concept corresponds with the traditional aim of constitutions and fundamental rights charters to protect people against public infringements.

Another, more modern concept of fundamental rights acknowledges that also private parties can deprive a human being of the realistic possibility of enjoying his or her civil or human rights. A state, which refuses to take appropriate measures in order to provide proper protection against such deprivation, would therefore (indirectly) violate the human rights of the offended person.

Human trafficking is based on a treatment of human beings as private property or even commodity depriving them of the possibility of using their constitutionally guaranteed rights. It therefore substantially affects the human dignity and the right to self-determination of a person. Consequently, a state, which would refuse to appropriately prevent and combat trafficking in human beings, would violate the trafficked person’s human rights.

One further question is what exactly the State is required to do in order to comply with human rights obligations resulting from national constitutions or international instruments. This aspect will be discussed in more detail in Chapter 3.2.

With regard to the definition of trafficking in human beings another question is more important: should the human rights impact be considered as a necessary element of that definition? The Group has no doubt that this question has to be answered positively and that any counter trafficking policy must be based on an understanding of trafficking in human beings that considers the human rights impact to be a central and primary element of the definition of trafficking in human beings.

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<sup>27</sup> An exception is the Hague Ministerial Declaration which explicitly states that “trafficking in women constitutes a flagrant violation of women’s human rights” for which the main responsibility lies with the Member States (The Hague Ministerial on European Guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation, Ministerial Conference under the Presidency of the European Union, The Hague, 24-26 April 1997). Also the US Trafficking in Persons Report 2004, p. 10, explicitly states: “Trafficking in Persons is a Human Rights Violation. Fundamentally, trafficking in persons violates the universal human right to life, liberty, and freedom from slavery in all its forms.”

## Recommendations

- Though trafficking often occurs across borders and with the involvement of organised crime networks, trafficking also takes place within borders and without the involvement of organised crime. States should therefore ensure that all forms of trafficking, regardless of the crossing of borders and/or the involvement of organised crime, are adequately criminalized.
- Although – as far as presently known – the majority of trafficking affects women and children, and most attention has been placed on trafficking into sexual exploitation, women, men and children are trafficked for numerous other forced labour purposes. States should ensure that counter trafficking legislation and policies cover all forms of trafficking of women, men and children.
- For the overall purpose of this report – further development of a comprehensive and coherent EU counter-trafficking policy – the definition has to take into account all relevant aspects, especially the impact on human rights. In this context, trafficking in human beings has to be defined as a complex phenomenon violating the trafficked person’s will and right of self-determination and affecting her or his human dignity.
- From a human rights perspective, the primary concern is to combat the use of forced labour or services, slavery, slavery like practices, servitude and the like. It is therefore recommended that States adequately criminalize any exploitation of human beings under forced and/or slavery-like conditions, independent of whether such exploitation concerns a trafficked person, a smuggled person, an illegal migrant or a lawful resident.
- In applying the Trafficking Protocol, States should focus on the outcomes of forced labour or services, slavery or slavery like practices – which are inherently coercive – rather than the movement or coercion elements, which should be seen as preparatory to these outcomes, as opposed to the acts that require criminal sanctions and interventions as human rights violations.

## 2.2 The current context<sup>28</sup>

At world level a clear progress has been achieved by the UN in recent years, the most of important of which the adoption of the Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. However, only some of the “new” but most of the “old” EU Member States as well as the European Community have not yet ratified the Protocol.<sup>29</sup>

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<sup>28</sup> See for a more extensive description of developments Explanatory paper 2.

<sup>29</sup> State of play on 15 September 2004: Belgium, Denmark, France, Portugal, Spain, Sweden, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovenia (source: United Nations Office on Drugs and Crime –

At the EU level, the main milestones are the adoption of the Framework Decision of 19 July 2002 on combating trafficking in human beings<sup>30</sup> approximating the criminal laws of the Member States, the Directive on a temporary residence permit for victims of trafficking who cooperate with the authorities<sup>31</sup> and – with regard to some aspects of trafficking in human beings – the Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography.<sup>32</sup>

However, although a number of political declarations and legally binding instruments are in place, they are often not yet effective or fully implemented. Moreover, additional measures are needed.

At the same time, the context in which further action should be taken at the EU-level presents interesting prospects. Important developments include the enlargement of the European Union with 10 central and eastern European countries; the envisaged new Constitution for the EU; the growing importance which is attached to the justice and home affairs dimension within the financial perspectives for the EU between 2007 and 2013;<sup>33</sup> the evaluation of the conclusions of the 1999 Tampere European Council and the expected elaboration of a “Tampere II-agenda” during the second half of 2004; and finally the initiative of the Council of Europe for a European Convention on Trafficking in Human Beings.

Although trafficking in human beings is explicitly addressed in the envisaged Constitution,<sup>34</sup> this happens mostly in the context of combating illegal migration. It should, however, be remembered that the crucial element of trafficking is the forced labour exploitation of the trafficked person rather than the question whether or not that person has illegally crossed the border. Also the Tampere Communication, by addressing “a stronger fight against trafficking in human beings and the development of an effective policy on returns and readmission”<sup>35</sup> in the same sentence, may give the impression that trafficked persons are above all illegal migrants, who should primarily return to and be readmitted by their countries of origin. Presuming that this is not the Commission’s intention, the Group recommends adapting the language in communications and other political papers in order to undoubtedly underline the

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UNODC website).

<sup>30</sup> OJ L 203, 1.8.2002, p. 1.

<sup>31</sup> Directive on the residence permit issued to third-country nationals victims of trafficking in human beings or to third-country nationals who have been the subjects of an action to facilitate illegal immigration who cooperate with the competent authorities, Council Document 14994/03 MIGR 101.

<sup>32</sup> OJ L 13, 20.1.2004, p. 44.

<sup>33</sup> Communication from the Commission to the Council and the European Parliament, “Building our common future, policy challenges and budgetary means of the enlarged Union 2007-2013”, COM(2004) 101 final/2, 26.2.2004; Communication from the Commission to the Council and the European Parliament, “Area of Freedom, Security and Justice: Assessment of the Tampere programmes and future orientations”, COM(2004) 401, 2.6.2004.

<sup>34</sup> Provisional consolidated version of the draft Treaty establishing a Constitution for Europe as set out in Document CIG 86/04 of 25 June 2004, see in particular Articles II-5, III-168(2)(d), III-172(1).

<sup>35</sup> COM(2004) 401, 2.6.2004, p. 10.

Commission's commitment to a holistic and integrated, human rights-based approach which focuses on combating the exploitation of human beings under forced labour or slavery like conditions rather than on (illegal) migration.

In the context of the new financial perspectives of the EU and the growing importance attached to Justice and Home Affairs matters, the Group notes that this situation offers the opportunity to financially support not only selected innovative projects in the area of trafficking, but also sustainable structures providing protection and assistance for trafficked persons as well as appropriate law enforcement capacities specifically targeting the perpetrators in this area of crime. Whereas in the previous period the development of innovative methods and structures has been central, in the coming period the emphasis should lie with consolidating organisations, structures and mechanisms that have proven their use but that cannot survive without further financial EU input.

## **Recommendations**

- The EU-context in 2004 provides opportunities for politically and financially strengthening the prevention and combat of trafficking in human beings. In view of the financial perspectives 2007-2013, the Experts Group in particular calls on the Council of the EU and the European Commission – as well as Member States at the national level – to allocate adequate resources to the prevention and repression of trafficking in human beings as well as to the provision of adequate remedies to trafficked persons. Notwithstanding the relevance of the new EU Member States, attention should also be paid to overseas countries of origin.
- Rather than merely project-based funding, future financial support should also be geared to long term, sustainable support of organisations, structures and mechanisms that successfully have been developed over the last years and that have proven their usefulness, but that are not able to survive without further financial EU input. Consequently, a balance needs to be found between long term, structural financing and project-based funding to give room to new and innovative initiatives.
- Political papers such as European Council Conclusions or Commission Communications should more clearly stress that trafficking in human beings is not primarily an issue of illegal immigration but that it has to be addressed as a serious crime and human rights violation, underlining the EU commitment to a holistic and integrated, human rights based approach focusing on combating the exploitation of human being under forced labour or slavery like conditions.

## Chapter 3

### Guiding principles and cross-cutting themes

#### 3.1 Introduction

This chapter will discuss a number of overarching issues. As the Experts Group considers the integration of a human rights perspective fundamental to any policies and measures addressing trafficking, the chapter will start with a discussion of the meaning of a human rights based approach, its elements and its consequences. Given the complexity of the phenomenon and the interconnectedness of the different factors that feed and maintain trafficking, a holistic and integrated approach is needed. Such an approach contains a number of elements. Firstly, in line with a human rights based approach, policies should as much concentrate on empowerment strategies as on repressive strategies. A first step is to redress the present imbalance between the attention paid to crime control strategies and the provision of adequate remedies to trafficked persons. Moreover, care should be taken with employing repressive strategies as they can easily give rise to unintended and undesirable side effects and may lead to increased vulnerability for trafficking. Secondly, and connected to the latter, a holistic and integrated approach requires looking at the root causes, in particular the relation between migration and labour policies and trafficking. In addition, trafficking can also be seen as a security issue, linking the concept of state security and human security, and thus bringing in a human rights perspective. Thirdly, a holistic approach requires action at different levels – local, national, regional and international – and in different fields, including criminal law, labour law, aliens’ law, migration policies, development co-operation, etc. The aim should be to develop an integrated policy covering the different levels and fields that require action. To achieve this, close co-operation between all actors involved is needed, including civil society organisations such as labour unions and NGOs.

Apart from the above-mentioned elements, this chapter will also look into the importance of data collection as the necessary basis for any strategy and the issue of information exchange and data protection. In particular the issue of data protection requires specific attention, both from a human rights perspective – the right to privacy – and in the light of the very real risks that a lack of security or the misuse of data presents to trafficked persons.

Finally, specific attention is paid to children as they have a specific legal status, different from adults, and specific needs and vulnerabilities. However, in line with a human rights based approach, it must be kept in mind that children are not only victims in need of protection but also subjects of rights.

A last remark concerns the language used in this report with regard to the term

“victim.” Although the Experts Group explicitly wants to stress the reality of trafficked persons as victims of a severe crime and human rights abuse, it also shares the concern about the use of the word “victim” because of its emphasis on vulnerability, passivity and powerlessness, thus failing to recognise the dignity, courage, aims and choices in trying to get around of the individuals concerned. Therefore, the term “victim” is exclusively used in direct relation to the status of trafficked persons as a victim of crime and human rights abuses. In other instances the term “trafficked person” is used, which is in compliance with international human rights documents, such as the UNHCHR “Recommended Principles and Guidelines on Human Rights and Human Trafficking.”<sup>36</sup> However, it must be stressed that also when the term “victim” is used, this does not mean that the person concerned should be completely identified with her/his status of victim of a crime or should be patronised in any way.

### **3.2 Human rights at the centre**<sup>37</sup>

The Brussels Declaration acknowledges that trafficking in human beings constitutes a serious violation of human rights and expresses the need for a human rights based approach to trafficking. Taking into account the inextricable link between the prevention and eradication of trafficking in human beings and the protection of the human rights of trafficked persons, the Experts Group considers the integration of a human rights perspective fundamental for the analysis of trafficking in human beings and the development of an effective response to it. Integration in this sense means that a human rights perspective should be part and parcel of any strategy, measure and policy to address trafficking.

Under international human rights law States have a duty to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to provide effective remedies to trafficked persons.<sup>38</sup> The protection of the rights of trafficked persons on the one hand and criminal investigation and prosecution of traffickers on the other hand must be understood as complementing each other. In comparison to the attention paid to the area of law enforcement, the assistance, protection and compensation of trafficked persons is lacking behind. This needs to be redressed.

Essential elements of a human rights based approach are the observance of international human rights norms and the principle of non-discrimination, standard setting and accountability, the recognition of human beings and in particular trafficked persons as subjects and holders of rights, participation and empowerment of the groups and communities affected and the integration of a gender and, where applicable, ethnic perspective. Moreover, it should be ensured that counter-trafficking measures do not undermine, adversely affect or infringe upon the human rights of individuals, e.g.

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<sup>36</sup> United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002.

<sup>37</sup> See for a more extensive description of the elements and principles underlying a human rights based approach Explanatory paper 3.

<sup>38</sup> UNHCHR, *op. cit.*

migrants, prostitutes, refugees or asylum seekers.

As such a human rights based approach offers a conceptual and normative framework that should give direction to the further development of policies in the area of trafficking. At the same time it offers a framework to monitor and evaluate counter-trafficking policies, practices and actions for their real and potential impact on trafficked persons and other groups concerned.

## **Recommendations**

- A human rights approach should be integrated as a normative framework in the further development of policies and measures against the trafficking in human beings, both at national and European level. The Principles and Guidelines on Human Rights and Human Trafficking as elaborated by the UN High Commissioner for Human Rights can serve as an important instrument to do so.
- The European Commission and the Member States should consider the human rights impact when preparing and adopting anti-trafficking measures and establish mechanisms to monitor the human rights impact during the implementation of such measures. To this aim, a “Human Rights Impact Assessment-model” should be developed in close co-operation with NGOs working with trafficked persons and human rights institutions, as an instrument to monitor and evaluate the human rights effects of anti-trafficking laws, policies and practices. Such an instrument should play an important role in ensuring that anti-trafficking measures comply with respect for and protection of human rights. In addition it should ensure that anti trafficking measures do not create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and practices that further undermine or adversely affect the human rights of individuals, such as the right to privacy, the right to freedom of movement, the right to leave one’s country, to migrate legally and to earn an income.
- The Commission shall take the initiative for the adoption of a legally binding EU instrument covering the standing of trafficked persons in order to protect the human rights of trafficked persons, which clearly goes beyond current member state commitments.<sup>39</sup> Such an instrument should lay down minimum standards of treatment to which all trafficked persons are entitled and ensure that trafficked persons are provided with access to adequate and appropriate remedies, independent of their capacity or willingness to cooperate in criminal proceedings or to give evidence. Within such an instrument special attention should be given to the position, rights and needs of children, according to the principles and provisions expressed in the relevant conventions.

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<sup>39</sup> See also Chapter 5.

- Member States should give priority to the development of counter-trafficking strategies, which aim at strengthening the position of the groups affected and/or at risk at their empowerment, participation and self-organisation.

### **3.3 The need for a holistic and integrated approach**

Trafficking in human beings is a complex problem, related to different fields and interests: migration, organised crime, labour, prostitution, human rights, unequal international economic relationships, gender issues, violence against women, the feminisation of poverty, etc. All those aspects are reflected in the various strategies employed by non-governmental, inter-governmental and governmental agencies. Depending on how the problem is defined, different solutions – that is measures to prevent or combat trafficking – will be proposed. For example, if trafficking is viewed as a result of poverty or as a human rights problem, other solutions will be proposed than if trafficking is predominantly viewed as a problem of organised crime or illegal migration.

Any analysis and its matching solutions carry their own value. There clearly is not one single solution. Given the complexity of the issue, strategies are necessarily multi-faceted and multi-disciplinary.

Strategies to address trafficking seem to move between two poles: on the one hand repressive strategies, which aim at suppressing those phenomena that are considered to be particularly connected to trafficking in human beings, such as organised crime and, (illegal) migration, and – depending on one's view – prostitution. On the other hand strategies which aim at empowering the persons and communities who are or could be affected by self-organisation, encouraging participation in finding solutions, improving living and working conditions and widening the set of (economic) choices, strengthening rights and increasing possibilities to exercise control over their own lives.

Both empowering and – depending on the target – repressive strategies are of value and both can contribute to an effective approach against human trafficking. Repressive strategies are crucial for protecting individuals against the crime of trafficking and the related exploitation, for the effective investigation of trafficking cases and the prosecution and punishment of traffickers. At the same time, especially repressive strategies beg for caution as they can easily give rise to unintended and undesirable side effects. For instance, more restrictive immigration policies may lead to the creation of a market for irregular migration and increased vulnerability to both trafficking and smuggling. At worst they can cause repercussions which have repressive rather than emancipative effects on the situation of the groups affected, e.g. by restricting freedom of movement or by using trafficked persons as witnesses without the corresponding protection. The consequences of repressive strategies should therefore be taken into account when they are prepared and implemented. Empowering and repressive strategies should be complementary and not undermine one another.

The Group is convinced that in order to effectively address trafficking, a holistic and integrated approach is needed which builds on the respect and promotion of human rights as its fundament. Such an approach has a number of elements.

In the first place equal attention needs to be paid to the prosecution of the traffickers on the one hand and empowerment, protection and assistance for trafficked persons on the other hand. One of the obstacles in the effective prosecution of traffickers is respectively the unwillingness of trafficked persons to report to the authorities and the absence of the victims in criminal proceedings against the perpetrators as a result of their being deported as illegal aliens under immigration law. Often contradictory interests play a role: the interest of immigration policies to remove illegal aliens versus the interest of internal security policies in the detection and prosecution of traffickers and the preservation of (possible) witnesses. These interests can and do conflict on a regular basis. The result is a lack of adequate identification of possible victims and their summary deportation. This hampers both an effective criminal approach to trafficking and an adequate protection of its victims. To overcome such problems, clear policy choices should be made.

In addition, multidisciplinary co-operation and coordination is needed between all involved agencies and stakeholders. This includes not only law enforcement, border officials and prosecutors, but also local authorities, labour unions, labour inspections, employers, employees, self-organisations, NGOs, international organisations and other relevant sectors of civil society. Without overcoming the present obstacles that prevent an effective co-operation between these parties, which all have a role to play, trafficking in human beings will not be tackled.

Moreover, action is needed at different levels – local, national, regional, European and international – and in different fields: criminal law and judicial measures to prosecute the traffickers and ensure access to justice to the victims; tools for financial investigations to hit traffickers where it hurts most; administrative law and controls to regulate and monitor procedures, practices and agencies that may have an influence on the prevalence of trafficking; aliens law to prevent the deportation of (possible) victims and provide them with a legal residence status; migration law and policies to encourage regular, managed and safe migration based on demand and need; social and labour law and the application of labour standards to ensure the same level of protection for foreign as for native workers in order to reduce the demand for trafficked persons; social policies to ensure the adequate assistance and protection of trafficked persons; and development policies to address the root causes, including gender discrimination and lack of opportunities, in the countries of origin. The aim should be to develop an integrated policy covering the different levels and fields.

Finally, civil society adds an amount of experience to the fight against human trafficking based on their work in human rights protection and grass-root counselling for trafficked persons. Often they complement state support or fill gaps in providing social protection to trafficked persons. Moreover, in particular independent NGOs play an active role in maintaining and strengthening democratic processes providing checks

and balances to government structures, monitoring institution-building processes, and advocating for a more thorough fulfilment of international human rights commitments by the state.

The implementation of a holistic and integrated approach requires well-structured capacities and procedures and a variety of instruments, depending on which area is addressed. These instruments may vary from Directives, Framework Decisions and specific budget lines at the EU level to the establishment of national and European anti-trafficking networks, data collection structures, co-operation and coordination mechanisms, guidelines, training programmes and the development of a Human Rights Impact Assessment model. In particular, a holistic and integrated approach should be reflected in the identification and the empowerment of appropriate National Referral Systems<sup>40</sup> and international co-operation.

## **Recommendations**

- To effectively address trafficking in human beings a holistic and integrated approach is needed based on respect for and promotion of human rights. In order to realize such an approach multidisciplinary co-operation and coordination between all involved actors and stakeholders, including civil society and labour organisations, are crucial. The aim should be to develop an integrated policy covering the different fields and levels on which action is required. To this end governments should establish efficient coordination and co-operation structures at the political and operational level.
- The role of civil society actors, in particular independent NGOs, should be more extensively recognised, not only because of their role in providing assistance to trafficked person but also because of their critical role in maintaining and strengthening democratic processes and in monitoring and advocating implementation of human rights commitments by states.
- Clear policy choices should be made between the interests of immigration policies on the one hand and the detection and prosecution of traffickers and the preservation of possible witnesses on the other hand. The lack of such a choice hampers both an effective criminal approach and an adequate protection of trafficked persons.
- Empowering and repressive strategies are both needed and should complement each other. Special care, however, should be taken when employing repressive strategies as they can easily give rise to unintended and undesirable side effects. The consequences of repressive strategies should therefore be taken into account when they are prepared and implemented. On the other hand, empowering strategies are not yet used to their full potential and should be researched further.

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<sup>40</sup> See Chapter 3.7.1.

### **3.4 Trafficking in human beings, migration and informalisation of the workplace<sup>41</sup>**

The vast majority of people who are trafficked are migrants who end up being abused and exploited in the informal and/or unprotected sectors. Increasing inequalities of wealth between and within countries, and increasing demand for migrant workers will fuel increased migration in the future.

Formally, the EU has recognised this trend, with the commitments made at Tampere 1999 to create a common EU policy on asylum and migration. This approach comprises action to counter the root causes and more legal immigration possibilities with full integration of those legally admitted, while countering irregular migration including the readmission of irregular migrants into their countries of origin.

Recently, the European Commission in its Communication on Tampere June 2004 has stated that there must be a realistic approach, taking account of economic and demographic needs, to facilitate the legal admission of migrants to the Union in accordance with a coherent policy respecting the principle of fair treatment of third-country nationals. The Communication underlines the need for an integrated approach to combat trafficking in persons.

However, despite these commitments many governments have continued to respond with a restrictive approach to migration and immigration policies. The effect of these has not decreased migration, but rather has left migrants more vulnerable to irregular forms of migration, including smuggling, trafficking and labour exploitation.

At the same time, increasing informalisation of the global economy is enabling increased movement of employment and labour. Again, policies have tended to favour deregularisation, resulting in informalisation and opening of markets. However, the vast majority of trafficked persons occur in the informal, unregulated and unprotected sectors, both in traditional informal sectors such as domestic service or sexual services, and new previously formal sectors, such as construction or agriculture, where sub contracting or contract work is leading to informalisation. Increasing informalisation of the economy has left informal sector workers more vulnerable to exploitative working practices and trafficking.

The promotion of regular and managed migration<sup>42</sup> and standards based working conditions has the potential to reduce trafficking by offering migrants and other workers a mechanism which is safer and guarantees their human and labour rights.<sup>43</sup>

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<sup>41</sup> For more information see Explanatory paper 4.

<sup>42</sup> In this context managed migration includes identifying shortages in the workforce and opportunities for migrant workers in countries of destination, and matching these with availability of potential migrant workers in countries of origin, while not depleting that countries workforce to its detriment. It implies using migration policies in ways that benefit migrants, countries of origin and destination.

<sup>43</sup> See Anti- Slavery International, *The Migration – Trafficking Nexus*, London, November 2003.

## Recommendations

- EU Member States should maintain their commitments made at the Tampere European Council in 1999.<sup>44</sup>
- Member States should promote regular and managed migration based on demand and need, including the demand for unskilled labour, which is gender sensitive and implies the establishment of clear and comprehensive policies, laws and administrative arrangements to ensure that migration movements occur to the mutual benefit of migrants, society and governments.
- Member States should provide a standard based approach to trafficking and migration. Such an approach should include, at a minimum:
  - the protection of migrant's rights and international standards of protection for all migrants (both legal and illegal) as key to ensuring safe migration. States should ratify and implement the appropriate conventions, in particular the United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families 1990;
  - ratification and application of the relevant ILO standards, in particular ILO Convention No. 29 on forced labour and ILO Convention No. 182 on the worst forms of child labour, but also ILO standards regarding non-discrimination, freedom of association, labour inspection, employment agencies, and others. Increasing informalisation has left workers vulnerable to labour abuses. Standards need to be applied in both formal and informal sectors;
  - the application of standards through a combination of education, self-regulation and enforcement;
  - awareness raising and training on labour standards and the connection with trafficking to those responsible for labour policies, including policy makers, employers, Unions and labour inspectors. Inclusion of these actors in counter trafficking initiatives should always be considered;
  - the enforcement of labour standards through labour inspections, and if necessary the use of administrative and criminal sanctions;
  - standards of freedom of association. States, employers, unions and others should pay particular attention to encouraging organisation of workers. Both formal organisation, through unionisation, and informal methods of organisation should be developed;
  - the enforcement of anti discrimination standards.
- The EU should continue to move towards implementing those parts of the Thessaloniki and Tampere agendas that aim at the promotion of regular and managed migration. Both the needs in countries that people wish to migrate from and the requirements in countries people wish to migrate to should be considered, enabling legal migration and integration of migrants and migrants' rights while addressing the root causes of migratory flows. The policy should to be open and

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<sup>44</sup> Presidency Conclusions, Tampere European Council 15 and 16 October 1999: specifically conclusions Nos. 3, 22, 23, 26 and 48 ([http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm)).

- accessible to all and include the following:
- regulation of travel/employment/au pair agencies;
  - provisions criminalizing the retention or possession of passports, visa, work permits or other documents by persons other than the document holder;
  - work permits or visas not linked to a specific employer or type of employment;
  - education and promotion about safe migration possibilities and practices.
- Women are more vulnerable to trafficking as many of the sectors in which they traditionally are engaged – for example the sex sector<sup>45</sup> and domestic labour – are less likely to be regulated, and more likely to be infiltrated by traffickers. Additionally women are less likely to have information about migration opportunities, or have fewer established migration routes and networks. Gender sensitive migration policies need to reflect and address these inequalities. Consideration needs to be given to the extent that largely unrecognised informal sector work or services (such as sexual services, domestic work, au pair or similar arrangements) should be regulated within migration or employment policies.<sup>46</sup>

### 3.5 Trafficking in human beings as a security threat

Trafficking in human beings is highly diametrically and informally organised. The trafficking process involves activities and perpetrators covering a broad range of criminal elements within and beyond national borders.

Security policy in its traditional perception articulates the protection of national or federal state borders by military strategies. After the collapse of the super-power-constellations at the end of the “cold war” era, security policy underwent a transformation in the 1990’s.

Taking into consideration civil wars and regional armed conflicts as a consequence from the breaking apart of the Soviet Union and Yugoslavia, the concern of security is shifting to the people rather than state borders. An example is the 1990 United Nations Development Programme (UNDP) report on Human Development Report (HDR), which argued that “development must be focused on people (even though grouped by countries) rather than the security on their national boundaries, and on advancing health, education, and political freedom in addition to economic well-being.”<sup>47</sup>

Consequently, the concept of human security has been developed in order to address the need for personal security and economic development that has an influence on

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<sup>45</sup> The term “sex sector” comes from Leam Lim, L. (ed.), *The Sex Sector. The Economic Bases of Prostitution in Southeast Asia*, ILO, Geneva, 1998. Prostitution here is defined as “The provision of sexual services for reimbursement or material gain.”

<sup>46</sup> This is without prejudice to the different positions that may be taken on the legalisation of the sex industry.

<sup>47</sup> King, G. and C. Murray, “Rethinking Human Security”, in *Political Science Quarterly*, Vol. 116, No. 4, 2001-2002, p. 587.

individual prosperity. According to the HDR, threats to human security are collected in seven categories: economic, food, health, environment, personal, community, and political.

### *Trafficking in human beings as a threat to security*

Non-state-perpetrators like organised crime and political extremism (terrorism) belong to the major security threats after the end of the cold war.

International security experts assume that political extremism is often financed by trafficking in drugs and human beings organised by transnational criminal groups. Moreover, it has been investigated that structures established by organised crime and political extremism (terrorism) tend to be used for multiple purposes.

Both criminal activities are spread in areas of low social and administrative infrastructures, such as post armed conflict areas and countries in transition.

Violations of individual security and the lack of economic development belong to the root causes of human trafficking.

## **Recommendations**

- Security policy should take into consideration both the protection of national borders and the protection of the individual. Accordingly, it can lead to the harmonization of a rights based approach and law enforcement approach in an overall anti-trafficking strategy.
- Member States should make human security an integral part of governmental security policies and should work on a system of responsibility and accountability to ensure human security.
- As a growing number of private enterprises are subcontracted by governments to re-build social infrastructure in post armed conflict areas, including anti-trafficking measures, a system of accountability should be ensured for their staff.
- As organised crime and political extremism (terrorism) flourish in areas of low administrative and social infrastructure, all anti trafficking measures should be targeted on strengthening local and national capacities and democratic institution building. General measures to strengthen local and national capacities, democratic institution building and to enhance the rule of law are important preventive measures and should be part of any comprehensive response to counter trafficking.

### 3.6 Specific position, rights and needs of children

Children are particularly vulnerable to trafficking as it is easier for traffickers to target them through coercion, deception or manipulation and as they are more dependent on adults and have fewer possibilities to escape an exploitative relationship.

In general children have more limited capacities to understand fully the consequences of their actions. Therefore, even when a child agrees to be trafficked and/or exploited, consent cannot be assumed and should never be used against the child. This is recognised in the Palermo Protocol, where the definition stipulates that in the case of children the use of force, coercion or deception is not required.

Some groups of children – such as street children, children living in institutions, children from minorities and disadvantaged groups, and girls – are particularly vulnerable to being trafficked, because of the lack of opportunities, education, support, etc. At the same time, there is a specific demand for children for sexual exploitation (such as child prostitution and child pornography), for economic exploitation (cheap labour, begging, pick pocketing, drug selling, etc.) and for illegal adoption.

Children are more vulnerable to the serious effects of being trafficked and exploited and of being treated under immigration and crime control policies. Child victims are sometimes sold to traffickers by their parents and often face dangerous travels. They may be sexually exploited and/or exploited in illegal activities or other forms of economic exploitation, exposed to violence of the exploiters and the clients. They often live on the streets or in inadequate accommodation, with no adult carers and no access to health, education and social services. These children usually have no legal status and therefore are prevented from seeking protection for fear of being returned. When identified by law enforcement authorities, they are often treated as illegal migrants, criminalized, held in detention centres (where some children are abused) and finally deported to their country of origin. Families often do not want the child back because of the stigma attached, and in the worst cases children are re-trafficked. All these experiences may have devastating long-term consequences for a child, whose protection needs are much greater than those of adults.

Children are not only victims in need of protection but also subjects of rights, consistent with their status under the Convention on the Rights of the Child (CRC), capable of decisions and actions, whose view should be taken into account consistent with Article 12 of the CRC.<sup>48</sup> Children's empowerment is crucial both for the prevention of trafficking and for their recovery and reintegration.

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<sup>48</sup> Art. 12(1) of the CRC assures the right of the child to express her/his own views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

## *Legal framework*

Children are entitled to specific rights under a number of international instruments. The UN Convention on the Rights of the Child (1989), ratified by all EU Member States, provides the most important legal framework for policy responses concerning children.

The CRC specifies the definition of a “child” as a person below the age of 18 years, and provides a number of fundamental principles and rights: the promotion of the best interests of the child (Art. 3), the non-discrimination principle (Art. 2), the right to participate (Art. 12), the right to survival and development (Art. 6). It also contains specific articles (32, 33, 34, 35, 36) dealing with exploitation, abuse and trafficking. Other relevant articles include the right to protection of children deprived of their family (Art. 20) and the non use of detention (Art. 37).

A second relevant convention is the Optional Protocol on the sale of children, child prostitution and child pornography. This goes further than the Palermo Protocol as it includes crimes that are not of a transnational nature and that do not involve organised criminal groups. It also includes the transfer of organs and illegal adoption. Additionally it states that the consent of the child is not relevant as long as the overall objective is the exploitation of the child.

Finally, the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour No. C182 (1999), in particular the definition of the worst forms of child labour<sup>49</sup> must be taken into account.

Specific provisions on children are also set out in the UN Trafficking Protocol. Nevertheless it is important to point out that the Protocol should be read in the light of the Convention on the Rights of the Child. With regard to the definition of “exploitation” in the UN Trafficking Protocol, the CRC should be kept in mind, which states the right of the child to be protected from “economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development” as well as from all forms of sexual exploitation and sexual abuse, in particular the exploitation of children in prostitution or pornography.<sup>50</sup>

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<sup>49</sup> Art. 3: “For the purposes of this Convention, the term ‘the worst forms of child labour’ comprises:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;

(b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;

(c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;

(d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.”

<sup>50</sup> CRC, Artt. 32 and 34.

At the EU level, despite the lack of a comprehensive legal base to promote children's rights in the EU Treaty, there are a number of relevant legal texts. These include Article 24 of the Charter of Fundamental Rights, which provides a duty to promote the best interests of the child and is appended to the Treaty and Article 29 of the Amsterdam Treaty concerning offences against children, and the draft Constitution that includes two articles concerning the promotion of the rights of the child. If the draft Constitution is adopted there will be a much clearer legal base in the framework of EU legislation to promote the best interests of the child.

## **Recommendations**

- Consistent with the Convention on the Rights of the Child and the UN Trafficking Protocol:
  - the definition of “child” as any person below the age of 18 should be respected in EU and national legislation and its implementation;
  - “exploitation” in the UN Protocol should be defined in the light of the CRC and ILO Convention 182 on the worst forms of child labour and should include at a minimum all forms of sexual exploitation and sexual abuse, economic exploitation, the use of a child for illicit activities, any work that is likely to be hazardous or to interfere with the child's education or that is likely to be harmful to the child's health or physical, mental, spiritual, moral or social development, illegal adoption and removal of organs;
  - the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation should be defined as “trafficking in children” whether transnational or national, and whether or not involving organised criminal groups.
- A child rights approach shall be integrated as a normative framework in the further development of policies and measures against trafficking in human beings, both at European and national level.
- All actions undertaken in relation to trafficked children shall be based on the principles set out in the UN Convention on the Rights of the Child, in particular:
  - the “best interests” principle: the best interests of the child should be the primary consideration in all actions concerning children. All considerations related to immigration or crime control should be secondary. Child victims of trafficking should not be criminalized;
  - the right to participate: the views of children should be sought and taken into account, according with their age and maturity, in all matters affecting them;
  - the “non discrimination” principle: trafficked children should be treated as children first and foremost, considerations of their national or other status should be secondary.
- Policies and measures concerning trafficking in children shall adopt a holistic and integrated approach, aimed at strengthening the effectiveness of specific mandates

as well as at co-operation of the different agencies concerned. The different components of the problem as well as their inter-links should be taken into account, such as different kinds of exploitation, phases of the trafficking cycle, phases of intervention, etc.

- Specific attention, including re sourcing, should be paid by the EU to child trafficking outside Europe (for example child soldiers, child agricultural and domestic workers) in its development co-operation policy and programmes.
- The European Union should allocate resources to finance actions specifically addressed to combating child trafficking both in the EU external relations and within the EU.

### **3.7 Co-operation and co-ordination mechanisms**

Multidisciplinary co-operation between all involved agencies and stakeholders, including civil society organisations, is a crucial element of a holistic and integrated approach to trafficking.

The UN Protocol addresses among other things co-operation and other measures. It explicitly refers to co-operation among law enforcement, immigration and other relevant authorities by the exchanging of information in order to identify victims and perpetrators; on the types of travel documents used; and on the means and methods used for trafficking by organised criminal groups (Art. 10). The Protocol further mentions co-operation among State parties to control borders (Art. 11). This limited description of co-operation does not cover all the necessary aspects in which the different actors should cooperate in all the phases of counter-trafficking.

Anti-trafficking co-operation in the EU should be seen in a broader context and should be considered the responsibility of all parties implementing initiatives against trafficking, be it governmental agencies (law enforcement, migration, labour, etc.), the judiciary, local authorities, intergovernmental organisations, NGOs, academia and individuals.

The most basic co-operation should be in the field of data collection and the exchange of information gathered by the various agencies and institutions, as information is the basis for the development of effective policies.<sup>51</sup>

Secondly, co-operation is needed between governmental and non-governmental agencies at local and national level to ensure the proper identification and referral of trafficked persons and to ensure that they receive adequate assistance while protecting their human rights. Part of such cooperative framework should be the establishment of cross sector and multidisciplinary teams to (further) develop, monitor and evaluate

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<sup>51</sup> See Chapter 3.8.1.

policies, and the establishment of national governmental coordinating structures. Local authorities can be active partners in including trafficking in local action plans against criminality, establishing support services for trafficked persons, raising public awareness and setting up specific programmes for vulnerable groups (in particular illegal minors) to prevent them from falling in the hands of trafficking networks.

Thirdly, a structure is needed to facilitate co-operation, contacts and exchange of information and experience between Member States, between international, national and non-governmental organisations, as well as between Member States and the Commission, other constituent entities of the Council of the EU and groups of experts and networks working in the area of trafficking in human beings. To this aim the establishment of a European Anti-Trafficking Network is proposed. Such Network can build on the cooperative structures established on national level and already existing cooperative structures on European level.

### **3.7.1 National Referral Mechanisms and institutional anti-trafficking framework<sup>52</sup>**

The weakness in all anti trafficking measures and policies lies within the lack of a formalized structure capable to respond to a complex and dynamic phenomenon of human trafficking that is highly informally and diametrically organised. Therefore, the creation of a flexible structure has to be ensured in order to rapidly respond to new trends and practices of traffickers, while enabling at the same time the access of all trafficked persons to service providers.

Within the OSCE a practical tool of National Referral Mechanisms (NRM) has been developed for governments and civil society to set up sustainable anti-trafficking structures that put the human rights of the victims first while enabling effective prosecution of perpetrators.

The crucial components of a NRM are tools for identification of trafficked persons, the elaboration of models of identification and the co-operation of law enforcement with civil society. It includes guidelines to set up components of a NRM such as shelters, specialised services, return and social inclusion, data protection, witness protection, confiscation of criminal assets, compensation of victims, and residence regimes.

At the same time methodology has been developed that enables national and local stakeholders to assess, monitor and evaluate existing components of a NRM. Setting up an institutional anti-trafficking framework, including a cross-sectoral Round Table and appointing a national governmental coordinator on trafficking, ensures a participatory approach through which monitoring and evaluation exercises lead to reform of legislation, policy and practice.

Civil society, as one of the main pillars of democratic development, has a key role in

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<sup>52</sup> For more information see Explanatory paper 5.

the establishment of successful NRMs. NGOs and other civic actors often bring a vast amount of experience based on their work in traditional fields of human rights protection and victim assistance. In many countries, they complement state support or fill gaps when certain social services are not provided by state. But most importantly, they play an active role in the process of democracy and democratisation by providing checks and balances to government structures, monitoring institution-building process and reform, and advocating for a more thorough fulfilment of international human-rights commitments by the state.

Nevertheless, a lot of NGOs in the EU Member States are faced with serious short cuts of their budget that sometimes lead to closing down of the organisation.

The OSCE Action Plan to Combat Trafficking in Human Beings, endorsed at the Maastricht Ministerial Council meeting, recommends that OSCE participating States – these are among others all EU member States – establish NRMs by building partnerships between civil society and law enforcement, creating guidelines to properly identify trafficked persons, and establishing cross-sector and multidisciplinary teams to develop and monitor policies.<sup>53</sup>

#### *Governmental coordination structures*

Governmental representatives should adopt a lead role in the establishment and/or strengthening of NRMs, while constructively involving counterparts from the non-governmental sector. As a first step, a national Round Table on trafficking in human beings should be set up, bringing together all major national actors involved in responding to trafficking. The Round Table should include representatives of appropriate federal and/or state ministries, such as Interior, Foreign Affairs, Social Affairs, and Health, as well as any other government offices that have a role in combating trafficking, national and international NGOs, and international organisations.

This national Round Table should be cross-sectoral, involving both governmental actors and civil society. This provides the basis for a multi disciplinary approach and the development of national strategies and action plans. A national coordinator, usually a high-ranking national official and representative of a national-level ministry, should chair the Round Table. In addition to other tasks, the national coordinator could be responsible for the regular functioning of the Round Table and for convening meetings on a regular basis. The Round Table will create networks among national, regional, and/or international structures that will allow for efficient information dissemination and feedback mechanisms among them. It should be responsible for the development and implementation of national strategies and action plans as well as for monitoring and evaluating their implementation. One of its tasks should be the development of a quick and “light weight” individual complaint mechanism to ensure the proper

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<sup>53</sup> OSCE Ministerial Council Decision No. 2/03, “Combating Trafficking in Human Beings” (December 2003).

enforcement of in particular the policies regarding the identification and assistance of trafficked persons.

## **Recommendations**

- Member States should establish National Referral Mechanisms (NRMs) to ensure the proper identification and referral of trafficked persons, including trafficked children, and to ensure that they receive adequate assistance while protecting their human rights. A NRM should incorporate:
  - guidelines on the identification and treatment of trafficked persons, including specific guidelines and mechanisms for the treatment of children to ensure that they receive adequate assistance in accordance with their needs and rights;
  - a system to refer trafficked persons to specialised agencies offering protection and support;
  - the establishment of binding mechanisms to harmonize the assistance of trafficked persons with investigative and crime prosecution efforts.
- Coupled with a National Referral Mechanism, Member States should establish a governmental coordination structure consisting of a National Governmental Coordinator and a cross-sector and multidisciplinary Round Table to develop, coordinate, monitor and evaluate national action plans and policies. One of the tasks of the Round Table should be to develop a quick and “light weight” mechanism to address individual complaints with regard to the proper identification and assistance of trafficked persons.
- Member States should ensure sustainable funding of civil society actors.

### **3.7.2 Establishment of a European Anti-Trafficking Network<sup>54</sup>**

Co-operation is not only needed at the national level but also at the European level. To facilitate co-operation, contacts and exchange of information and experience between all involved agencies and stakeholders of Member States – governmental and non-governmental –, as well as between Member States and the Commission, other constituent entities of the Council of the EU and other groups of experts and networks working in the area of trafficking in human beings a European Anti-trafficking Network should be established. Such Network should build on the cooperative structures established at national level, in particular the NRMs, and should cover prevention, victim protection and assistance as well as law enforcement and police and judicial co-operation. Member States should be responsible to provide the conditions for national representatives, including NGOs, to participate in the European Network, whereas the European Commission shall be responsible for providing the secretariat. The Network secretariat and its activities shall be financed from the general budget of

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<sup>54</sup> See for a draft Council Decision establishing a European Anti-Trafficking Network Explanatory paper 6.

the European Union.

The Network should consist of contacts points designated by each Member State and should include at least one representative from the national authorities, preferably the National Governmental Coordinator chairing the National Round Table, as well as a representative from a NGO, which participates in the NRM and the National Round Table. The Commission should also appoint a contact point. Other relevant bodies may be associated with the Network, such as members of the European Parliament and the Committee of Regions.

### **Recommendation**

- In order to facilitate co-operation, contacts and exchange of information as well as the development, monitoring and evaluation of anti-trafficking policies on the European level, a European Anti-Trafficking Network should be established. The Network should build on the national cooperative structures, in particular the NRMs, and consist of contacts points designated by each Member State as well as a contact point designated by the Commission. It should include both governmental and non-governmental agencies and cover the areas of prevention and victim assistance as well as law enforcement and police and judicial co-operation.

### **3.8 Data collection, information exchange and data protection**

To effectively address trafficking in human beings, both nationally and internationally, insight is needed on present developments, trends, threats, recent methods, *modi operandi*, the number of persons and the amount of money involved, etc. This need for information exists with all actors involved.

A present problem is the lack of relevant data and/or the fragmented character of available data, i.e. the lack of exchange of information, at national as well as at European and international level. The first step therefore is to systematically collect relevant data based on common guidelines, to begin with the national level. Only when data gathering is adequately organised at the national level, it becomes useful to collect and compare data at the European level.

In this respect, it is important to distinguish between two different types of data: non-personal, anonymous data, which are open to the public, and personalised data, which are and should be subjected to a strict legal regime.

Although the exchange of personal data is – and should be – subject to strict and solid European regulations that secure the individual right to privacy, it should, however, be acknowledged that in reality these are not always enforced. This is particularly problematic in trafficking cases where the getting known of personal information may

not only have extreme social consequences for the trafficked person, but may directly endanger her or his personal safety. These existing gaps in data protection regulations and their implementation need to be solved. At the same time, the need for strict data protection regimes may pose tensions between law enforcement interests and human rights interests that need to be addressed.

Analysis of available data and scientific research have to fill the gaps in knowledge about the nature, extent and seriousness of the phenomenon of human trafficking and related abuses. The data needed for policy purposes in the areas of prevention, repression and assistance are non-case related, anonymous and non-personal and are provided by national as well as international sources. This does not exclude that personal data concerning perpetrators and victims can provide useful data but, in that case, these data need to be made anonymous.

With regard to children, there is a need for specific information systems both in and between origin and destination countries. Such systems should aim at systematizing qualitative and quantitative data on child trafficking, as well as sharing experiences and best practices among governmental institutions and non-governmental actors. For this purpose, it would be necessary to identify practicable tools between national and international information systems.

Operational actions, however, require specific and personalised data on perpetrators, victims and related identified persons. Given the explicit international dimension of trafficking in human beings, the exchange of personal and case-related data, not only at national but also at international level, is essential. This goes for law-enforcement authorities in the broad sense (police, judicial authorities, customs, labour and social inspection services). However, also NGOs dealing with prevention and especially those taking care of trafficked persons have, in order to fill in their tasks, needs in the field of exchange of information on national as well as on international level. This may concern not only non-personal, anonymous data, but also personalised data. Especially in the case of NGOs working on cases of missing and possibly trafficked persons, including children, personal data play a key role in concrete cases.<sup>55</sup>

This section will respectively address mechanisms for the collection of data, the exchange of personalised data and the need to balance data protection and human rights concerns with the interest of law enforcement.

### **3.8.1 Data collection: National Rapporteurs or similar mechanisms**

One of the problems in the development, monitoring and evaluation of counter trafficking policies and their implementation is the lack of reliable data and the fragmented character of available information. Moreover, data are often difficult to

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<sup>55</sup> See e.g. Vermeulen, G. and H. De Pauw (eds.), *Co-operation between Civil Society Organisation and Law-Enforcement Services in the Area of Missing and Sexually Exploited Children*, Maklu, Antwerp/Apeldoorn, 2004.

compare due to different methods used to collect them and the differences in the legal systems of the Member States.<sup>56</sup> To address this problem, in the first place a central place is needed at the national level where information from different sources and actors comes together and can be analysed. This could be a National Rapporteur or a comparable mechanism. The aim should be to bring together existing information/data from different agencies, including law enforcement agencies, intergovernmental organisations and NGOs, identifying gaps and bottlenecks and proposing methods and measures to address these gaps in information. The information thus gathered should serve as a basis for national action plans and policy-making, which should fall under the responsibility of national governments. However, the Rapporteur – or a comparable mechanism – should be independent and should not have an executive, operational or policy-coordinating task. In order to guarantee optimal access to all relevant agencies and sources of information a clear distinction must be made between the mandate to collect information, the coordinating function on a national operational level and the policy-making level. Neither should the National Rapporteur or a comparable mechanism act as a kind of “ombudsman”. Such a function is extremely useful, but could easily interfere with the collection of data and the access to different agencies this requires.

Finally, it is important that those who give information also gain benefit from having given that information. One way to achieve this is the publication of public annual reports.

Once a mechanism for national data collection is established, a similar mechanism should be established on the European level. The task of such a European mechanism (this could be a European Rapporteur) should be to bring together the information collected at national levels and to report to the Commission. Important condition for the effectiveness of data collection on the European level is that all the national mechanisms for data collection have a comparable mandate and comparable competences. Moreover, in order to make the data collected by the different Member States comparable, common guidelines for the collection of data should be developed.

## **Recommendations**

- Member States should establish a central place where information from different sources and actors is systematically gathered and analysed. This could be a National Rapporteur or a comparable mechanism. Such a mechanism should meet the following requirements:
  - main task should be the collection of data on trafficking in the widest possible sense, including monitoring the effects of implementation of national action plans;
  - an independent status;

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<sup>56</sup> E.g. the number of criminal investigations or convictions on trafficking are difficult to compare if not all Member States have a specific provision on trafficking in their Criminal Codes or if such provisions differ widely.

- a clear mandate and adequate competences to have access to, and actively collect, data from all involved agencies, including law enforcement agencies, and to actively seek information from NGOs. The mandate to collect data must be clearly distinguished from executive, operational or policy-coordinating tasks, which should be fulfilled by other bodies;
  - the competence to directly report to the government and/or the Parliament and to make recommendations on the development of national policies and action plans, without itself being a policy-making agency.
- Once national data-collection mechanisms are established, the EU should establish a similar mechanism at the European level, the task of which is to bring together at a European level the information collected at national level, to identify gaps and bottlenecks at European level and to issue recommendations to the Commission and the Council of the EU to address those gaps and bottlenecks. Again, such a European mechanism should also be open to representations from NGOs.
  - In order to make national data comparable common guidelines for the collection of data should be developed, both with regard to the type of data and to the methods used.

### **3.8.2 Data exchange**

Two types of information exchange can be distinguished: information exchange at the level of policy development and information exchange at the operational level.

In particular information exchange with regard to personalised or operational sensitive data should be based upon previously concluded protocols that lay down the information flows between the different agencies in accordance with the legal requirements. These can include IOs and NGOs that directly work in the area of missing persons, including missing children, or that are providing assistance to trafficked persons.

The exchange of personalised data is subject to specific regulations. At the international level it is regulated through the traditional international co-operation regimes in criminal matters, including Schengen, Europol and Eurojust.

#### *The present legal framework at international level*

The collection, retention, processing and exchange of personal data are subject to strict European regulations that secure every individuals' rights to privacy according to Art. 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Co-operation in the field of information exchange between law-enforcement and NGOs, private or civil society organisations is subject to the Convention for the Protection of Individuals of the Council of Europe, 28 January 1991, with regard to automatic processing of personal data (Data Protection

Convention 108) and its Additional Protocol. The same legal instrument applies to the collection of personal data by civil society organisations. An additional standard is Recommendation R (87) 15 of the Council of Europe regulating the use of personal data in the police sector. The principles of these two European instruments, which have to be implemented in national law, are also embodied in the Convention implementing the Schengen agreement and the Europol Convention. Each Member State of the European Union has implemented the above-mentioned European legal standards on data protection.<sup>57</sup>

Of course, this does not prevent that national legislation can differ and that national privacy law can apply a more stringent regulation, which will have consequences for the international collection and processing of personalised data.

At the other hand, it should be acknowledged that in practice existing data protection regimes are not always strictly enforced. Moreover, it should be acknowledged that increased co-operation and data exchange lead to greater risks of misuse of data. In this context it must be realised that any failure to protect personal data may pose a direct and serious threat to the life, safety and welfare of trafficked persons.

## **Recommendations**

- In particular the exchange of personalised or operational sensitive information should be based upon previously concluded protocols that lay down the information flows between the different agencies in accordance with the legal requirements.
- In view of the enlargement of the EU and the envisaged greater collection, distribution and synchronisation of data in the framework of the Dublin Declaration, the increased risks of misuse of data and the potential harm this can cause to trafficked persons should be recognised. It should be ensured that any increased co-operation with regard to data sharing is accompanied by strict data protection measures and regimes, including an assessment of the actual and practical capacity for the observance of such regimes.

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<sup>57</sup> See for a legal analysis of information-related co-operation considering the European standards the research of G. Vermeulen and others, which includes also a European Model Protocol. This Protocol reflects the above-mentioned European legal standards, general quality standards for civil society organisations and general principles of a code of practice for civil society and law-enforcement.

### 3.8.3 Balancing data protection, human rights concerns and the interest of law enforcement<sup>58</sup>

Data protection guarantees the right of the affected person to control the communication and use of their personal data. It is important to note that the definition of personal data includes not only details such as name, address, date of birth, nationality, etc., but also information about personal circumstances, such as conduct and activity, state of health, including Hiv status, pregnancy, or hepatitis status.

Protection of a trafficked person's data should apply to the use of data within the destination country as well as in contact with the country of origin. In cases where no data protection protocols exist, such protocols should be instituted. This can be done through a special law regulating the use of data but also through the adoption of appropriate data protection directives for trafficked persons.<sup>59</sup>

Protocols that regulate the exchange of personalised information are particularly important in the case of trafficked persons, as the misuse of information may directly endanger the safety and welfare of the person concerned. Apart from endangering the life and safety of the person concerned and her/his family, information such as stamps on passports that label a trafficked person as a prostitute or identify them as having been deported as victim of trafficking, or information exchanged with embassies or law enforcement agencies in the country of destination, can actually condemn that person to a life as social outcast or prevent them from legal migration in the future.

#### *Key provisions in general data protection regulation*

The objective of data protection regulations should be the right to self-determination over personal information. Regulations must guarantee that the processing of data (whether in their compilation, storage or transmission, etc.) only occurs in line with legal directives and/or with consent of the affected person.<sup>61</sup> These data should be used exclusively for the fulfilment of the purposes for which they were originally compiled. Moreover, data should only be taken, used and exchanged on a need basis, rather than as a matter of course, with a presumption that it should not be unless need can be shown.

In practice there are exceptions to this, for example cases where the affected person agrees to its alternative use, when there is a danger to public security, when it serves the prosecution of criminals or in cases where its use prevents serious endangerment of another person.

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<sup>58</sup> This section is a revised version of the Chapter "Fundamental Principles in Data Protection," in Kroeger, T. and J. Malkoc, B.H. Uhl, *National Referral Mechanism. Joining the Rights of Trafficked Persons. A Practical Handbook*, OSCE/ODIHR, Warsaw, 2004, pp. 93-96.

<sup>59</sup> For example in co-operation agreements, instruction to workers, in victim accommodation institutions, etc.

<sup>60</sup> See Art. 7 of the EU Data Protection Directive.

These situations can also involve the transmission of data between state agencies, or between state offices and non-governmental organisations. Such transmission should only be cleared when it does not violate any of the affected person's rights to protection, especially where the affected person is prejudiced by its transmission.

Apart from general data protection regulations, use should be made from the practice of so called "restricted notes", meaning that the data of a trafficked person are marked with a number, the identity of which is only known to selected officials.

Furthermore, people who have access to personal data in the course of their work (for example, those working in state authorities) must be bound by a duty of confidentiality.<sup>63</sup>

In discussing data protection there are a number of key areas. These include the transmission of data between criminal prosecution authorities and counselling agencies; the transmission of data of the Schengen system; the role of the media, the protection of data in contacts with agencies in the country of origin and the duty of confidentiality, including the right to refuse to give evidence, of counselling professionals.

Especially the Schengen System poses problems due to the *de facto* practical obstacles for the trafficked person to contest the storage or accuracy of her/his personal data on the SIS. At the same time the storage of information in the SIS can have far reaching consequences for the (alleged) trafficked person, such as a possible refusal of legitimate entry, residence or employment in the EU in the future.

Another important aspect of data protection concerns the relation between the trafficked person and professional counsellors. In order to access help and support, the trafficked person must have a protected space in which she/he can talk about her/his experiences. It is therefore crucial that regulations are in place to ensure the confidentiality of the client – counsellor relation and that protect counsellors from any obligation to pass on information to third parties against the will and without the consent of the trafficked person.

## **Recommendations**

- In order to ensure adequate protection of data of trafficked persons it is recommended:
  - to take as a principle that data should only be taken, used and exchanged on a need basis with the presumption that they should not be unless need can be shown;
  - to adopt specific mandatory data protection protocols for trafficked persons,

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<sup>62</sup> See Art. 16 of the EU Data Protection Directive.

which apply to the use of data within the destination countries as well as in contacts with countries of origin;

- previously to the exchange of personal data, to ensure that the country of origin concerned guarantees an appropriate level of data protection;
  - to ensure that people who have access to personal data in the course of their work are bound by a duty of confidentiality;
  - to make the unauthorised use of data, breach of confidentiality, etc., a criminal offence;
  - to make use of the practice of “restricted notes” to minimise the danger of the trafficked person’s data to get known;
  - to include in co-operation agreements between law enforcement authorities and counselling agencies/authorised NGOs provisions which guarantee that the identity and other personal data of the trafficked person will not be forwarded without the consent of the trafficked person or the proper authority to do so;
  - to adopt, where they not already exist, regulations that guarantee the confidentiality of the client – counsellor relation and that protect counsellors from any obligation to pass on information to third parties against the will and/or without the consent of the trafficked person.
- In constructing the new SIS II system and to accommodate the information flowing from acceding states, consideration should be given to the drafting of a provision, which would specifically exclude alleged and actual victims of trafficking from the SIS database. At the very least, the Schengen Convention should impose a specific obligation on Member States to notify a trafficked person on her/his request if her/his data are stored in the SIS, putting at least some of the control over the data back into the hands of the trafficked person.
  - In contacts with the media the following principles should be observed: data such as the name, personal history, photograph or any other details, which allow the identity of the trafficked person to be deduced, may not be published; any reporting should be avoided that endangers the trafficked person.

## Chapter 4

### Prevention

#### 4.1 Introduction

Prevention of trafficking in human beings comprises a wide range of strategies, which seek to reduce the risk of the crime occurring and its potential harmful effects on individuals and the society. These strategies have to be based on a broad, multidisciplinary knowledge of this crime, its causes, and promising and proven practices. At the same time they have to be gender-sensitive and integrate a human rights perspective.

The approaches to prevention of trafficking in human beings can differ. In this chapter, we will concentrate on those preventive measures that complement criminal justice interventions. Research, awareness raising, training and administrative control will be the main subjects for discussion in this chapter. In addition, this chapter will touch on the root causes of trafficking.

Firstly, it is necessary to put in place and strengthen existing measures to alleviate the circumstances that make individuals and groups of people particularly vulnerable to trafficking in human beings. Prevention strategies should counteract discrimination, marginalisation and social exclusion, both in countries of origin and destination. They should promote the well being of the people in the countries of origin through sustainable development in the social, economic, health and education sectors, with a particular emphasis on women, minorities and children. They should focus on the risk and protective factors associated with trafficking in human beings and victimisation of trafficked persons.<sup>64</sup>

However, prevention is not only an issue for countries of origin but also for countries of destination. A lack of appropriate rights for trafficked persons and adequate financial resources increase the risk for re-trafficking. These factors appear as secondary root causes.

Apart from concentrating on root causes in countries of origin and secondary root causes in countries of destination, strategies aimed at preventing human trafficking must pay attention to the demand side of the problem in transit and destination countries.

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<sup>64</sup> United Nations, Economic and Social Council, *Revised Draft Guidelines for the Prevention of Crime*, E/CN.15/2002/4, 31 January 2002.

In this regard, current restrictive migration policies, i.e. the lack of legal labour migration possibilities in light of abundant demand for cheap and exploitable labour in destination countries as well as the corresponding supply of cheap labour are among the root causes of human trafficking, which a preventive approach must address.

Whereas administrative control measures (pre-border, border and in-land controls) are without doubt essential in the overall counter-trafficking strategy, it needs to be ensured that measures to prevent trafficking in human beings do not inhibit migration possibilities, freedom of travel and mobility consistent with laws, or undercut the protection provided to asylum seekers, refugees and migrants in international law. The rule of law and internationally recognized human rights must be respected in all aspects of the prevention of trafficking in human beings.

In crime prevention strategies trafficking in human beings is predominantly perceived as a form of cross-border organised crime. This may not always present the complete picture. While the majority of trafficking may occur across borders, it also takes the form of internal trafficking. Preventive measures should also concentrate on trafficking in human beings within the territory of one country and without the involvement of organised crime groups.

The main responsibility for prevention lies with governments at local, national and international level, which should create the conditions and frameworks for sustainable crime prevention, including mechanisms for impact assessment and review. Prevention strategies should be based on existing experiences and accurate information and should be integrated into all relevant policies and programmes.

Networking, co-operation and coordination among different sectors of society – state and local authorities, international organisations, non-governmental organisations, the business sector, labour unions and private citizens – are critical to effective prevention. Civil society and community involvement and partnerships represent a crucial element of the whole concept of prevention of trafficking in human beings. Taking into account the transnational character of trafficking there is a need for sustainable regional and international preventive actions and networks addressing the international dimension of the crime.

## **4.2 Root causes of trafficking**

Complex economic, social and cultural conditions, such as globalisation, employment, trade, and migration policies, humanitarian crises, regional conflicts and environmental disasters, increase vulnerabilities and fuel trafficking in human beings. Its most commonly identified push factors are poverty and unemployment in countries of origin, among others as a consequence of social reforms, the disappearance of public sector employment and the decline of industries and agriculture in many transition countries. These factors act, together with gender discrimination and tolerance of violence against women, as push factors in particular for women to

migrate.

Pull factors, such as images drawn from the media and stories from returning migrants, aspirations for a better life with more opportunities, the expectation of employment and financial rewards, and, more generally, of an improved social position and treatment in richer destination countries, entice many persons into migrating under ill-informed and risky circumstances. In search of better jobs and lives abroad, migrants may fall prey to fraudulent employment offers and find themselves back in coercive or exploitative conditions. Among these migrants, a large proportion of women, young girls and children end up under slavery-like conditions in the traditionally female designated, most vulnerable sectors of domestic work and the sex industry. Comparable to women, some traditionally vulnerable groups, such as ethnic minorities, tend to have limited access to social services, reinforcing their vulnerability to trafficking. The same root causes apply to internal trafficking.

Similar effects of macro-economic and social development have impacted countries of destination. Increasing demand for cheap, un-skilled labour in construction and manufacturing jobs, as well as for domestic and sexual services create strong pull factors for legal or illegal migrants. With little research done in this area, little attention has been directed towards addressing the pull factor of demand as a root cause of trafficking. New research on the influence of demand<sup>65</sup> on trafficking in human beings, suggests that the unregulated nature of some parts of the labour market, the abundant supply of exploitable labour, together with the power and malleability of social norms regulating the behaviour of employers and clients are key factors in explaining the nature of the demand which fuels trafficking in human beings.

In addition, trafficking is usually connected with the shift towards investment in informal – often clandestine or illegal and largely invisible – sectors, where workers are not able to organise or demand their rights and where therefore labour is cheaper and workers easily exploitable.<sup>66</sup>

This raises questions with regard to the sectors to which women predominantly are trafficked. For example, domestic work is largely unregulated and unprotected and partly even not recognised as work, leaving very few channels for legal migration, whereas on the other hand the demand for this type of work (domestic services, childcare and taking care of the old) will further increase if only due to demographic developments (increased labour participation of women; the general ageing of the population). With few options available for legal migration, irregular migration

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<sup>65</sup> Anderson, B. and J. O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, Save the Children Sweden, 2002.

<sup>66</sup> “Where labour standards are rigorously adhered to, workers are well organised and labour laws are monitored and enforced – for all workers, indigenous or migrant – the demand for trafficked people and services is likely to be low (although in two sectors into which women especially are trafficked – prostitution and domestic service – the closed and “invisible” nature of the activities will be a challenge to the enforcement of human rights and protection), in ILO, *Trafficking in Human Beings. New Approaches to Combating the Problem*, Geneva, p. 6.

channels become the only alternative. In such context strict immigration laws may be counterproductive and by themselves become a contributing factor to trafficking in human beings.<sup>67</sup>

## Recommendations

- The EU and its Member States should review and modify policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effects, in particular on women, of repressive and/or discriminatory nationality, migration and labour migration laws. The exclusion from basic rights and protection of precisely those sectors in which predominantly women work constitutes a discriminatory practice.
- Member States should ratify and implement the UN Convention on the Rights of Migrant Workers and their families, in order to protect basic human rights of migrants, coupled with the implementation of gender sensitive national programmes based on these international standards.
- Member States should consider to increase the opportunities for legal, gainful and non-exploitative labour migration for workers with wide ranges of skills, along with strengthening regulatory and supervisory mechanisms to protect the rights of migrant workers.
- Prevention of trafficking as well as anti-trafficking law enforcement, prosecution and judiciary elements should be integrated in all relevant EU and Member States co-operation programmes with countries of origin and potential countries of origin. Priority goals should be to combat the root causes. Impact assessments should be a structural element of all programmes in order to avoid adverse effects.
- Since trafficking is often related to poverty and low levels of development in origin countries, the EU and Member States should not adopt punitive measures, such as reducing development aid, nor should conditionality clauses be included in co-operation agreements as these could result in harshening the root causes determining trafficking in human beings. Instead, a more positive approach should be taken of working with third countries to address root causes, to invest in capacity building and to raise awareness of safe migration.
- EU financial support for NGOs should be increased in order to ensure their long term and effective complementing of public policies in prevention of trafficking.
- Within existing programmes, such as Daphne and AGIS, funding should be allocated for research and pilot projects on the factors that influence the demand for the labour/services of trafficked persons, in particular in the area of domestic

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<sup>67</sup> See also Chapter 3.4.

and sexual services and for the promotion and implementation of gender sensitive sexual education of children and youth in Member States.

- Member States should reduce vulnerability for trafficking by adopting measures to
  - ensure that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons;
  - combat violence and discrimination against women, e.g. by encouraging gender sensitisation and equal respectful relationships between the sexes;
  - ensure women equal access to and control over economic and financial resources, including the promotion of flexible financing and access to credit, including micro-credit with low interest for socially vulnerable women;
  - combat all forms of discrimination against minorities, including the development of programmes that offer livelihood options, basic education, literacy, and reduce barriers to entrepreneurship.
- Both countries of origin and countries of destination involved in trafficking in human beings, and particularly in child trafficking, shall ensure that specific consideration is given to the root causes that affect children, such as the lack of access to school, the abandonment of children by their families, their living conditions, etc.<sup>68</sup>

### **4.3 Research and evaluation**

Although combating human trafficking has increasingly become a political priority for many governments around the world, information about the magnitude of the problem and current trends remains very limited. One of the biggest gaps in the understanding of trafficking is in the area of statistics and data collection.

Although there is a rapid increase in research,<sup>69</sup> there is little synthesis of the key findings of these studies. Given the fairly recent introduction of the new international definitions of trafficking and smuggling, it is perhaps unsurprising that few governments systematically collect trafficking data. In fact, many countries mix data related to trafficking, smuggling, and irregular migration, meaning that figures are often little more than estimates. Furthermore, the available data usually concern only the trafficking of women and children for sexual exploitation and not other forms of trafficking.<sup>70</sup>

There are many other reasons for the scarcity of data: trafficking cases tend to remain unreported because the victims fear reprisals by the traffickers and/or government

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<sup>68</sup> For a detailed discussion on root causes of child trafficking, please see Chapter 4.7.

<sup>69</sup> In addition to published studies, many organisations have conducted research in relation to their operational programmes that have not been published. E.g. any awareness raising programmes has a research component.

<sup>70</sup> Also here figures about trafficking are often mixed with figures about the number of (migrant) prostitutes in general.

penalties because of their status as undocumented migrants and those brave enough to testify against traffickers may simply find themselves deported. Other factors are a lack of common definitions among existing data sources and the unwillingness of some countries and agencies to share data. But, most importantly, it is a clandestine activity making the collection of data very difficult.

Lack of data can also be attributed to the low priority placed on fighting trafficking by law enforcement officers, due to lacking, inadequate or inadequately implemented legislation for prosecution and victim protection and the likeliness of the witnesses being deported. The net result is that the police often prefer not to go after traffickers at all, knowing that a great deal of effort only rarely results in a conviction.

It is evident that trafficking is an evolving phenomenon. Traffickers change their mechanisms and *modus operandi* according to the changing conditions they find in the field. A comparable mechanism for the ongoing adjustment of anti-trafficking policies is lacking at national and regional levels. Furthermore, counter-trafficking policies are not evaluated with respect of their impact.

There is no major comparative European study on trafficking based on extensive fieldwork and common research design. Most of the research has been short-term.

Moreover, there is hardly any research on the demand market, its clients and employers, including their profiles, awareness level and participation in the market, which can form the basis for awareness raising campaigns targeting clients and employers in order to reduce their participation in the trafficking chain.

A final consideration has to be done in terms of child trafficking. Although there is a clear consensus that trafficking in children is growing it is yet difficult to quantify. Children are often invisible in data and statistics, which usually use adults as a unit of analysis.

## **Recommendations**

- Research on trafficking should:
  - be designed in a non-static way in order to detect and study changes in the trends and patterns of trafficking.<sup>71</sup> Regular reviews and assessments of the trafficking situation and anti-trafficking responses should be an integral part of research programmes with a view to adapting anti-trafficking measures to the changed circumstances;
  - be oriented towards the production of practical recommendations to curb trafficking and to establish appropriate protection and assistance of trafficked persons;

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<sup>71</sup> See IOM, *The Changing Patterns and Trends of Trafficking in Persons in the Balkan Region*, Geneva, 2004.

- respect the protection of confidential and personal data and information;
  - include elements related to intelligence (participation and activities of criminal groups), socio-economic profiles of perpetrators and victims and of their societies of origin; main causes for trafficking, and the consequences for the individuals involved as well as for the concerned countries;
  - collect data separately for women, men and children;
  - be based on the Palermo Protocol definition in order to facilitate a systematic measurement of the phenomenon and to be able to compare data.
- The EU and Member States should create the conditions, including appropriate structures, to carry out systematic annual assessments on patterns, trends and volume of trafficking in each country of concern, based on a clear and uniform methodology. Reports should be made public and serve as guidelines for EU assistance.<sup>72</sup>
  - The EU should systematically monitor and evaluate policy measures and programmes at the EU, international and national levels to determine the envisaged and real impact of such policies and improve their effectiveness.<sup>73</sup> All counter-trafficking projects and programmes receiving EC funding should be subject to mandatory evaluations and these evaluations should be made available.
  - A website should be established containing update overviews of research on trafficking in the countries of the EU in order to make results, developed tools, etc., accessible to different private and public users in organisations and institutions.
  - More research should be conducted in the key source countries, in particular on the root causes of trafficking and the links between trafficking, poverty and exploitation. These links should be articulated to encourage European development agencies to seriously address these issues. At the same time, EU countries, particularly those of destination of trafficked persons, should carry out research on the mechanisms of and incentives for trafficking in their own countries.
  - More research should in particular been carried out in the following areas:
    - trafficking and forced labour in other sectors than the sex industry;
    - the impact of counter-trafficking policies in general and on the human rights of trafficked persons, (female) migrants and other groups that might be affected by counter trafficking measures in particular;
    - relations between the regulation of migration and the level of human trafficking, the demand market and its employers and clients, including their profiles, their awareness level and their participation in the market, as well as

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<sup>72</sup> See also Chapter 3.8.1.

<sup>73</sup> UNHCHR, *op. cit.*, Guideline No. 3, “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 group to another group.”

the role of labour standards, unions, and the impact of changes in the labour market. Research results, including concrete recommendations, should be disseminated among concerned governments with a view to using them in a practical way to reduce the market demand;

- effective law enforcement strategies.
- Quantitative and qualitative research focused on children should be implemented, including the different factors influencing the risks for children and the different kinds of exploitation they suffer (i.e. sexual exploitation, labour exploitation, illegal adoption, removal of organs).
- The European University Institute as well as other educational institutions officially created or depending on the European Union, should initiate systematic teaching and research on trafficking issues in the European Union.

#### **4.4 Awareness raising**

Awareness-raising activities in the area of trafficking in human beings aim in particular at preventing trafficking in human beings through information with a particular focus on vulnerable groups; to influence public opinion; at increasing the readiness of institutions, organisations, groups and individuals to address trafficking in human beings adequately; and at disseminating information on the assistance and services available for trafficked persons.

Awareness raising campaigns should be embedded in a comprehensive strategy, complementary to advocacy for human rights, gender equality, self-empowerment and human dignity. They should be educative, convey empowering and gender-sensitive messages, with aspects of interactivity, and be based on an assessment of the interests of the respective target groups.

Awareness-raising activities should make use of various channels of formal and informal communication and rely on co-operation with other relevant actors, including NGOs, in countries of origin, transit and destination. They should be preceded by an initial research phase in order to comprehensively understand the phenomenon, identify potential target groups and design effective interventions tailored to the needs of specific groups.

Important elements are:

- information about safe migration and employment opportunities abroad, including information on relevant laws and policies in countries of destination and the rights of migrants;
- information on the risks and consequences of trafficking and how to protect oneself, in particular aimed at women, minority groups, children and young people to enable them to make informed decisions about migration;
- information on differences between prostitution and trafficking and between

- trafficking, smuggling and illegal migration;
- information on the rights of trafficked persons and existing assistance mechanisms in the countries of transit and destination.

## **Recommendations**

- The development of international networks including all relevant actors should be encouraged in order to disseminate information on trafficking, share best practices and design common strategies and partnerships.
- Awareness-raising campaigns should:
  - be tailor made and aimed at clearly identified target groups;
  - use a combination of different methods and activities so that they cover the entire trafficking chain from prevention, through victim identification, prosecution of traffickers, assistance and protection of trafficked persons, to return and reintegration of trafficked persons.
- Elements of awareness raising campaigns in countries of origin should include:
  - information on safe migration and existing possibilities for labour migration, including information on relevant laws and policies in countries of destination, the rights of migrants and possibilities to get help in case of problems. Such information should be available in the language of the countries concerned and be displayed in the consular and visa sections of the state diplomatic missions. Copies should be enclosed in any postal visa applications;
  - specific activities to make children and young people aware of the risks of trafficking as an essential part of their education, coupled with an education that promotes equality between men and women, and that focuses on human rights, self-empowerment and dignity.
- Other measures should include:
  - the establishment of telephone hotlines in the countries of origin, transit and destination that can be used as an independent source of information, advice and guidance for potential migrants, as the first point of contact for trafficked persons and as a tool for anonymous reporting of cases of trafficking in human beings. Hotlines should include specialised personnel in child related matters.
  - specific activities aimed at media professionals to promote an adequate presentation of the issue, without reinforcing stereotypes and with respect for the privacy and safety of trafficked persons;
  - specific activities aimed at the relevant market actors, such as employers, clients, co-workers and unions, to reduce demand for labour/services of trafficked persons; to promote zero tolerance towards all forms of trafficking and related abuses; to inform them about possible actions they can undertake, including the appropriate referral of (possible) trafficked persons; and to promote the ability of trafficked persons to organise to claim rights;
  - the inclusion of awareness raising components in all anti-trafficking training aimed at strengthening the institutional capacity of relevant agencies, including

prosecutors, judges, police, border guards, alien police, labour inspections, NGOs and social workers.<sup>74</sup>

#### **4.5 Training<sup>75</sup>**

Training is recognised as a key element for any strategy or action plan against trafficking in human beings. Its objective is to strengthen the technical capacity of all concerned actors for implementing this strategy. Training in support of national strategies and the establishment of recurrent training schemes for all relevant actors should be included in national action plans.

By contrast to awareness raising activities, which address a wider audience with the aim of acquainting them with the phenomenon of human trafficking and the related risks, training measures should aim at both enhancing the understanding of human trafficking as a crime and human rights violation as well as providing the actors with the tools and skills to adequately respond to it. Therefore, all training should contain a general part, designed as awareness raising and comprising a comprehensive description of the phenomenon, definitions, modus operandi, etc., as well as a specific part, tailor-made for the actors targeted by the training and giving detailed instructions on the interventions and measures to be taken by these actors.

All training should be based on a human rights approach and raise awareness on anti-discrimination measures, gender equality, as well as the special needs and rights of children. A multi-disciplinary approach should be adopted to strengthen the understanding of the necessity of co-operation of the various actors and especially between the competent state authorities, non-governmental and intergovernmental organisations. This requires a wide scope of actors to be targeted, such as judges, public prosecutors, police investigators, front-line police and frontier personnel, migration personnel, labour inspectors, trade unions, journalists, psychologists and physicians, school and university teachers, IOs, IGOs, NGOs, international military and police peacekeepers, social workers, consular personnel, and public administration officials. To this end, training should also be delivered by a variety of agencies, and especially with the involvement of NGOs.

Training should promote a new understanding of law enforcement as public service to society at large and should encompass the principle of democratic policing, the rights and needs of victims as well as the concern for the conviction of perpetrators. Similarly, training for judges, prosecutors and other juridical staff should enhance a new understanding of the criminal justice system where the state recognizes its dual responsibility to both prosecute and convict the perpetrators, while also protecting the victims of crime, restoring their human rights and avoiding any further damage to the victim.

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<sup>74</sup> See Chapter 4.5.

<sup>75</sup> See for more information Explanatory paper 8.

Training should target individual national actors as well international military and police peacekeepers and related civilian contractors, where present. Such single-actor training should, however, be designed and delivered by a multi-disciplinary team, especially with the participation of NGOs.

In addition, joint training targeting several actors together is crucial. Although at present rarely employed, such multi-actor training is indispensable in order to ensure a co-ordinated and multi-disciplinary approach. Joint trainings for all parties involved in addressing trafficking and assisting victims (police, prosecutors, victim assistance agencies, etc.) will result in an improved understanding of each other's roles and enhanced co-operation. This would increase both effective prosecution and effective assistance and protection of trafficked persons.

A regional and European harmonised approach to training, based on the UN definitions and norms and best practices, will facilitate the concrete co-operation in anti-trafficking measures. To this end, regional and European anti-trafficking training modules should be developed and sustainable training structures established, i.e. training programmes be mainstreamed into the regular curricula of all relevant actors thus becoming a recurrent feature.

In addition to formal training (seminars or workshops), new training techniques should be implemented, such as study visits, exchange of officials and peer training.

## **Recommendations**<sup>76</sup>

- A training component should be included in all counter-trafficking national action plans. Moreover, regional anti-trafficking and European modules should be developed and mainstreamed into the regular curricula of all relevant actors.
- Training should target a wide scope of actors and be delivered by a variety of agencies. All training should contain a general as well as a specific part tailor made for the targeted actors. Multi-actor training is indispensable to ensure a coordinated and multi-disciplinary approach. All training should be delivered by multi-disciplinary teams, especially with the participation of NGOs.
- It is recommended that all anti-trafficking training programmes contain, within the generalist level, definitions of terms such as trafficking, trafficked persons, traffickers, exploitation; the difference between prostitution and trafficking and between trafficking, smuggling and irregular migration; a general explanation of, the trafficking process, the *modus operandi* of traffickers, control and exploitation of trafficked persons and labour standards; and the psychological, social and economic impact on trafficked persons. Training should have a human rights basis.

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<sup>76</sup> See Explanatory paper 8 for a comprehensive description of needs and recommended types of training per target group.

- Additionally, law enforcement training should focus on the following specific target groups:
  - law enforcement officials, both at non-specialist level (front-line officers – criminal, traffic, municipal, public order, alien and border police), and specialist level (specialised counter-trafficking police detectives and investigators that hold specific responsibility for the crime, including public prosecutors, as appropriate);
  - labour inspectors;
  - consular staff;
  - judges, prosecutors and attorneys;
  - international military and police peace-keepers and related civilian contractors.
- Due to the special sensitivities involved, there should be a separate child specific training for all law enforcement and other officials and NGOs dealing with trafficked children.

#### **4.6 Administrative controls to combat trafficking in human beings**

Administrative controls are geared to regulate and monitor procedures, practices and agencies that may have an influence on the prevalence of trafficking in human beings. They have a potential to combat human trafficking and to support prevention, protection and prosecution alike, which is not yet fully used. It includes accessing a range of mechanisms, from repressive to positive enforcement, and implies multi-agency co-operation, including civil society as well as private sector participation. Use can be made of both sanctions and incentive schemes. Condition is that they are implemented in a transparent and accountable way. Moreover, administrative controls should be guided by an emphasis on human rights obligations. Respect and concern for human rights is an overriding principle when addressing all forms of trafficking.

Administrative control measures can support the prevention of trafficking by way of enhancing co-operation between countries of origin and destination with regard to a better management of international migration flows, especially schemes for legal labour exchanges. In addition, enhanced document security as well as strengthened systems for visa processing and border controls, including the verification and identification of persons, can facilitate legitimate migration while preventing trafficking in persons. Administrative measures should further the enforcement of more generous and relaxed immigration regimes and regulations and prevent their abuse by traffickers. At the same time they should be carefully planned and evaluated to control for unintended consequences of even stronger dependency by prospective migrants on traffickers and smugglers.

Additional preventive measures are the regulation and monitoring of private employment, marriage, tourist and adoption agencies appearing in the *modus operandi* of traffickers, as well as the sex industry and other sectors where trafficking is likely to take place. Moreover, administrative measures can be used to monitor and enforce

labour standards, in combination with training of the relevant actors and backed by criminal law enforcement.

Administrative controls are enhanced through multi-agency co-operation, which should include representatives from official labour, immigration and consular agencies, as well as NGOs, human rights organisations and the private sector, and need to take place at local, national and international levels.

They can contribute to the reduction of the invisibility of trafficking and the related exploitation, the identification of trafficked persons and the collection of evidence and can help to reduce the opportunities for traffickers to make use of the proceeds of crime in lawful markets. Where lack of evidence does not allow for criminal prosecution, administrative control measures may at least lead to the disruption of exploitative situations. They can also be used to enforce application of labour standards and to monitor the Internet for illegal use. In that regard, they offer a full range of innovative policy measures to ensure the participation and contribution of the private sector, i.e. through promoting the self-regulation of the private sector as well as by the introduction of rating systems by the authorities.

## Recommendations

- Member States should promote the introduction of a broad range of administrative controls in pre-border, border and in-land areas, with due respect to human rights considerations and fundamental rights of the person, including the freedom of movement.
- Multi-agency co-ordination groups, including law enforcement agencies, labour market institutions/inspectors, immigration officials, other ministry or embassy staff and NGOs, should be functioning actors in the co-ordination and implementation of administrative control measures on both policy and operational level, as well as in the sharing of intelligence among all actors, especially among labour market inspectors and police investigators, on a local and national level (in close co-ordination with National Referral Mechanisms), but also at regional/international level (between origin and destination countries).<sup>77</sup>
- Member States should introduce regimes and practices to regulate and monitor private agencies that frequently appear in the *modus operandi* of traffickers.<sup>78</sup> In order to provide for early identification of those agencies, which act outside of the legal requirements, States should introduce systems to regulate these agencies by way of licensing, and to monitor them. In doing so, states should apply innovative

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<sup>77</sup> Whereas the Brussels Declaration (BD) calls for the creation of multi-disciplinary groups that meet regularly and whose role is described as “regular evaluation, monitoring and further improvement in the implementation of national policies”, concrete operational co-operation and co-ordination is also needed in order to render administrative controls effective.

<sup>78</sup> BD, pt. 11.

policies such as rating systems. The private sector (private employment agencies and their business associations, but also individual commercial agencies) should be obliged to collaborate with the police as well as be encouraged to introduce self-regulating schemes (codes of conduct); Moreover, administrative measures should be used to monitor and enforce labour standards, in combination with training of the relevant actors and backed by criminal law enforcement.

- Member States should encourage a pro-active regulating and monitoring of vulnerable sectors such as construction, sweat shops, agriculture and the sex industry by multi-agency groups. This would counter-act the “invisibility of the exploitation” by identifying (possibly) trafficked persons and collecting intelligence, which can be used for large-scale investigation.<sup>79</sup>
- Member States should consider the introduction/expansion of transparent labour admission systems and establish multi-agency and international enforcement mechanisms; intensified efforts should be taken to ensure that international labour standards are applied and enforced in countries of origin and destination.
- Member States should enhance their capacity for processing applications for visa, residence and work permits and family reunification, thereby fostering legitimate migration. Support systems should be set up for the verification of documents and statements submitted together with applications. Data on fraudulent and suspect agencies, employers, etc., should be shared among all relevant labour, law enforcement and consular agencies nationally and regionally, in and between countries of origin and destination. The network of liaison officers could be further strengthened in this regard. Measures should also be taken to intensify consular co-operation in countries of origin, with a view to identifying potential cases of human trafficking; to this end, consular and other frontier staff should be sufficiently trained.
- Document security should be improved, and special internal control mechanisms should be introduced in order to prevent the falsification of, or fraudulent use of visa, labour permits and residence permits.
- States should establish mechanisms to monitor the Internet as a means to detect and prosecute the potential illegal use of Internet for trafficking purposes, such as escort, adoption and bridal agencies. Public-private partnerships with Internet providers and other businesses (including their self-regulation by means of codes of conduct) should be further enhanced. Special attention should be paid to the identification of child victims of exploitation and abuse via Internet.

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<sup>79</sup> See also the ILO, *Working Paper on Special Action Programme to Combat Forced Labour*, January 2004.

## 4.7 Children

Any comprehensive prevention strategy aimed at protecting children from becoming victims of trafficking and the related exploitation should be in line with the principles and provisions of the UNCRC as well as with domestic child related legislation, whereby the latter should increasingly be in accordance with the former.

The level of vulnerability of children and the opportunities for exploitation, violence and abuse are directly related to the level of protection and opportunities, which States are able and willing to guarantee to any child present in its territory. This guarantee of protection is particularly relevant for the most vulnerable groups of children, such as foreign or migrant children who, in violation with the UNCRC principles and provisions, often can not benefit from the same opportunities guaranteed to children with national citizenship.

One of the root causes of trafficking is poverty. Children who are trafficked often come from poor families in the least developed regions of the world where poverty is widespread. One in seven children worldwide is without education, 70% of them girls. The low social status of girls makes them especially vulnerable and in some instances they are simply sold by their parents. Some children come from families that are unstable or unable to provide care for them. Other children have become *de facto* street children or have been placed in institutions where they suffer abuse and neglect and thus become vulnerable to approaches from exploiters.

This indicates that prevention mechanisms have to be both long term and short term. Long-term prevention measures include EU aid and support measures to build properly functioning child protection systems within countries of origin, improve access to education particularly for girls, and raise the socio economic conditions within countries of origin.

Children are also trafficked as a direct result of organised crime and families being forced to sell their children to traffickers. Therefore, greater efforts to combat organised crime would also have a preventive effect, although targeted measures on one or two countries could simply move the problem to elsewhere.

Raising awareness amongst children and their families is also essential – campaigns need to be targeted on specific at risk groups. It is also essential to raise awareness aimed at the demand side of trafficking as well as awareness of the rights of the child. It is therefore necessary to open up legal migration opportunities for families and children who are above the minimum age for work.

## Recommendations

- Any policy or legislative measure aimed at preventing trafficking should entail specific measures to address and prevent violence, abuse and exploitation of children. Guiding principle for any measures or policies with regard to children should be the UNCRC. Other relevant frameworks are the 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and the policies against the sexual exploitation of children as undertaken at the Second World Congress Against the Commercial Sexual Exploitation of Children held in December 2001 in Yokohama. Best practices on the prevention of child trafficking should be developed, implemented and disseminated.
- Migrant children represent a particularly vulnerable group among the child population and should be guaranteed the same level of protection and opportunities as national children, regardless of their residence status.
- EU development co-operation programmes should explicitly address the root causes of trafficking in children. Elements of such programmes should be:
  - improvement of children's access to school and vocational training and increasing the level of school attendance, in particular of girls and minority groups;
  - reduction of the number of children abandoned by their families and promotion of alternative solutions to institutional care, including foster-care and adoption, preferably in the country of origin (consistently with the principle of subsidiary of international adoption) in order to improve their living conditions, along with imposing stricter controls on institutions, foster-families and on international adoption;
  - protection of street children by ensuring the provision of food, health care, informal education and/or shelters, together with protection from exploitation and abuse they may suffer;
  - information to families and children about children's rights, safe migration and the risks of trafficking through interventions in schools and in other settings in order to reach children that are outside the formal educational system;
  - improvement of the system for birth;
  - where applicable: addressing the needs of children affected by armed conflict, displacement and other humanitarian crises.
- In addressing the demand side Member States should take specific measures to address the different kinds of child exploitation: sexual exploitation, with particular attention to child prostitution and child pornography; economic exploitation; illegal adoption; and removal of organs.
- Member States should take measures to address the disappearance of trafficked and exploited children from accommodation centres where they have been placed, as they risk being re-trafficked and/or exploited.

- Opportunities for legal labour migration and family reunification should be increased in order to reduce the number of unaccompanied children who often end up being trafficked.
- Border controls should pay particular attention to unaccompanied minors, children travelling with non-family members, and children without appropriate documentation. Unaccompanied and undocumented children should not be refused entry or returned at ports of entry, but be subject to particular protection and investigation measures. Immigration, border and other law enforcement authorities should immediately refer unaccompanied children to the appropriate child welfare authorities. If the child is accompanied by an adult who is not able to demonstrate through valid documents that she/he has the legal authority, appropriate measures should be taken to protect the child. Staff carrying out interviews on children should be properly trained and NGOs should be involved in this process. In addition, the possession of a proper passport/travel document for children of all ages should be obligatory, as should the establishment of checks on the validity of “relations” between the child and the accompanying adult. Co-operation between border officials, law enforcement officials and child assistance agencies should be improved.
- Visa application procedures must pay particular attention to children travelling without an immediate family member and photo ID’s must be taken of children and their accompanying adult. The aim of such procedures should be the protection of the child and the promotion of her/his best interests.
- Registration of children’s biometric data, both in the country of origin and in the destination country, could be useful but should be aimed only at the child’s protection and the promotion of her/his best interests, and not for immigration control purposes (e.g. expulsion enforcement). The registration should not be traumatising and criminalizing, and child-friendly procedures should be adopted. Moreover, if applied, it should be subjected to strict controls in light of the right to privacy and the use of data.
- States should adopt national legislation according to the Hague Convention on Protection of Children and Co-operation in Respect of Inter-Country Adoption<sup>80</sup> in order to avoid inappropriate behaviour by adoption agencies and to prevent abusive practices in legal international adoptions.

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<sup>80</sup> See [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=69](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=69)

## Chapter 5

### Recovery, assistance and protection of trafficked persons

#### 5.1 Introduction

Until now States' policies, including EU policy responses to trafficking, have tended to concentrate on measures in the area of crime control and migration policies, but much less on assistance and human rights protections for trafficked persons. Yet, as recognised in the Brussels Declaration, to effectively combat trafficking, the whole spectrum from prevention and prosecution through to assistance and protection of its victims needs to be addressed.

In fact, it could be stated that the neglect of the area of assistance and protection to trafficked persons forms both an obstacle to effectively address trafficking and falls short of the obligations that States have under international human rights law to provide victims of human rights violations with effective remedies. It forms an obstacle because the level of assistance and protection is directly related to the trafficked person's confidence in the State and its ability to protect her/his interests and thus directly influencing her/his decision to co-operate with authorities in the prosecution of traffickers. The absence of adequate procedural safeguards and assistance may prevent trafficked persons from reporting to the authorities and inadvertently expose them to further trauma and the risk of reprisals by traffickers, including the risk of being re-trafficked. Moreover, research shows that one of the main obstacles in the prosecution of traffickers is the absence of the victims, often as a result of the deportation of (possible) trafficked persons as illegal aliens under immigration laws.<sup>81</sup>

It falls short of States obligations because under international human rights law trafficked persons – as victims of a human rights violation – have a right to protection, assistance and redress in itself, separate and apart from their value as witnesses in the context of the prosecution of the perpetrators.

More attention to the assistance and protection of trafficked persons is thus required, both on the EU-level and on the level of national states.

To do justice to both aspects – the position of the trafficked person as a victim of a crime and human rights violation and the position of the trafficked person as a witness in the framework of criminal proceedings – the term “trafficked persons” is used as the more general term referring to those who have been trafficked and are entitled to

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<sup>81</sup> See e.g. Rijken, C., *Trafficking in Persons. Prosecution from a European Perspective*, T.M.C. Asser Press, The Hague, 2003.

assistance and protection on the very basis of that fact, whereas the term “victims of trafficking” is used in its judicial meaning and specifically refers to those who are recognized in criminal proceedings as victims in a specific case of trafficking in relation to identified perpetrators.<sup>82</sup> Whereas “trafficked persons” as such are entitled to a certain standard of assistance and protection, additional protective measures are needed in the context of criminal law to protect those who testify against the perpetrators.

This chapter will first discuss the issue of identification of trafficked persons, the prevention from immediate expulsion and the issue of residence status. Consequently it will deal, in accordance with the above stated distinction, with respectively assistance and protection of trafficked persons as victims of a human rights violation and witness protection of trafficked persons who decide to testify against the perpetrators in the context of the prosecution. Finally, the last paragraph will deal with the conditions for return of trafficked persons to their country of origin and the related questions of safety and reintegration in their home communities.

## **Recommendation**

- In order to effectively address trafficking as well as meeting state’s obligations under international human rights law Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers.

## **5.2 Identification<sup>83</sup>**

Identifying trafficked persons is a fundamental problem in all anti-trafficking strategies. For a variety of reasons, those caught up in human trafficking often do not want to reveal their status or experiences to state authorities. They may harbour deep feelings of mistrust towards official bodies, stemming from experiences in their country of origin, but also in the country of destination. Frequently, trafficked persons fear violent retaliation by traffickers against themselves and/or children and family members at home. Such threats of violence may enhance their fear of deportation because of their illegal status. For these reasons trafficking in human beings is too often an invisible phenomenon.

Because trafficked persons initially are often reluctant to identify themselves as such, the term “presumed trafficked person” is generally used to describe persons who are likely to be victims of trafficking and who should therefore come under the general scope of anti-trafficking programmes and services.

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<sup>82</sup> See also Chapter 3.1.

<sup>83</sup> See also Explanatory paper 9.

Trafficked persons are only rarely able to extricate themselves independently from their situation. Usually, if they come to the attention of authorities at all, it is as a result of checks by the police, border officials, or other state authorities or through contacts with NGOs. Official bodies likely to come into contact with trafficked persons should be aware of the special circumstances they face and show sensitivity in dealing with them and affording them access to existing protective mechanisms. It is important for official bodies to remember not only that trafficked persons are victims of a crime who are entitled to compassion and human rights but also that winning their goodwill and co-operation can help combat organised crime. There are a variety of means that can be used to help encourage presumed trafficked persons to come forward. These include hotlines, outreach work and drop-in centres.

The identification of a trafficked person can be a complex and time-consuming process requiring professional guidance and support structures to create a safe space for the person concerned. Sometimes it is a question of weeks or months before a trafficked person overcomes post-traumatic stress syndrome and develops enough trust to be able to speak out.

According to research in Italy, more than 40 per cent of all trafficked persons in the sex industry are now identified through outreach work from non-governmental organisations, local authorities, and hotlines. Clients of prostitutes and other citizens identify more than 22 per cent of trafficked persons. Only 13.9 per cent of trafficked persons qualified for assistance are being identified and referred by the police.<sup>84</sup>

Identification of trafficked persons can take time because of the complexity of the crime and the networks of individuals involved. The interaction between the trafficker and the victim is multifaceted, since the perpetrator is often also “protecting” the victim in their illegal status from the authorities. The victim can feel dependent on, and bound to, the traffickers, e.g. by debts.<sup>85</sup> Moreover individual members of the criminal network can adopt different roles in relation to the victim, varying from abuse and control to support and “protection”. Therefore severing ties with the criminal circuit often rather takes the form of a process than that of an immediate action.

The complexity and variety of relationships in the crime of trafficking complicates the identification of the victim by external actors, including social workers and the police.

Moreover, little experience has as yet been gained in the identification of trafficked persons in other sectors than the sex industry, such as domestic work, construction,

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<sup>84</sup> Regione Emilia-Romagna, *On the Road, Article 18: Protection of Victims of Trafficking and the Fight against Crime (Italy and the European Scenarios). Research Report*, On the Road Edizioni, Martinsicuro, 2002, p. 88 f.

<sup>85</sup> See research by F. Carchedi, who developed several models of interaction in order to present the complexity of relationships between trafficked persons and other actors, including clients, social workers, and police. F. Carchedi, *Voluntary and Involuntary Prostitution Deriving from Trafficking of Women. Some Structural Characteristics*, paper presented in Prague, 2003.

agricultural labour or the garment industry.<sup>86</sup>

### *Models of identification procedures*<sup>87</sup>

Trafficked persons may be identified either by government actors and law enforcement or by NGOs, local social-welfare organisations, labour unions labour inspections and other labour-related agencies, particularly if they are trained and if a system of referral is in place. In order to build confidence and trust, and to establish contacts with presumed trafficked persons, outreach work, drop-in centres and hotlines should be developed within support systems. In addition, public awareness raising campaigns can have a role in reducing the invisibility of exploitation and therefore provide another means of identification.

Outreach work and drop-in centres are crucial elements in supporting presumed trafficked persons in the environment in which they are forced to work. Apart from the existing forms of outreach work and drop-in centres, which are mostly linked to the sex industry, new forms of outreach work need to be developed by unions and other labour related organisations targeted at the specific sectors in which trafficking is likely to take place, such as construction sites, agricultural labour and the garment industry.

In addition hotlines<sup>88</sup> and different types of tailor made information materials (e.g. leaflets, stickers, info guides, etc.) with basic information on support structures and hotline numbers play an important role in the process of (self)identification.

Finally, trafficked person may be identified by law-enforcement agencies. It might usually be expected that front line officers and border guards, are the first to identify trafficked persons. However, research seems to show that only a limited number of trafficked persons are identified in this way.<sup>89</sup> Additional measures and training are needed here. One of the instruments is the development of lists of indicators. It should, however, be kept in mind that, although useful, such lists can never be sufficient.

Little experience has been gained with the role that labour inspections and other labour related authorities can play in the identification of trafficked persons in other sectors than the sex industry. There is a clear need for training and the development of new methods and materials here.

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<sup>86</sup> This Chapter is therefore mostly based on the experience gained with trafficking in the sex industry.

<sup>87</sup> See for a more extensive description of models of identification Explanatory paper 9.

<sup>88</sup> See for a more extensive description of hotlines Explanatory paper 11.

<sup>89</sup> Limanowska, B., *Trafficking in Human Beings in South-eastern Europe: Current situation and Responses to Trafficking in Human Beings in Albania, Bosnia and Herzegovina, Bulgaria, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia, Moldova, Romania*, ODIHR/UNICEF/UNOHCHC, 2002, p. 152.

### *Identification of trafficked children*

In particular in relation to children co-operation and sharing of information is needed between all involved agencies to ensure that trafficked children are identified and assisted as early as possible. Guidelines and lists of indicators, used e.g. by border officials or police officers, should take into account the specificities of child trafficking. Moreover, agencies that could come into contact with trafficked children should be trained in child sensitive and child friendly methods of working. In cases where there is a suspicion that the child is a victim of trafficking, the child should be immediately referred to the appropriate child welfare authorities. Where the age of the trafficked person is uncertain, the presumption should be that she/he is a child and she/he should be provisionally treated as such.

### **Recommendations**

- To allow proper identification of trafficked persons all involved actors – government actors, law enforcement, NGOs, local social welfare organisations, labour unions, labour inspections and other labour related agencies – should be trained and a system of referral should be in place.
- In order to establish contacts with presumed trafficked persons and to build the necessary confidence and trust, outreach work, drop-in centres and hotlines should be developed. This is particularly important since research indicates that only a limited number of trafficked persons are identified by law enforcement agencies. The majority of trafficked persons seem to be identified through outreach work of NGOs, local authorities, hotlines, clients, colleagues and other citizens.
- In light of the little experience that is gained with the identification of trafficked persons in other sectors than the sex industry, specific attention should be paid to information and training of labour unions, labour inspections and other labour related agencies in order to enable them to identify and properly refer trafficked persons. A specific budget line should be created to develop specific methods and information materials, targeted at those sectors where trafficking is likely to take place, such as domestic work, construction, agricultural labour and the garment industry.
- Agencies (including law enforcement, labour, social service, health and education agencies, outreach workers, hotlines, etc.) should co-operate and share information so as to ensure that trafficked children are identified and assisted as early as possible. In cases where there is suspicion that the child is a victim of trafficking, the child should be referred to the appropriate child welfare authorities. After placing the child in a safe accommodation, appropriate measures need to be taken to identify and assist the child and, if the child is accompanied, to assess the relationship between the child and the accompanying adult. Where the age of the trafficked person is uncertain, due to the absence of papers or to false identity papers, and she/he claims to be less than 18 years of age, the presumption should

be that she/he is a child and she/he should be provisionally treated as such.

### 5.3 Reflection period and residence status<sup>90</sup>

Granting a reflection period, followed by a residence permit, including all corresponding rights, to trafficked persons – regardless of whether or not she/he is willing and/or able to give evidence as a witness – assists Member States in their obligation to protect the human rights of trafficked persons and not to treat trafficked persons exclusively as an instrument for the prosecution.<sup>91</sup> Categorical protection of basic rights also serves to raise the trafficked person’s confidence in the state and its ability to protect her/his interests. Once recovered, a trafficked person with confidence in the state would be more likely to make an informed decision and to co-operate with the authorities in the prosecution of traffickers.

Moreover, in order to effectively encourage trafficked persons to come forward and/or to act as witnesses, they must know beforehand that they can rely on the state to provide them assistance and protection. If states are not willing to provide assistance and protection as a right rather than a favour, it will not have the effect intended. Protection should include the possibility of a permanent or long-term residence permit.

In dealing with the reflection period account should be taken of the fact that, for a number of reasons, severing ties with the criminal circuit often takes the form of a gradual process rather than an immediate decision. Those reasons include dependency of the criminal network, division of roles within the network (“good guy, bad guy”), considerations with regard to safety of family and/or children, future perspectives, the power of the criminal network over family members or friends, other victims in the same network they feel responsible for, debts, etc. It is therefore not realistic to demand from a trafficked person to immediately sever all ties in order to qualify for assistance or to presume that a person is not trafficked because of continuing ties with the criminal circuit.

Following a reflection period of not less than three months, a residence permit as set forth in Article 8 of the EU Council Directive should be granted to identified trafficked persons, independent of their willingness to co-operate as a witness and regardless of whether or not the perpetrators are prosecuted. Those trafficked persons who do not wish to testify as witnesses – or are not required as witnesses, because they possess no relevant information or because the perpetrators cannot be taken into custody in the destination country – require equally adequate protection and assistance as victim-witnesses.<sup>92</sup>

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<sup>90</sup> See for more information Explanatory paper 10.

<sup>91</sup> International Covenant on Civil and Political Rights (ICCPR), Art. 7; UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Supplementing the United Nations Convention against Transnational Organized Crime, Art. 7.

<sup>92</sup> UNHCHR, *op. cit.*, Guideline No. 6.

Special attention should be paid to trafficked children, i.e. persons below the age of 18, in that their best interests should be a paramount consideration in all policies and procedures involving them.

Finally, there is a group of trafficked persons who have become victims of trafficking either in their own country or in another country whereas neither that country nor their home country is able or willing to offer protection.<sup>93</sup> For this group a solution should be found at the European level, e.g. by an agreement between the EU Member States to offer residence to a certain number of trafficked persons who are in need of immediate protection, whereas such protection can neither be offered by their home country nor by the country they were trafficked to.

## Recommendations

- The Council Directive on the residence permit issued to third country nationals victims of trafficking in human beings or to third country nationals who have been subjects of an action to facilitate illegal immigration and who cooperate with the competent authorities, should be adapted to include the following provisions:

### *Reflection period*

If there is the slightest indication to suspect that a person may be trafficked, a reflection period should be granted of no less than three months. Purpose should be to allow the trafficked person to (begin to) recover and to make an informed decision about her/his options, that is, whether to assist in criminal proceedings, to pursue legal proceedings for compensation, to enter a social assistance programme or to choose for immediate return home. Part of the reflection period should be the obligation to refer the trafficked person to support agencies, which can provide her/him with appropriate assistance. For the authorities the reflection period enables the identification of the trafficked person including determining whether or not the person indeed is a victim of trafficking. In dealing with the reflection period account should be taken of the fact that, for a number of reasons, severing ties with the criminal circuit often takes the form of a gradual process rather than an immediate decision. In the case of children, there should be the possibility of extending the reflection period.

### *Temporary residence permit*

Following the reflection period, a temporary residence permit should be granted to identified trafficked persons for a period of at least six months, with the possibility of renewal, on one (or more) of the following grounds:<sup>94</sup>

- the willingness of the trafficked person to press charges and act as a witness in

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<sup>93</sup> This could be either EU countries or third countries, e.g. Kosovo. International organisations could play a mediating role in this.

<sup>94</sup> These grounds should qualify for both the granting of the initial granting of a temporary residence permit and the renewal of such a permit.

- the criminal case;
- participation of the trafficked person in a social assistance programme aimed at her/his social inclusion either in the country of destination or the country of origin;
- the involvement of the trafficked person in a civil procedure to claim compensation for damages;
- social assistance programmes should be open to all trafficked persons, regardless on which of the above listed grounds a temporary residence permit is granted and should include access to the labour market, vocational training, education and other services aimed at enabling the trafficked person to regain control over her/his life and to build a sustainable future.

#### *Long term or permanent residence permit*

Following a temporary residence permit, trafficked persons should qualify for a long term or permanent residence permit on one (or more) of the following grounds:

- having successfully completed a social assistance programme and having found employment.<sup>95</sup> in this case, her/his temporary residence permit should be transformed into a work permit and thus be subjected to the regulations for migrant workers;
- humanitarian grounds:<sup>96</sup> criteria should include the risk of retaliation against the trafficked person or her/his family; the risk of prosecution in the country of origin for trafficking-related offences; the perspectives for social inclusion and an independent, sustainable and humane life in the country of origin (taking into account risks of stigmatisation and discrimination); the availability of adequate, confidential and non-stigmatising support services in the country of origin; and the presence of children. In addition, applications should be judged in the light of the principle of non-refoulement and of Art. 3 of the European Convention on Human Rights, which holds that no one should be subjected to inhuman or degrading treatment;
- asylum: trafficked persons should be entitled to seek and enjoy asylum in accordance with international refugee law.<sup>97</sup>

#### *Family members and children of the trafficked person*

- if there are substantial reasons to believe that family members of the trafficked person, including possible children, are at risk in the home country, such family members should be entitled to temporary or permanent residence on the same conditions as the trafficked person;
- if a trafficked person is granted a temporary or permanent residence permit, the trafficked person should be entitled to family reunification with her/his

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<sup>95</sup> Including establishment as a self-employment worker.

<sup>96</sup> UN Trafficking Protocol (TraffProt), Art. 7.2; UNHCHR, *op. cit.*, Principle 11, “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 or to the safety of their families”.

<sup>97</sup> UNHCHR, *op. cit.*, Guideline No. 1.6.

children under the age of 18, who should be granted a residence permit on the same conditions as the trafficked person.

- In order to ensure that trafficked persons are not sent back to a situation that endangers their life, health or personal freedom and/or would submit them to inhuman or degrading treatment, any decision to deport or return a trafficked person, including trafficked children, should be preceded by a risk assessment. NGOs and other service agencies that provide assistance to the trafficked person concerned should be actively included in this process.
- Trafficked children should always be granted a temporary residence permit, with all corresponding rights, in order to allow them adequate assistance. They should only be returned after a risk assessment is done and if the return is in the best interest of the child, safe and assisted. When they reach the age of majority, if no other kind of residence permit can be issued under the conditions laid down in national law (e.g. for employment or study reasons), full regard should be given to their vulnerable status and they should be allowed to remain in the host country for humanitarian reasons.
- In the case of unaccompanied children all steps necessary shall be taken to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of the child with her/his family where this is deemed to be in her/his best interest. In all cases the view of the child, in particular regarding decisions on her/his possible return to her/his family, should be given due weight in accordance with its age and maturity.<sup>98</sup>
- A solution should be found for the group of trafficked persons who have become victims of trafficking in their own or another country and who are in need of (immediate) protection whereas neither that country nor their own country is able or willing to offer such protection, e.g. by an agreement between the EU Member States to offer residence to a certain number of victims in these situations.

#### **5.4 Social assistance and the development of standards<sup>99</sup>**

Human trafficking is a multifaceted phenomenon that involves people with different personal, cultural, social and national backgrounds who have experienced several forms of deception and abuse during the various stages of the trafficking process. Acknowledging the individual characteristics and prospects of a trafficked person, through an individual needs assessment, must thus be the starting point of any support and assistance service to properly meet her/his specific needs.

Trafficked persons – both adults and children under the age of 18 – should be entitled to basic social assistance and protection regardless of their willingness or capacity to press

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<sup>98</sup> UNHCHR, *op. cit.*, Nos. 8.4; 8.6.

<sup>99</sup> For more information see Explanatory paper 11.

charges and/or give testimony against their traffickers. States should establish appropriate structures for providing basic social assistance and protection. This should include at the minimum safe and appropriate accommodation, health care (physical and psychological) on voluntary basis,<sup>100</sup> free legal assistance, education, and training and employment opportunities. All services must be provided on a voluntary and confidential basis, in a non discriminatory and non judgemental manner and in compliance with a number of basic principles derived from international human rights norms, in particular respect for the right to privacy, confidentiality, self-determination and freedom of movement. This includes among other things that trafficked person should never be locked up in “shelters” or detention centres, also not “for their own best will”. Furthermore, a human rights based and gender and cultural sensitive approach are *conditiones sine qua non* service providers must take into account in order to efficiently guarantee the protection and empowerment of trafficked persons.

NGOs, local authorities, intergovernmental organisations and international organisations are the main actors that may grant assistance and support to trafficked persons. The services provided must offer a real and viable opportunity for trafficked persons to escape trafficking, violence and exploitation. They should enable trafficked persons to fully acquire their self-reliance and to become regular migrants and fully-fledged citizens. This goal of full social and labour inclusion can be achieved through specific programmes that supply multiple specialised services managed by a multi-disciplinary team of trained professionals.

In order to ensure, on the one hand, the quality of the services provided and, on the other hand, the quality of the service providers, standards should be developed. Elements of such standards should be: gender sensitivity; cross-cultural sensitivity and appropriate working methods; non judgemental attitude; tailor-made services in order to address individual needs and potentials; a multidisciplinary approach; co-operation with other organisations, including the law enforcement and judicial authorities; regular training and supervision sessions; mechanism for monitoring and evaluation (*ex-ante*, *in itinere*, and *ex-post*) based on transparency and accountability to assess the performance of the activities, the work of the professionals, the efficacy of the strategies implemented and, most of all, the “client’s satisfaction”, that is the fulfilment of the needs of the person assisted.

## Recommendations

- Member States should establish appropriate structures for providing assistance and protection to trafficked persons. This should include at the minimum safe and appropriate accommodation, counselling, health care, free legal assistance, education, vocational and employment opportunities. All services must be provided on a voluntary and confidential basis, in a non-discriminatory and non-judgmental manner

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<sup>100</sup> This includes among other things no testing for Hiv or Aids without the permission of the person concerned.

and in compliance with a number of basic principles derived from international human rights norms, in particular the respect for privacy, confidentiality, self-determination and freedom of movement.

- Member States should recognise the importance of a variety of service providers working with trafficked persons, including the NGO sector, and should adequately support, cooperate with and timely and transparently fund them.
- Organisations providing services to trafficked persons should offer multidisciplinary assistance and tailored solutions to trafficked persons through professionals who are specifically trained, amongst others in cross-cultural and gender-sensitive working methods. Working with interpreters and cultural mediators is strongly recommended, as it is the promotion and the support of self-help organisations/groups.
- Service providers for trafficked persons should develop standards, based on clear and measurable indicators, to regularly monitor and assess the quality and the suitability of their services and their performance. The EU should support the development of such standards as well as transnational co-operation between service providers.
- Specialised services should be provided to trafficked children to meet their specific needs, including their linguistic and cultural needs, and protect their rights. This includes among others suitable housing preferably in a family environment (e.g. foster families or residential settings specific for children and with appropriate adult support); specialised psychosocial services, etc. Older children should not be treated as *de facto* adults and placed in reception centres without adult support. If a child is found trafficked, a legal guardian should be appointed – temporarily<sup>101</sup> or permanently, depending on the circumstances – at the earliest possible stage in order to act in the best interest of the child and follow her/him throughout the whole process of assistance and protection.

## **5.5 Witness protection and judicial treatment of trafficked persons<sup>102</sup>**

The EU Council has recognised the importance of the protection of victim’s rights in the Council Framework Decision of 15 March 2001 on the Standing of Victims in Criminal Proceedings. This decision states that:

- the provisions of the Framework Decision are “not confined to attending to the victim’s interests under criminal proceedings proper. They also cover certain measures to assist victims before or after criminal proceedings, which may mitigate the effect of the crime”;
- “the rules and practices as regards the standing and main rights of victims need to be approximated, with particular regard to the right to be treated with respect for their dignity, the right to provide and receive information, the right to understand and be

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<sup>101</sup> A legal guardian should be appointed at least temporarily until the parents are located and it is ensured that the child can safely be returned to them.

<sup>102</sup> For more information see Explanatory paper 12.

understood, the right to be protected at various stages of the procedure and the right to have allowance for the disadvantage of living in a different Member State from the one in which the crime was committed”.

Also the UN Convention on Transnational Organised Crime contains a number of provisions regarding protection of witnesses, which also apply to the Trafficking Protocol.

Trafficked persons, because of their particular situation and vulnerabilities are often less likely to be treated with respect and accorded the rights due to victims of crime, but are rather treated as criminals or illegal migrants. Particular attention needs to be given to the rights of trafficked persons as victims of crime.

Moreover, it needs to be ensured that trafficked persons are not detained, charged or prosecuted for violations of immigration law or for activities they are involved in as a direct consequence of their situation as trafficked persons, such as prostitution, the possession or use of fraudulent documents, etc.<sup>103</sup>

Given the specific characteristics of the crime of which they have become victim, it is important to distinguish between the protection of witnesses in general and the protection of victims giving testimony in trafficking cases. For the latter group additional measures will be needed, particularly in the light of protection against potential retaliation or intimidation before, during or after criminal proceedings.

### *Underlying principles*

The following are the underlying principles as regards witness protection and judicial treatment of trafficked persons:

- trafficked persons should be treated as victims of crime, with accompanying rights;
- trafficked person should not be criminalized, re victimized or re traumatised as a result of contact with law enforcement and judicial authorities, or of activities committed as a direct consequence of their being trafficked;
- the safety of the trafficked person, and their family<sup>104</sup> is paramount;
- provisions for protection of trafficked persons as victims in criminal proceedings, or as witnesses of crime, should be broadly defined to include all trafficked persons, regardless of their degree of co-operation with police or judicial authorities, or the extent of their involvement in criminal proceedings.

### *Children*

The above principles apply to all trafficked persons, including children (i.e. persons below the age of 18). In addition, legal proceedings should be specifically adapted to meet the

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<sup>103</sup> UNHCHR, *op. cit.*, Guideline No. 2.5.

<sup>104</sup> Family should include those who the trafficked person has a close relationship with, for example partners, that may not include members of their immediate family.

needs and interests of trafficked children and to avoid re-traumatisation, whereby the best interests of the child should be a primary consideration. Child-friendly procedures should be provided especially with regard to the length and scope of questioning, exposure to the suspected trafficker, etc.<sup>105</sup> Children should be questioned by specially trained officers in accordance to their age and stage of development at an appropriate time, in a safe and child-friendly setting and in the presence of a parent or a legal guardian to protect their interests. The guardian should have the right to refuse to have the child give testimony if it is against the child's best interest.

## Recommendations

- It should be ensured that the Framework Decision on the standing of victims in criminal proceedings is fully applicable to victims of trafficking, independent of their legal status in the Member State concerned.<sup>106</sup>
- The European Commission should take the initiative for the development of a legally binding EU instrument covering the standing of trafficked persons in criminal proceedings, building on the Framework Decision on the standing of victims in criminal proceedings. Such a framework should include a broad definition to cover all trafficked persons, including children, as victims of crime, regardless of the degree of their participation in criminal proceedings, and include trafficked persons before, during and after criminal proceedings are taking place.
- Within such an instrument guidelines should be developed with respect to the following aspects:

*The right to respect:* This requires treating the trafficked person as a victim of crime and holder of rights, rather than a criminal, illegal migrant, prostitute or morally dubious person. Respect for trafficked persons should inform and guide all interventions.

*The right to information and advice:* This should include immediate access to support organisations and access to translation and free legal advice. Clear, accurate information needs to be given on options available to trafficked persons, including co-operation with police, and the consequences of these options, including victim and witness assistance and protection schemes. Full information should be given at all stages, with access to advice, and time to consider the information and options. Children should be informed in a manner that is understandable to them.

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<sup>105</sup> See e.g. the UNICEF Guidelines, which cover among others access to justice, protection of the child as a victim and potential witness, etc. See also Council Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography which states that “children should be questioned according to their age and stage of development for the purpose of investigation and prosecution of offences falling under this Framework Decision”.

<sup>106</sup> Art. 7 of the Framework Decision on combating trafficking in human beings explicitly refers to some articles in the Framework Decision on the standing of victims in criminal proceedings.

*The right to privacy:* Trafficked persons have the right to privacy and respect for their private and family life.<sup>107</sup> Many trafficked persons will suffer stigma from their community or others if details of their trafficking experience are made public. In addition, sharing of personal information of trafficked persons can increase security risks to them and their families. States should ensure privacy is protected by measures, including ensuring that trafficked persons' names and court proceedings are not publicised by the media, and that there are provisions governing the collecting and sharing of information of trafficked persons details between agencies.

*The right to protection:* Under Articles 2 and 3 of the European Convention of Human Rights states have a positive obligation to protect individuals. Protection offered to trafficked persons should be on the basis of individual risk assessment and need. It should be offered in consultation with the trafficked person. Usually practical forms of protection are more effective, cheaper, and less intrusive for the trafficked person than full scale witness protection programmes. With regard to unaccompanied children, a legal guardian should be appointed to protect her/his interest and ensure adequate protection of the child.

*Interrogation and investigation:* Guidelines should be developed for non-confrontational, non-judgemental investigative techniques that respect the trafficked persons' rights and recognise their status as a victim. In the case of children, specific child friendly procedures need to be adopted.

*Court procedures:* Special procedures should be developed that protect trafficked persons' right to privacy, including provisions for giving testimony without confronting the defendant, for example by video, limitation to cross examination on sexual history, and restrictions on media reporting of personal details. These should include special procedures adapted to the needs and rights of trafficked children.

*The right to compensation:*<sup>108</sup> The right to compensation should be enforced in both criminal and civil proceedings, as well as any State compensation schemes, and should apply not only for the injuries suffered by the trafficked person as a victim of crime, but also for the loss of wages that would have been earned had the trafficked person been correctly paid for the forced labour she/he undertook. States should put in place provisions, such as access to legal aid, and seizure of criminal assets, that in practice enable trafficked persons to claim compensation.

## **Recommendations**

- Member States should take appropriate measures to ensure that trafficked persons, including children, are not detained, charged or prosecuted for violations of immigration law or for activities they are involved in as a direct consequence of their situation as trafficked persons.
- In line with Art. 23 of the Convention on Transnational Organized Crime

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<sup>107</sup> Article 8 of the European Convention of Human Rights.

<sup>108</sup> See for a more extensive treatment of the issue of compensation Chapter 6.5 and Explanatory paper 15.

(criminalization of the obstruction of justice) consideration should be given to establish as a criminal offence the intimidation of witnesses.

## **5.6 Return and long-term assistance<sup>109</sup>**

Trafficking does not end with the escape of the trafficked persons from the coercive situation or with their return to their home country. Apart from the risk of reprisals and/or of being prosecuted themselves for e.g. the use of false papers or prostitution, trafficked persons may face a number of other problems on their return. In particular when individuals have been trafficked for prostitution, they may risk stigmatisation and discrimination, as well as rejection by their families and social exclusion when their predicament gets known in their community.

All trafficked persons face the problem of finding viable means of existence, a problem that is aggravated if they have children or a family to take care of or when they or their families are still in debt to their traffickers. In addition, many trafficked persons do not dispose anymore of their identity papers, as these were confiscated by the traffickers, or have been travelling on false identity papers. This means that the majority of the trafficked persons who return to their home country find themselves back in even worse conditions than the ones they originally started from.

As a result, trafficked persons run a considerable risk to not only get re-victimised but also to get re-trafficked on return to their home country. There are numerous reports of trafficked persons who on their arrival were waited for by the criminal network only to be re-trafficked, either to the country they were originally trafficked to or to another country. Other trafficked persons end up being re-trafficked due to the lack of protection from intimidation from traffickers by the authorities in their home country, the lack of means to sustain themselves in their country, the impossibility to repay their debts or as a result of the stigmatisation and discrimination they face on return.

Authorities in the destination countries should therefore be aware that by deporting or returning trafficked persons to their home countries, in many cases they may send them straight back into the hands of the traffickers or again place them at risk.

Still a great number of victims want to return. Others are forced to return because they do not qualify for a temporary residence permit or because the temporary residence permit has expired and they do not qualify for a permanent residence status or asylum.

At the same time, many countries of origin have difficulties in providing victims of trafficking with appropriate support and assistance. Both in countries of destination and in countries of origin, as far as assistance programmes are available, they are mostly short-term and do not provide sustainable social and economic alternatives.

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<sup>109</sup> See for a more extensive description of the principles and elements of return procedures and long term assistance programmes Explanatory paper 13.

In order to prevent trafficked persons from being re-victimized and/or re-trafficked and to protect their safety it is essential to establish risk assessment procedures and appropriate, preferably voluntary, return procedures and programmes, offering long term assistance – including education, vocational training, employment opportunities etc. – to enable trafficked persons to regain control over their lives and build a sustainable future.

In the case of trafficked children (i.e. persons under the age of 18), prior to her/his return, contact between the child and her/his family should be facilitated and a social assistance programme should be proposed to the child and the family. Trafficked children should never be forcibly returned to their country of origin if their family has not been traced, does not agree or is not able to provide the child immediate and long-term care; other suitable care-givers different from the family may be considered only if the child agrees.

Return and long-term assistance programmes should start in the country to which the person was trafficked<sup>110</sup> and continue after the return of the trafficked person to her/his home country. Throughout the process of return and reintegration the trafficked person should be properly accompanied and their well-being should be effectively monitored.

As stated in the Brussels Declaration, the range of assistance measures should be made available to trafficked persons irrespective of whether they are being returned to their home country or are provided with a long term residency status in the country of destination.<sup>111</sup> In addition, they should be accessible independent of the trafficked person's capacity and willingness to cooperate as a witness. In order to develop such long-term assistance programmes, networking and co-operation should be intensified between NGOs, IOs, IGOs and other involved agencies in countries of origin, transit and destination.

The importance of developing appropriate return procedures and long term support programmes is recognized in a variety of international documents, among which the Brussels Declaration, the Hague Ministerial Declaration on EU Guidelines for anti-trafficking measures (26 April 1997), the OSCE Ministerial Council Decision No. 1 (28 November 2000), the OSCE Action Plan (24 July 2003), the Council of Europe Recommendation No. 11, the UNHCHR Principles and Guidelines on Human Rights and Human Trafficking (2002) and the UN Trafficking Protocol.

## **Recommendations**

- Member States should establish appropriate return procedures with due regard to the privacy, safety, dignity and health of the trafficked person, in close partnership with NGOs and IOs. These procedures should be laid down in Protocols for the return of trafficked persons and should apply to all involved agencies. Such protocols/procedures should at least address the following issues: the prompt return of

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<sup>110</sup> See Chapter 5.4.

<sup>111</sup> BD, pt. 15. See also Chapter 5.3.

the person on her/his wish; information to the trafficked person on the applicable procedures and the available assistance in her/his home country to enable an informed decision; risk assessments regarding the safety of the trafficked person during and after return; confidentiality of any information relating to the person being trafficked; guarantees that no reference to the status of the person as being trafficked is made in any document related to her/his return (such as stamps in passports); the arrangement of proper identity documents; arrangement for basic necessities during travel.

- Member States should in co-operation with countries of origin and in close partnership with local NGOs develop voluntary and safe return programmes in countries of origin to ensure that trafficked persons who return to their home country have access to long term assistance and support in order to secure their safety and well-being, to enable them to find viable means of existence, to prevent re-victimization and reduce the risk of re-trafficking. NGOs providing these services should be adequately financed and co-operation between NGOs and other civil society organisations in countries of origin, transit and destination should be encouraged and facilitated.<sup>112</sup>
- The development of long-term assistance programmes should make an integral part of development co-operation policies.<sup>113</sup>
- Return and long term assistance programmes should aim at the empowerment of the trafficked person,<sup>114</sup> defined as the process through which an individual can develop her/his ability to stand independently, make her/his own decisions and show control over her/his life. They should rest on the following principles: voluntariness; protection of privacy and safety;<sup>115</sup> protection of the confidentiality of the relation between the service provider and the trafficked person; non-stigmatisation; freedom of movement of the trafficked person;<sup>116</sup> the treatment of trafficked persons in a respectful, non judgmental and non moralizing or patronizing way; the needs, views and concerns of the trafficked person should be at the centre. Elements of such programmes should be an individual needs and risk assessment; regularization of the documentation status of the person concerned; appropriate housing; health care; psychological assistance; legal aid; assistance in finding viable means of existence; and support of self-organisation.
- In the case of children, special policies and programmes should be developed to ensure that they will be provided with appropriate physical, psychological, legal and educational assistance, housing and health care.<sup>117</sup> Children should only be returned after a risk assessment is done and if the return is in the best interest of the child, safe and assisted.

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<sup>112</sup> BD, pt. 15; UNHCHR, *op. cit.*, Guidelines Nos. 11 and 12.

<sup>113</sup> The Hague Declaration, III, 3.4.

<sup>114</sup> BD, pt. 15.

<sup>115</sup> The Hague Declaration, III, 3.4.

<sup>116</sup> UNHCHR, *op. cit.*, Guideline No. 1.5.

<sup>117</sup> UNHCHR, *op. cit.*, Guideline No. 8.7; UN TrafProt Art. 6.4.

## Chapter 6

### Law enforcement strategies

#### 6.1 Introduction

An integrated approach to trafficking in human beings comprises effective prosecution aiming at adequate punishment of the perpetrators. It necessarily includes deterrent criminal law provisions, appropriate proceedings as well as instruments depriving the offence of any economic advantage in order to confirm the determination to defend the values that are enshrined in fundamental constitutional and legal traditions in Europe. These traditions include the clear belief of human rights as recognised in national constitutions of all EU Member States, in the Charter of Fundamental Rights of the European Union, in the European Convention on the Human Rights and in international human rights instruments. These rights constitute – together with rules on the system of government – the very basis of all Member States of the European Union. Inviolable human dignity and the integrity of the person<sup>118</sup> are at the centre of these rights. Where these values are threatened criminal law instruments and law enforcement authorities are needed to defend the ethical basis of our societies.

Article 5(3) of the Charter of Fundamental Rights of the European Union addresses trafficking in human beings in its first chapter and lays down that trafficking in human beings is prohibited. This means that the Charter, certainly reflecting the common position of EU Member States on fundamental rights, considers trafficking in human beings as an attack on human dignity.

At the same time individual damages and suffering, the undermining of core ethical values supporting a modern democratic society, the serious consequences for public health (Hiv/Aids) and last not least huge economic profits for the perpetrators constitute a situation that makes a major internal security concern of trafficking in human beings. Although the underlying assumptions of figures at world level are often unclear and these figures should be considered carefully, estimations at the national level seem to confirm the general trend. For example, the estimated illegal profits in 2002 in Germany only amounted to almost 8,5 million EUR.<sup>119</sup> This amount has been estimated on the basis of only 24% of the registered human trafficking investigations in that state.

Both the need to defend the respect of human dignity, which is at the centre of human rights and constitutes the very basis of our society, and the necessity of repulsing serious attacks on internal security force law enforcement agencies to consider the fight against trafficking in human beings as a primary concern. The protection of the human rights of

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<sup>118</sup> Articles 1 and 3 of the Charter of Fundamental Rights of the European Union.

<sup>119</sup> BKA, *Lagebild Menschenhandel*, 2002 (<http://www.bka.de/lageberichte/mh/2002/mh2002.pdf>).

trafficked persons on the one hand and law enforcement investigations in trafficking cases on the other hand must be understood as complementing one another and not as contradictory strategies. The crucial role of law enforcement investigations in trafficking cases for maintaining the respect of human dignity in a secure society must be taken into account for the preparation, adoption, implementation and evaluation of counter-trafficking legislation relating to law enforcement activities, for the allocation of personal and financial resource to the competent authorities as well as for the preparation and implementation of specific operations.

## 6.2 State of the art: The Tampere II process

As referred to above,<sup>120</sup> a number of legislative acts have been adopted over the last years at EU level in order to strengthen the penal framework combating trafficking in human beings and to improve the standing of victims in criminal proceedings. Currently, this legislation is being evaluated<sup>121</sup> or will now be subjected to an evaluation procedure.<sup>122</sup>

Police and judicial co-operation within the European Union have since the entry into force of the Amsterdam Treaty in May 1999 undergone significant progress through the development of a legislative framework and co-operation structures, e.g. Europol.

The main challenge ahead is to make this legislative framework and these structures fully operational. The focus therefore should be put on implementation and on concrete operative measures rather than the development of new initiatives with a major impact on national legislation and national structures. This approach also includes work on supporting measures and policies such as crime statistics, vulnerability studies of specific sectors, crime proofing and research. Indeed, the current policy context will provide prospects for the strengthening and further enhancement of police and judicial co-operation generally speaking.

As regards policy development and future orientations for legislative programmes and operative measures, the Experts Group would in particular point to the process of elaborating new guidelines for the heads of state and government, Tampere II. The current process is intended to provide an end-result at the European Council on 4-5 November 2004, but the process can, in many ways, be said to have begun already in the spring 2003. In November 2003, the conference on tackling organised crime in partnership took place in Dublin.<sup>123</sup> The outcome of the conference, the Dublin Declaration is very future orientated and addresses several crucial issues for strengthening the fight against organised crime. Besides private-public partnerships, the Declaration provides positive recommendations in several fields. This includes issues concerning the synchronisation of

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<sup>120</sup> See Chapter 2.2.

<sup>121</sup> Framework Decision on the standing of victims in criminal proceedings, deadline for implementation: 22 March 2002, except for Artt. 5 and 6 (March 2004) and Art. 10 (22 March 2006).

<sup>122</sup> Framework Decision on combating trafficking in human beings; deadline for implementation: 1 August 2004.

<sup>123</sup> <http://www.tocpartnership.org/orgcrime2003/website.asp?page=dublin>

criminal intelligence systems and the collection, storage, analysis and exchange of information. The Declaration also provides recommendations on supporting measures such as crime statistics, crime and product proofing etc. On 29 April 2004, the Council agreed on a Resolution on a model protocol for the establishment in Member States of partnerships between the public and private sectors to reduce the harm from organised crime.<sup>124</sup> Furthermore, the Commission has since the spring 2003 been active in developing future oriented policies through various communications that will, *inter alia*, contribute to the development of state-of-the-art high-tech solutions to support law enforcement and criminal justice responses to the threats from organised crime and terrorism.<sup>125</sup> At the same time Member States have also been active to further strengthen and develop police and judicial co-operation.

The potential that lies in a development of the Union's external relations must be taken note of. The enlargement took place and the logic of organised crime and terrorism see no obstacles in the fact that we have national borders and jurisdictions. In particular relations with the neighbouring countries eastbound and southbound should be at the forefront of enhanced co-operation, i.e. countries of origin and transit.

The enlargement of the EU and greater co-operation, however, also brings considerable challenges, particularly in relation to countering corruption and sharing data – and above all ensuring that such data sharing is safe –, developing effective working methods and training. Especially the area of data sharing is extremely sensitive in the context of trafficking and calls for caution in light of the harm that misuse of data or the failure to adequately protect data can cause to the life, safety and welfare of trafficked persons. In the same way it needs to be recognised that greater collection, distribution and synchronisation of material in the framework of the Dublin Declaration leads to greater risks of misuse. These risks require a critical attitude towards the ability of the actors involved to meet these challenges and should be reason to ensure that any increased co-operation and data sharing is accompanied by strict data protection measures and regimes, including an assessment of the actual and practical capacity for the observance of such regimes.<sup>126</sup>

Finally, despite the potential positive effects of increased attention for trafficking as a form of (transnational) organised crime, it should not be forgotten that trafficking also occurs outside the context of organised crime and within national borders.

In conclusion, the Experts Group welcomes the potential that is currently present for

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<sup>124</sup> Council Documents 8502/04 CRIMORG 31, 6627/3/04 REV 3 CRIMORG 10.

<sup>125</sup> Communication of 29 March 2004 on measures to be taken to combat terrorism and other forms of serious crime, in particular to improve exchanges of information (COM (2004) 221 final); Communication of 16 April 2004 on the prevention and fight against organised crime in the financial sector (COM (2004) 262 final); Communication of 2 June 2004 on Enhancing police and customs co-operation in the European Union (COM (2004) 376 final); Communication of 16 June 2004 “Towards enhancing access to information by law enforcement agencies” (COM (2004) 429 final); Communication on the implementation of the Preparatory Action on the enhancement of the European industrial potential in the field of Security research (COM (2004) 72 final).

<sup>126</sup> See also Chapter 3.8.3.

addressing generally the phenomena of serious, especially organised crime (that is also present in the context of trafficking in human beings). However, there is an obvious need, besides the clear requirement to go from lip service to action, to address some more specific issues on trafficking in human beings in the field of law enforcement and judicial co-operation. Areas that should be reviewed and further developed concern – apart from the issue of data protection – the scope and the implementation of the Framework Decisions on combating trafficking in human beings and on the standing of victims in criminal proceedings, adequate procedures tackling money laundering in the context of trafficking cases, the compensation of victims, the role of corruption, the specific needs of children and finally specialisation, prioritisation, coordination and co-operation at EU and at national level with regard to law enforcement activities.

Witness protection and the judicial treatment of trafficked persons, including the need for a legally binding instrument covering the standing of trafficked persons in criminal proceedings, are discussed in Chapter 5.5, which covers the whole area of protection and assistance of trafficked persons, including the specific rights and needs of children. The other issues mentioned are discussed in this Chapter.

### **6.3 Prioritisation, specialisation, co-ordination and co-operation**

The Brussels Declaration, as many other documents on the subject, highlights the need of prioritisation, specialisation, coordination and co-operation in order to ensure efficient and successful law enforcement.<sup>127</sup>

#### *Specialisation and prioritisation*

Governments should ensure that law enforcement agencies are structured in a way that enables them to efficiently target trafficking in human beings as a serious form of crime. Reference could be made to the Italian *Direzione Investigativa Antimafia*, which concentrates on investigations in the area of organised crime, including trafficking in human beings or to the French OCRTEH.<sup>128</sup>

Appropriate education and training of competent personnel at different levels are required, taking into account the concrete task assigned to police officers, labour inspectors, prosecutors, judges or ministerial staff. Although the focus of specialised training may differ depending on somebody's specific role in the law enforcement sector, the various push and pull factors facilitating human trafficking (root causes, demand, and migration context) as well as the huge personal, social and economic impact and damages should always play a central role in relevant courses. Given the fact that many victims are not nationals of the country where they are found by law enforcement personnel, some kind of "inter-cultural competence" should also be an integral part of education, formation and training. Furthermore, the relation between trafficking in human beings and smuggling of

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<sup>127</sup> BD, pt. 17.

<sup>128</sup> *Office central pour la répression de la traite des êtres humains.*

migrants has to be taken into account. From a legal point of view both forms of crime have to be distinguished from each other. In practice, however, it seems to be difficult, at least at a rather early stage of investigations, to define a case as trafficking in human beings or smuggling of migrants. What appears to be a smuggling case at the beginning may become step by step or even abruptly an example of trafficking. This problem can at least partly be solved by retaining a focus on the aspect of forced labour exploitation rather than on the question whether a particular case in a particular stage of the investigation should be qualified as a case of trafficking or of smuggling. Finally, it has to be noticed that criminal infrastructures that are developed in the area of trafficking could also be used for migrant smuggling and vice versa (transportation, false documents, corrupting officials).

The European Police College (CEPOL) that already organises courses regarding trafficking in human beings should be involved in order to ensure the same high level of knowledge and information in all EU Member States and to promote a harmonised approach to trafficking in human beings.

Despite the long list of international and European declarations, resolutions, guidelines and action plans that should, at least politically, obligate State parties or EU Member States to intensify their law enforcement activities, it seems that adequate personal and financial resources are often lacking. Moreover, police officers who may be confronted with a wider range of crimes including trafficking in human beings as well as drug related offences are likely to concentrate their work on investigations that promise a relatively successful result in a relatively short time. It might be easier to prove that somebody possessed a certain quantity of cocaine or had no legal residence status than to find clear, reliable evidence proving that somebody acted as trafficker in human beings. Surprisingly, the number of investigations in one EU Member State decreased between 1995 and 1999. Despite a relative increase from 1999 to date the level is still lower than in the mid-nineties.<sup>129</sup> Currently, the reasons for that development are being analysed in a research project. It should be examined to what extent conclusions could be drawn not only in a specific national context but also for further steps at the European level.

Law enforcement activities have until now mostly concentrated on trafficking in the sex industry. The broadening of the definition of trafficking will require the development of new working methods and new types of specialisation to address forced labour exploitation in other sectors.

The Group reiterates the necessity of pro-active, intelligence led investigative techniques without reliance on the testimony of the victims. These techniques should be used to make the victim's role as a witness less burdensome and the criminal proceedings more effective and successful. The aim of such techniques should not be misinterpreted. Referring to such an approach as "victimless" may cause us to believe that the approach is rather aiming at a quick expulsion of the victim (that is not needed any more for the criminal proceedings) than to gather additional evidence in order to make adequate punishment of the offender more likely. "Victimless" approaches should never be used to legitimate a neglect of the

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<sup>129</sup> Bundeskriminalamt, *op. cit.*, p. 3.

necessity of protection and assistance of trafficked persons.

### *Coordination and co-operation*

The transnational character of trafficking in human beings is regularly underlined in documents at political and working level. Consequently, European institutions, especially Europol, have been equipped with specific competencies, specialised personnel and instruments in order to support EU Member States in their fight against human trafficking. Europol shall, *inter alia*, act to prevent and combat smuggling and trade in human beings.<sup>130</sup> It can provide access to intelligence databases and investigations from all EU Member States. It offers assistance for training, operational support in order to share information and evidence. At international level Interpol offers similar services.<sup>131</sup> At the same time the general competence of Eurojust covers trafficking in human beings.<sup>132</sup> The role of Europol is particularly important in this context as it shall not only facilitate the exchange of information but also provide operational analysis in support of Member States' operations and generate strategic reports and crime analysis on the basis of information and intelligence supplied by Member States, generated by Europol or gathered from other sources. However, it seems that the information flow from Member States to Europol is still under the possible level and that joint investigations are more based on spontaneous bi- or multilateral co-operation than in regular structures and mechanisms. A more regular involvement of Europol is desirable.

Co-operation at EU level also means that all institutions involved work on the basis of the same definition of trafficking in human beings. This requires that the competence of Europol for the trafficking in human beings would be brought in line with the broader definition of the FD on THB.<sup>133</sup>

While strengthening the role of Europol it should be taken into account that gathering information about and investigations in cases of trafficking in human beings for the purposes of labour exploitation might require a type of specialisation and knowledge that is different from the one necessary in the context of trafficking in human beings in the sex industry. Agencies responsible for the control of working conditions and financial investigations related to black labour are highly relevant in this regard. Consequently, they have to be made more sensible and to be mobilised for the fight against trafficking in human beings.

Although Member States should do so in their own as well as the EU interest, specific financial incentives could encourage the competent authorities to cooperate more closely

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<sup>130</sup> Art. 2(2) of the Europol Convention.

<sup>131</sup> <http://www.interpol.int/Public/THB/default.asp>

<sup>132</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against serious crime, Article 4(1); OJ L 63, 6.3.2002, p. 1.

<sup>133</sup> See Annex referred to in Article 2 of the Europol Convention: 'traffic in human beings' means subjection of a person to the real and illegal sway of other persons by using violence or menaces or by abuse of authority or intrigue with a view to the exploitation of prostitution, forms of sexual exploitation and assault of minors or trade in abandoned children. (<http://www.europol.eu.int/index.asp?page=legalconv#ANNEX>).

with Europol. The Group supports the general idea of a European budget line that could overcome some of the obstacles in operational law enforcement and judicial co-operation. The discussion concerning the financial perspectives might be an option to examine the idea of such a budget line in more detail.

## **Recommendations**

- Specialisation of law enforcement must be ensured through necessary organisational structures and adequate education and training of competent personnel. CEPOL should play a central role in this context. New types of specialisation, working methods and co-operation partners – such as agencies responsible for the control of working conditions and financial investigations related to irregular labour – need to be established in order to address forced labour exploitation in other sectors than the sex industry.
- The fight against trafficking in human beings must be clearly defined as a law enforcement priority. Adequate personal and financial resources must be allocated. A certain percentage of these resources should continuously be devoted to the fight of trafficking in human beings. At the lower level police officers should be encouraged and motivated to investigate in human trafficking cases.
- Pro-active, intelligence led investigative techniques without reliance on the testimony of the victims should be further developed. “Victimless” approaches, however, should never be used to legitimate a neglect of the necessity for protection and assistance of trafficked persons.
- At present Europol is not effectively used. This signifies a deficit in the area of exchange of information, the formation and functioning of joint investigative teams and the possibility for law enforcement agencies throughout the EU of benefiting from the information gathered in other Member States, which needs to be addressed.
- Financial incentives, for example through a European budget line, should be used to encourage Member States to regularly cooperate at EU level by involving European institutions such as Europol or Eurojust.

## **6.4 Money laundering, seizure of assets, financial investigations<sup>134</sup>**

Trafficking in human beings is noted as a growing source of illegal income, especially in relation to cash transactions and money laundering efforts.

EU legislation has been put place with regard to trafficking in human beings as well as in order to combat money laundering. In principle, Member States agreed to make serious

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<sup>134</sup> See also Explanatory paper 14.

offences predicate offences for the purpose of the criminalization of money laundering. Furthermore, there has been a trend towards a wider definition of money laundering based on a broader range of predicate or underlying offences in order to facilitate the international co-operation in prosecuting organised criminal activities and confiscating the proceeds of crimes.

An interpretative analysis of the relevant EU legislation shows that trafficking in human beings can be considered as a predicate offence of money laundering. However, the relevant instruments do not provide a homogenous list of crimes to be considered as predicate offences of money laundering. A *clear* reference to human trafficking is needed in this context and attention has to be drawn to the possibility of using the established prevention system for money laundering in order to combat human trafficking.

Finally, some national laws have introduced confiscation provisions requiring a less challenging evidentiary basis with regard to certain serious crimes. Persons convicted of such crimes should have confiscated property or pecuniary resources that are disproportionate to their present or past known income unless they are able to give a satisfactory explanation in that regard. Such a way may be considered as well with regard to trafficking in human beings.

Confiscated assets should be used to the benefit of victims of trafficking, e.g. in payment of court orders for compensation, restitution and recovery due to trafficked persons. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such fund that could be part of a more general compensation system for crime victims.<sup>135</sup>

## Recommendations

- It needs to be clearly established in EU legislation that trafficking in human beings is a predicate offence of money laundering and that its proceeds are subjected to money laundering instruments.
- Member States should be clearly obligated to take the appropriate measures to identify and trace proceeds of trafficking in human beings; these proceeds have to be subjected to confiscation and other measures such as freezing and seizing.
- Convicted traffickers should have confiscated such property or pecuniary resources that are disproportionate to their present or past known legal income, unless they are able to give a satisfactory explanation in that regard.
- Confiscated proceeds of trafficking should be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such fund that

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<sup>135</sup> UNHCHR, *op. cit.*, Guideline No. 4.4. See also Chapter 6.5.

could be part of a more general compensation system for crime victims.

## **6.5 Restitution and compensation of victims<sup>136</sup>**

Trafficked persons are victims of serious crimes. Many of them have been seriously violated and suffered physical harm and/or economic damages or loss. Compensation for the harm, damage and/or loss they have suffered is an important element of restitution and recovery. Compensation and restitution are not only an essential aspect from the perspective of the victims to have justice done, but are also an essential step for the social reintegration of the victims.

Significant financial sums are made from the forced labour exacted from trafficked persons. Through rigorous seizure of assets and similar provisions these proceeds should be recovered from the criminals involved. However, retention of these assets by the state can be morally problematic, as it can be perceived that the state is benefiting from the forced labour exacted from trafficked persons. It is therefore the more important that seized assets and proceeds of crime are applied to the restitution and compensation of the victims.

Nevertheless, the possibility for trafficked persons of getting adequate compensation is not well developed at European level. A joint European effort could express particular solidarity with trafficked persons without prejudice to existing national systems on compensation to victims of crime.

The right to compensation should be enforced in both criminal and civil proceedings, as well as any State compensation schemes and should apply not only for the injuries suffered but also economic loss.

### **Recommendations**

- The Framework Decision on the standing of victims in criminal proceedings should be evaluated<sup>137</sup> and, where necessary, revised with particular attention to the compensation of trafficked persons.
- Provisions to enable trafficked persons to get compensation, in both civil and criminal proceedings, as well as through state compensation schemes, should include the right to free legal advice and assistance, and a stay of deportation while such proceedings are in progress.
- Trafficked persons have to be considered “victims of a serious crime against the

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<sup>136</sup> See for a description of the current European situation regarding compensation Explanatory paper 15. See also Chapter 5.5.

<sup>137</sup> The evaluation procedure already started. Nevertheless, it should still be possible to pay specific attention to trafficked person in the ongoing debate.

person”<sup>138</sup> and “qualified victims of crime” and should have access to compensation schemes for victims of violent intentional crime in general.

- The compensation concept should include the prompt use of all European instruments to detect, freeze, seizure and confiscate the proceeds of the trafficking or the values in which they have been transformed or converted. Such proceeds should be used firstly for the purpose of compensation to trafficked persons.
- Adequate compensation instruments and procedures, for example national funds or a European Fund for the compensation of trafficked persons (EU citizens, residents in EU Member States and third country nationals), should be established in order to ensure equal and effective compensation to trafficked persons. A funding mechanism for a possible European fund could be based on the contributions of Member States (for instance, a percentage of the proceeds of trafficking confiscated in the criminal proceeding).
- The discussion on this matter should be opened at the highest political level – including a dialogue with relevant third countries – in order to identify needs and priorities and to encourage the elaboration of a European instrument and the progressive convergence and consistency of national legislation.

## 6.6 Anti-corruption strategies<sup>139</sup>

The international trafficking in human beings is highly controlled by criminal organisations that meet the criteria of organised crime. It is an illegal trade that can be characterised as “low risk and high profits”. The *modi operandi* reoccurring in all definitions of organised crime are influencing by means of intimidation and/or corruption. Research also shows corruption as one of the recurring and structural elements of trafficking.<sup>140</sup>

Next to the *modi operandi* of the criminal organisations controlling the trafficking in human beings powerful push and pull factors characterize the phenomenon of human trafficking as well.

All of this results in law enforcement, customs, social and labour inspection services, but also NGOs that care about the relief of trafficking persons, being put under pressure to turn a blind eye to human trafficking or to situations of exploitation of trafficked persons in the sex industry or to other illicit forms of employment.

One can not be blind to the fact as well that, in a lot of countries, great pressure is put on

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<sup>138</sup> BD, pt. 13, sixth bullet point.

<sup>139</sup> See for more information Explanatory paper 16.

<sup>140</sup> See e.g. Wijers, M. and L. Lap Chew, *Trafficking in Women, Forced Labour and Slavery-like Practices in Marriage, Domestic Labour and Prostitution*, STV/Global Alliance Against Trafficking in Women, Utrecht/Bangkok, 1999 (rev. ed.).

civil servants that are scantily paid for their job and are confronted with the enormous financial means the human traffickers have the disposal of.

Efficient anti corruption strategies require simultaneous activity at micro, meso and macro level, a multi disciplinary approach and preventive as well as repressive measures. Elements include *inter alia* a general policy that clearly determines its policy objectives, the correct functioning and transparency of the administration, coherence and transparency of laws and regulations, selection and training of personnel, the optimisation of organisational structures, the elaboration of lines of conduct, criminal law enforcement and the establishment of internal and external control.

Finally, the promotion of a vibrant civil society to enable accountability and scrutiny of public policy and officials is important in any anti corruption strategy.

### **Recommendation**

- Anti-corruption strategies (as described in more detail in Explanatory paper 15) should make an integral part of any policy to prevent and combat trafficking.

## Chapter 7

### Summary of recommendations

#### Chapter 2 – Definition and current context

##### Definition

- Though trafficking often occurs across borders and with the involvement of organised crime networks, trafficking also takes place within borders and without the involvement of organised crime. States should ensure that all forms of trafficking, regardless of the crossing of borders and/or the involvement of organised crime, are adequately criminalized.
- Although – as far as presently known – the majority of trafficking affects women and children, and most attention has been placed on trafficking into sexual exploitation, women, men and children are trafficked for numerous other forced labour purposes. States should ensure that counter trafficking legislation and policies cover all forms of trafficking of women, men and children.
- For the overall purpose of this report – further development of a comprehensive and coherent EU counter-trafficking policy – the definition has to take into account all relevant aspects, especially the impact on human rights. In this context, trafficking in human beings has to be defined as a complex phenomenon violating the trafficked person’s will and right of self-determination and affecting her or his human dignity.
- From a human rights perspective, the primary concern is to combat the use of forced labour or services, slavery, slavery like practices, servitude and the like. It is therefore recommended that States adequately criminalize any exploitation of human beings under forced and/or slavery-like conditions, independent of whether such exploitation concerns a trafficked person, a smuggled person, an illegal migrant or a lawful resident.
- In applying the Trafficking Protocol States should focus on the outcomes of forced labour or services, slavery or slavery like practices – which are inherently coercive – rather than the movement or coercion elements, which should be seen as preparatory to these outcomes, as opposed to the acts that require criminal sanctions and interventions as human rights violations.

## **Current context**

- The EU-context in 2004 provides opportunities for politically and financially strengthening the prevention and combat of trafficking in human beings. In view of the financial perspectives 2007-2013, the Experts Group in particular calls on the Council of the EU and the European Commission – as well as Member States at the national level – to allocate adequate resources to the prevention and repression of trafficking in human beings as well as to the provision of adequate remedies to trafficked persons. Notwithstanding the relevance of the new EU Member States, attention should also be paid to overseas countries of origin.
- Rather than merely project-based funding, future financial support should also be geared to long term, sustainable support of organisations, structures and mechanisms that successfully have been developed over the last years and that have proven their usefulness, but that are not able to survive without further financial EU input. Consequently, a balance needs to be found between long term, structural financing and project-based funding to give room to new and innovative initiatives.
- Political papers such as European Council Conclusions or Commission Communications should more clearly stress that trafficking in human beings is not primarily an issue of illegal immigration but that it has to be addressed as a serious crime and human rights violation, underlining the EU commitment to a holistic and integrated, human rights based approach focusing on combating the exploitation of human being under forced labour or slavery like conditions.

## **Chapter 3 – Guiding principles and cross-cutting themes**

### **Human rights at the centre**

- A human rights approach should be integrated as a normative framework in the further development of policies and measures against the trafficking in human beings, both at national and European level. The Principles and Guidelines on Human Rights and Human Trafficking as elaborated by the UN High Commissioner for Human Rights can serve as an important instrument to do so.
- The European Commission and the Member States should consider the human rights impact when preparing and adopting anti-trafficking measures and establish mechanisms to monitor the human rights impact during the implementation of such measures. To this aim, a “Human Rights Impact Assessment-model” should be developed in close co-operation with NGOs working with trafficked persons and human rights institutions, as an instrument to monitor and evaluate the human rights effects of anti-trafficking laws, policies and practices. Such an instrument should play an important role in ensuring that anti-trafficking measures comply with respect for and protection of human rights. In addition it should ensure that anti trafficking measures do not create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and

practices that further undermine or adversely affect the human rights of individuals, such as the right to privacy, the right to freedom of movement, the right to leave one's country, to migrate legally and to earn an income.

- The Commission should take the initiative for the adoption of a legally binding EU instrument covering the standing of trafficked persons in order to protect the human rights of trafficked persons, which clearly goes beyond current Member State commitments.<sup>141</sup> Such an instrument should lay down minimum standards of treatment to which all trafficked persons are entitled and ensure that trafficked persons are provided with access to adequate and appropriate remedies, independent of their capacity or willingness to cooperate in criminal proceedings or to give evidence. Within such an instrument special attention should be given to the position, rights and needs of children, according to the principles and provisions expressed in the relevant conventions.
- Member States should give priority to the development of counter-trafficking strategies, which aim at strengthening the position of the groups affected and/or at risk at their empowerment, participation and self-organisation.

#### **The need for a holistic and integrated approach**

- To effectively address trafficking in human beings a holistic and integrated approach is needed based on respect for and promotion of human rights. In order to realize such an approach multidisciplinary co-operation and coordination between all involved actors and stakeholders, including civil society and labour organisations, are crucial. The aim should be to develop an integrated policy covering the different fields and levels on which action is required. To this end governments should establish efficient coordination and co-operation structures at the political and operational level.
- The role of civil society actors, in particular independent NGOs, should be more extensively recognised, not only because of their role in providing assistance to trafficked person but also because of their critical role in maintaining and strengthening democratic processes and in monitoring and advocating implementation of human rights commitments by states.
- Clear policy choices should be made between the interests of immigration policies on the one hand and the detection and prosecution of traffickers and the preservation of possible witnesses on the other hand. The lack of such a choice hampers both an effective criminal approach and an adequate protection of trafficked persons.
- Empowering and repressive strategies are both needed and should complement each other. Special care, however, should be taken when employing repressive strategies as they can easily give rise to unintended and undesirable side effects. The consequences of repressive strategies should therefore be taken into account when they are prepared

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<sup>141</sup> See also Chapter 5.

and implemented. On the other hand, empowering strategies are not yet used to their full potential and should be researched further.

### **Trafficking in human beings, migration and informalisation of the workplace**

- EU Member States should maintain their commitments made at the Tampere European Council in 1999.<sup>142</sup>
- Member States should promote regular and managed migration based on demand and need, including the demand for unskilled labour, which is gender sensitive and implies the establishment of clear and comprehensive policies, laws and administrative arrangements to ensure that migration movements occur to the mutual benefit of migrants, society and governments.
- Member States should provide a standard based approach to trafficking and migration. Such an approach should include, at a minimum:
  - the protection of migrant's rights and international standards of protection for all migrants (both legal and illegal) as key to ensuring safe migration. States should ratify and implement the appropriate conventions, in particular the United Nations Convention on the Protection of the Rights of All Migrant Workers and their Families 1990;
  - ratification and application of the relevant ILO standards, in particular ILO Convention No. 29 on forced labour and ILO Convention No. 182 on the worst forms of child labour, but also ILO standards regarding non-discrimination, freedom of association, labour inspection, employment agencies, and others. Increasing informalisation has left workers vulnerable to labour abuses. Standards need to be applied in both formal and informal sectors;
  - the application of standards through a combination of education, self-regulation and enforcement;
  - awareness raising and training on labour standards and the connection with trafficking to those responsible for labour policies, including policy makers, employers, Unions and labour inspectors. Inclusion of these actors in counter trafficking initiatives should always be considered;
  - the enforcement of labour standards through labour inspections, and if necessary the use of administrative and criminal sanctions;
  - standards of freedom of association. States, employers, unions and others should pay particular attention to encouraging organisation of workers. Both formal organisation, through unionisation, and informal methods of organisation should be developed;
  - the enforcement of anti discrimination standards.

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<sup>142</sup> Presidency Conclusions, Tampere European Council 15 and 16 October 1999: specifically conclusions Nos. 3, 22, 23, 26 and 48 ([http://ue.eu.int/ueDocs/cms\\_Data/docs/pressData/en/ec/00200-r1.en9.htm](http://ue.eu.int/ueDocs/cms_Data/docs/pressData/en/ec/00200-r1.en9.htm)).

- The EU should continue to move towards implementing those parts of the Thessaloniki and Tampere agendas that aim at the promotion of regular and managed migration. Both the needs in countries that people wish to migrate from and the requirements in countries people wish to migrate to should be considered, enabling legal migration and integration of migrants and migrants' rights while addressing the root causes of migratory flows. The policy should to be open and accessible to all and include the following:
  - regulation of travel/employment/au pair agencies;
  - provisions criminalizing the retention or possession of passports, visa, work permits or other documents by persons other than the document holder;
  - work permits or visas not linked to a specific employer or type of employment;
  - education and promotion about safe migration possibilities and practices.
- Women are more vulnerable to trafficking as many of the sectors in which they traditionally are engaged – for example the sex sector<sup>143</sup> and domestic labour – are less likely to be regulated, and more likely to be infiltrated by traffickers. Additionally women are less likely to have information about migration opportunities, or have fewer established migration routes and networks. Gender sensitive migration policies need to reflect and address these inequalities. Consideration needs to be given to the extent that largely unrecognised informal sector work or services (such as sexual services, domestic work, au pair or similar arrangements) should be regulated within migration or employment policies.<sup>144</sup>

### **Trafficking in human beings as a security threat**

- Security policy should take into consideration both the protection of national borders and the protection of the individual. Accordingly, it can lead to the harmonization of a rights based approach and law enforcement approach in an overall anti-trafficking strategy.
- Member States should make human security an integral part of governmental security policies and should work on a system of responsibility and accountability to ensure human security.
- As a growing number of private enterprises are subcontracted by governments to rebuild social infrastructure in post armed conflict areas, including anti-trafficking measures, a system of accountability should be ensured for their staff.
- As organised crime and political extremism (terrorism) flourish in areas of low administrative and social infrastructure, all anti trafficking measures should be targeted

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<sup>143</sup> The term “sex sector” comes from Leam Lim, L. (ed.), *The sex sector, the economic bases of prostitution in Southeast Asia*, ILO, Geneva, 1998. Prostitution here is defined as “The provision of sexual services for reimbursement or material gain”.

<sup>144</sup> This is without prejudice to the different positions that may be taken on the legalisation of the sex industry.

on strengthening local and national capacities and democratic institution building. General measures to strengthen local and national capacities, democratic institution building and to enhance the rule of law are important preventive measures and should be part of any comprehensive response to counter trafficking.

### **Specific position, rights and needs of children**

- Consistent with the Convention on the Rights of the Child and the UN Trafficking Protocol:
  - the definition of “child” as any person below the age of 18 should be respected in EU and national legislation and its implementation;
  - “exploitation” in the UN Protocol should be defined in the light of the CRC and ILO Convention 182 on the worst forms of child labour and should include at a minimum all forms of sexual exploitation and sexual abuse, economic exploitation, the use of a child for illicit activities, any work that is likely to be hazardous or to interfere with the child’s education or that is likely to be harmful to the child’s health or physical, mental, spiritual, moral or social development, illegal adoption and removal of organs;
  - the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation should be defined as “trafficking in children” whether transnational or national, and whether or not involving organised criminal groups.
- A child rights approach shall be integrated as a normative framework in the further development of policies and measures against trafficking in human beings, both at European and national level.
- All actions undertaken in relation to trafficked children shall be based on the principles set out in the UN Convention on the Rights of the Child, in particular:
  - the “best interests” principle: the best interests of the child should be the primary consideration in all actions concerning children. All considerations related to immigration or crime control should be secondary. Child victims of trafficking should not be criminalized;
  - the right to participate: the views of children should be sought and taken into account, according with their age and maturity, in all matters affecting them;
  - the “non discrimination” principle: trafficked children should be treated as children first and foremost, considerations of their national or other status should be secondary.
- Policies and measures concerning trafficking in children, shall adopt a holistic and integrated approach, aimed at strengthening the effectiveness of specific mandates as well as at co-operation of the different agencies concerned. The different components of the problem as well as their inter-links should be taken into account, such as different kinds of exploitation, phases of the trafficking cycle, phases of intervention, etc.

- Specific attention, including re sourcing, should be paid by the EU to child trafficking outside Europe (for example child soldiers, child agricultural and domestic workers) in its development co-operation policy and programmes.
- The European Union should allocate resources to finance actions specifically addressed to combating child trafficking both in the EU external relations and within the EU.

### **Co-operation and co-ordination mechanisms**

- Member States should establish National Referral Mechanisms (NRMs) to ensure the proper identification and referral of trafficked persons, including trafficked children, and to ensure that they receive adequate assistance while protecting their human rights. A NRM should incorporate:
  - guidelines on the identification and treatment of trafficked persons, including specific guidelines and mechanisms for the treatment of children to ensure that they receive adequate assistance in accordance with their needs and rights;
  - a system to refer trafficked persons to specialised agencies offering protection and support;
  - the establishment of binding mechanisms to harmonize the assistance of trafficked persons with investigative and crime prosecution efforts.
- Coupled with a National Referral Mechanism, Member States should establish a governmental coordination structure consisting of a National Governmental Coordinator and a cross-sector and multidisciplinary Round Table to develop, coordinate, monitor and evaluate national action plans and policies. One of the tasks of the Round Table should be to develop a quick and “light weight” mechanism to address individual complaints with regard to the proper identification and assistance of trafficked persons.
- Member States should ensure sustainable funding of civil society actors.
- In order to facilitate co-operation, contacts and exchange of information as well as the development, monitoring and evaluation of anti-trafficking policies on the European level, a European Anti-Trafficking Network should be established. The Network should build on the national cooperative structures, in particular the NRMs, and consist of contacts points designated by each Member State as well as a contact point designated by the Commission. It should include both governmental and non-governmental agencies and cover the areas of prevention and victim assistance as well as law enforcement and police and judicial co-operation.

## **Data collection, information exchange and data protection**

- Member States should establish a central place where information from different sources and actors is systematically gathered and analysed. This could be a National Rapporteur or a comparable mechanism. Such a mechanism should meet the following requirements:
  - main task should be the collection of data on trafficking in the widest possible sense, including monitoring the effects of implementation of national action plans;
  - an independent status;
  - a clear mandate and adequate competences to have access to, and actively collect, data from all involved agencies, including law enforcement agencies, and to actively seek information from NGOs. The mandate to collect data must be clearly distinguished from executive, operational or policy-coordinating tasks, which should be fulfilled by other bodies;
  - the competence to directly report to the government and/or the Parliament and to make recommendations on the development of national policies and action plans, without itself being a policy-making agency.
- Once national data-collection mechanisms are established, the EU should establish a similar mechanism at the European level, the task of which is to bring together at a European level the information collected at national level, to identify gaps and bottlenecks at European level and to issue recommendations to the Commission and the Council of the EU to address those gaps and bottlenecks. Again, such a European mechanism should also be open to representations from NGOs.
- In order to make national data comparable common guidelines for the collection of data should be developed, both with regard to the type of data and to the methods used.
- In particular the exchange of personalised or operational sensitive information should be based upon previously concluded protocols that lay down the information flows between the different agencies in accordance with the legal requirements.
- In view of the enlargement of the EU and the envisaged greater collection, distribution and synchronisation of data in the framework of the Dublin Declaration, the increased risks of misuse of data and the potential harm this can cause to trafficked persons should be recognised. It should be ensured that any increased co-operation with regard to data sharing is accompanied by strict data protection measures and regimes, including an assessment of the actual and practical capacity for the observance of such regimes.
- In order to ensure adequate protection of data of trafficked persons it is recommended:
  - to take as a principle that data should only be taken, used and exchanged on a need basis with the presumption that they should not be unless need can be shown;
  - to adopt specific mandatory data protection protocols for trafficked persons, which apply to the use of data within the destination countries as well as in contacts with countries of origin;
  - previously to the exchange of personal data, to ensure that the country of origin

- concerned guarantees an appropriate level of data protection;
  - to ensure that people who have access to personal data in the course of their work are bound by a duty of confidentiality;
  - to make the unauthorised use of data, breach of confidentiality, etc., a criminal offence;
  - to make use of the practice of “restricted notes” to minimise the danger of the trafficked person’s data to get known;
  - to include in co-operation agreements between law enforcement authorities and counselling agencies/authorised NGOs provisions which guarantee that the identity and other personal data of the trafficked person will not be forwarded without the consent of the trafficked person or the proper authority to do so;
  - to adopt, where they not already exist, regulations that guarantee the confidentiality of the client – counsellor relation and that protect counsellors from any obligation to pass on information to third parties against the will and/or without the consent of the trafficked person.
- In constructing the new SIS II system and to accommodate the information flowing from acceding states, consideration should be given to the drafting of a provision, which would specifically exclude alleged and actual victims of trafficking from the SIS database. At the very least, the Schengen Convention should impose a specific obligation on Member States to notify a trafficked person on her/his request if her/his data are stored in the SIS, putting at least some of the control over the data back into the hands of the trafficked person.
  - In contacts with the media the following principles should be observed: data such as the name, personal history, photograph or any other details that allow the identity of the trafficked person to be deduced may not be published; any reporting should be avoided that endangers the trafficked person.

## **Chapter 4 – Prevention**

### **Root causes of trafficking**

- The EU and its Member States should review and modify policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effects, in particular on women, of repressive and/or discriminatory nationality, migration and labour migration laws. The exclusion from basic rights and protection of precisely those sectors in which predominantly women work constitutes a discriminatory practice.
- Member States should ratify and implement the UN Convention on the Rights of Migrant Workers and their families, in order to protect basic human rights of migrants, coupled with the implementation of gender sensitive national programmes based on these international standards.

- Member States should consider increasing the opportunities for legal, gainful and non-exploitative labour migration for workers with wide ranges of skills, along with strengthening regulatory and supervisory mechanisms to protect the rights of migrant workers.
- Prevention of trafficking as well as anti-trafficking law enforcement, prosecution and judiciary elements should be integrated in all relevant EU and Member States co-operation programmes with countries of origin and potential countries of origin. Priority goals should be to combat the root causes. Impact assessments should be a structural element of all programmes in order to avoid adverse effects.
- Since trafficking is often related to poverty and low levels of development in origin countries, the EU and Member States should not adopt punitive measures, such as reducing development aid, nor should conditionality clauses be included in co-operation agreements as these could result in harshening the root causes determining trafficking in human beings. Instead, a more positive approach should be taken of working with third countries to address root causes, to invest in capacity building and to raise awareness of safe migration.
- EU financial support for NGOs should be increased in order to ensure their long term and effective complementing of public policies in prevention of trafficking.
- Within existing programmes, such as Daphne and AGIS, funding should be allocated for research and pilot projects on the factors that influence the demand for the labour/services of trafficked persons, in particular in the area of domestic and sexual services and for the promotion and implementation of gender sensitive sexual education of children and youth in Member States.
- Member States should reduce vulnerability for trafficking by adopting measures to
  - ensure that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons;
  - combat violence and discrimination against women, e.g. by encouraging gender sensitisation and equal respectful relationships between the sexes;
  - ensure women equal access to and control over economic and financial resources, including the promotion of flexible financing and access to credit, including micro-credit with low interest for socially vulnerable women;
  - combat all forms of discrimination against minorities, including the development of programmes that offer livelihood options, basic education, literacy, and reduce barriers to entrepreneurship.
- Both countries of origin and countries of destination involved in trafficking in human beings, and particularly in child trafficking, shall ensure that specific consideration is given to the root causes that affect children, such as the lack of access to school, the abandonment of children by their families, their living conditions, etc.

## Research and evaluation<sup>145</sup>

- Research on trafficking should:
  - be designed in a non-static way in order to detect and study changes in the trends and patterns of trafficking.<sup>146</sup> Regular reviews and assessments of the trafficking situation and anti-trafficking responses should be an integral part of research programmes with a view to adapting anti-trafficking measures to the changed circumstances;
  - be oriented towards the production of practical recommendations to curb trafficking and to establish appropriate protection and assistance of trafficked persons;
  - respect the protection of confidential and personal data and information;
  - include elements related to intelligence (participation and activities of criminal groups), socio-economic profiles of perpetrators and victims and of their societies of origin; main causes for trafficking, and the consequences for the individuals involved as well as for the concerned countries;
  - collect data separately for women, men and children;
  - be based on the Palermo Protocol definition in order to facilitate a systematic measurement of the phenomenon and to be able to compare data.
- The EU and Member States should create the conditions, including appropriate structures, to carry out systematic annual assessments on patterns, trends and volume of trafficking in each country of concern, based on a clear and uniform methodology. Reports should be made public and serve as guidelines for EU assistance.<sup>147</sup>
- The EU should systematically monitor and evaluate policy measures and programmes at the EU, international and national levels to determine the envisaged and real impact of such policies and improve their effectiveness.<sup>148</sup> All counter-trafficking projects and programmes receiving EC funding should be subject to mandatory evaluations and these evaluations should be made available.
- A website should be established containing update overviews of research on trafficking in the countries of the EU in order to make results, developed tools, etc., accessible to different private and public users in organisations and institutions.
- More research should be conducted in the key source countries, in particular on the root causes of trafficking and the links between trafficking, poverty and exploitation.

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<sup>145</sup> For a detailed discussion on root causes of child trafficking, see Chapter 4.7.

<sup>146</sup> See IOM, *The Changing Patterns and Trends of Trafficking in Persons in the Balkan Region*, July 2004.

<sup>147</sup> See also Chapter 3.8.1.

<sup>148</sup> United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002, Guideline No. 3: “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 group to another group.”

These links should be articulated to encourage European development agencies to seriously address these issues. At the same time, EU countries, particularly those of destination of trafficked persons, should carry out research on the mechanisms of and incentives for trafficking in their own countries.

- More research should in particular been carried out in the following areas:
  - trafficking and forced labour in other sectors than the sex industry;
  - the impact of counter-trafficking policies in general and on the human rights of trafficked persons, (female) migrants and other groups that might be affected by counter trafficking measures in particular;
  - relations between the regulation of migration and the level of human trafficking, the demand market and its employers and clients, including their profiles, their awareness level and their participation in the market, as well as the role of labour standards, unions, and the impact of changes in the labour market. Research results, including concrete recommendations, should be disseminated among concerned governments with a view to using them in a practical way to reduce the market demand;
  - effective law enforcement strategies.
- Quantitative and qualitative research focused on children should be implemented, including the different factors influencing the risks for children and the different kinds of exploitation they suffer (i.e. sexual exploitation, labour exploitation, illegal adoption, removal of organs).
- The European University Institute as well as other educational institutions officially created or depending on the European Union, should initiate systematic teaching and research on trafficking issues in the European Union.

### **Awareness raising**

- The development of international networks including all relevant actors should be encouraged in order to disseminate information on trafficking, share best practices and design common strategies and partnerships.
- Awareness-raising campaigns should:
  - be tailor made and aimed at clearly identified target groups;
  - use a combination of different methods and activities so that they cover the entire trafficking chain from prevention, through victim identification, prosecution of traffickers, assistance and protection of trafficked persons, to return and reintegration of trafficked persons.
- Elements of awareness raising campaigns in countries of origin should include:
  - information on safe migration and existing possibilities for labour migration, including information on relevant laws and policies in countries of destination, the rights of migrants and possibilities to get help in case of problems. Such information should be available in the language of the countries concerned and be

- displayed in the consular and visa sections of the state diplomatic missions. Copies should be enclosed in any postal visa applications;
- specific activities to make children and young people aware of the risks of trafficking as an essential part of their education, coupled with an education that promotes equality between men and women, and that focuses on human rights, self-empowerment and dignity.
- Other measures should include:
    - the establishment of telephone hotlines in the countries of origin, transit and destination that can be used as an independent source of information, advice and guidance for potential migrants, as the first point of contact for trafficked persons and as a tool for anonymous reporting of cases of trafficking in human beings. Hotlines should include specialised personnel in child related matters;
    - specific activities aimed at media professionals to promote an adequate presentation of the issue, without reinforcing stereotypes and with respect for the privacy and safety of trafficked persons;
    - specific activities aimed at the relevant market actors, such as employers, clients, co-workers and unions, to reduce demand for labour/services of trafficked persons; to promote zero tolerance towards all forms of trafficking and related abuses; to inform them about possible actions they can undertake, including the appropriate referral of (possible) trafficked persons; and to promote the ability of trafficked persons to organise to claim rights;
    - the inclusion of awareness raising components in all anti-trafficking training aimed at strengthening the institutional capacity of relevant agencies, including prosecutors, judges, police, border guards, alien police, labour inspections, NGOs and social workers.<sup>149</sup>

## **Training**

- A training component should be included in all counter-trafficking national action plans. Moreover, regional anti-trafficking and European modules should be developed and mainstreamed into the regular curricula of all relevant actors.
- Training should target a wide scope of actors and be delivered by a variety of agencies. All training should contain a general as well as a specific part tailor made for the targeted actors. Multi-actor training is indispensable to ensure a coordinated and multi-disciplinary approach. All training should be delivered by multi-disciplinary teams, especially with the participation of NGOs.
- It is recommended that all anti-trafficking training programmes contain, within the generalist level, definitions of terms such as trafficking, trafficked persons, traffickers, exploitation; the difference between prostitution and trafficking and between trafficking, smuggling and irregular migration; a general explanation of, the trafficking

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<sup>149</sup> See Chapter 4.5.

process, the *modus operandi* of traffickers, control and exploitation of trafficked persons and labour standards; and the psychological, social and economic impact on trafficked persons. Training should have a human rights basis.

- Additionally, law enforcement training should focus on the following specific target groups:
  - law enforcement officials, both at non-specialist level (front-line officers – criminal, traffic, municipal, public order, alien and border police), and specialist level (specialised counter-trafficking police detectives and investigators that hold specific responsibility for the crime, including public prosecutors, as appropriate);
  - labour inspectors;
  - consular staff;
  - judges, prosecutors and attorneys;
  - international military and police peace-keepers and related civilian contractors.
- Due to the special sensitivities involved, there should be a separate child specific training for all law enforcement and other officials and NGOs dealing with trafficked children.

#### **Administrative controls**

- Member States should promote the introduction of a broad range of administrative controls in pre-border, border and in-land areas, with due respect to human rights considerations and fundamental rights of the person, including the freedom of movement.
- Multi-agency co-ordination groups, including law enforcement agencies, labour market institutions/inspectors, immigration officials, other ministry or embassy staff and NGOs, should be functioning actors in the co-ordination and implementation of administrative control measures on both policy and operational level, as well as in the sharing of intelligence among all actors, especially among labour market inspectors and police investigators, on a local and national level (in close co-ordination with National Referral Mechanisms), but also at regional/international level (between origin and destination countries).<sup>150</sup>
- Member States should introduce regimes and practices to regulate and monitor private agencies that frequently appear in the *modus operandi* of traffickers.<sup>151</sup> In order to provide for early identification of those agencies, which act outside of the legal requirements, States should introduce systems to regulate these agencies by way of licensing, and to monitor them. In doing so, states should apply innovative policies

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150 Whereas the Brussels Declaration calls for the creation of multi-disciplinary groups that meet regularly and whose role is described as ‘regular evaluation, monitoring and further improvement in the implementation of national policies’, concrete operational co-operation and co-ordination is also needed in order to render administrative controls effective.

151 BD, pt. 11.

such as rating systems. The private sector (private employment agencies and their business associations, but also individual commercial agencies) should be obliged to collaborate with the police as well as be encouraged to introduce self-regulating schemes (codes of conduct). Moreover, administrative measures should be used to monitor and enforce labour standards, in combination with training of the relevant actors and backed by criminal law enforcement.

- Member States should encourage a pro-active regulating and monitoring of vulnerable sectors such as construction, sweat shops, agriculture and the sex industry by multi-agency groups. This would counter-act the “invisibility of the exploitation” by identifying (possibly) trafficked persons and collecting intelligence, which can be used for large-scale investigation.<sup>152</sup>
- Member States should consider the introduction/expansion of transparent labour admission systems and establish multi-agency and international enforcement mechanisms; intensified efforts should be taken to ensure that international labour standards are applied and enforced in countries of origin and destination.
- Member States should enhance their capacity for processing applications for visa, residence and work permits and family reunification, thereby fostering legitimate migration. Support systems should be set up for the verification of documents and statements submitted together with applications. Data on fraudulent and suspect agencies, employers, etc., should be shared among all relevant labour, law enforcement and consular agencies nationally and regionally, in and between countries of origin and destination. The network of liaison officers could be further strengthened in this regard. Measures should also be taken to intensify consular co-operation in countries of origin, with a view to identifying potential cases of human trafficking; to this end, consular and other frontier staff should be sufficiently trained.
- Document security should be improved, and special internal control mechanisms should be introduced in order to prevent the falsification of, or fraudulent use of visa, labour permits and residence permits.
- States should establish mechanisms to monitor the Internet as a means to detect and prosecute the potential illegal use of Internet for trafficking purposes, such as escort, adoption and bridal agencies. Public-private partnerships with Internet providers and other businesses (including their self-regulation by means of codes of conduct) should be further enhanced. Special attention should be paid to the identification of child victims of exploitation and abuse via Internet.

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<sup>152</sup> See also the ILO, *Working Paper on Special Action Programme to Combat Forced Labour*, January 2004.

## Children

- Any policy or legislative measure aimed at preventing trafficking should entail specific measures to address and prevent violence, abuse and exploitation of children. Guiding principle for any measures or policies with regard to children should be the UNCRC. Other relevant frameworks are the 1999 ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour and the policies against the sexual exploitation of children as undertaken at the Second World Congress Against the Commercial Sexual Exploitation of Children held in December 2001 in Yokohama. Best practices on the prevention of child trafficking should be developed, implemented and disseminated.
- Migrant children represent a particularly vulnerable group among the child population and should be guaranteed the same level of protection and opportunities as national children, regardless of their residence status.
- EU development co-operation programmes should explicitly address the root causes of trafficking in children. Elements of such programmes should be:
  - improvement of children's access to school and vocational training and increasing the level of school attendance, in particular of girls and minority groups;
  - reduction of the number of children abandoned by their families and promotion of alternative solutions to institutional care, including foster-care and adoption, preferably in the country of origin (consistently with the principle of subsidiarity of international adoption) in order to improve their living conditions, along with imposing stricter controls on institutions, foster-families and on international adoption;
  - protection of street children by ensuring the provision of food, health care, informal education and/or shelters, together with protection from exploitation and abuse they may suffer;
  - information to families and children about children's rights, safe migration and the risks of trafficking through interventions in schools and in other settings in order to reach children that are outside the formal educational system;
  - improvement of the system for birth;
  - where applicable: addressing the needs of children affected by armed conflict, displacement and other humanitarian crises.
- In addressing the demand side Member States should take specific measures to address the different kinds of child exploitation: sexual exploitation, with particular attention to child prostitution and child pornography; economic exploitation; illegal adoption; and removal of organs.
- Member States should take measures to address the disappearance of trafficked and exploited children from accommodation centres where they have been placed, as they risk being re-trafficked and/or exploited.

- Opportunities for legal labour migration and family reunification should be increased in order to reduce the number of unaccompanied children who often end up being trafficked.
- Border controls should pay particular attention to unaccompanied minors, children travelling with non-family members, and children without appropriate documentation. Unaccompanied and undocumented children should not be refused entry or returned at ports of entry, but be subject to particular protection and investigation measures. Immigration, border and other law enforcement authorities should immediately refer unaccompanied children to the appropriate child welfare authorities. If the child is accompanied by an adult who is not able to demonstrate through valid documents that she/he has the legal authority, appropriate measures should be taken to protect the child. Staff carrying out interviews on children should be properly trained and NGOs should be involved in this process. In addition, the possession of a proper passport/travel document for children of all ages should be obligatory, as should the establishment of checks on the validity of “relations” between the child and the accompanying adult. Co-operation between border officials, law enforcement officials and child assistance agencies should be improved.
- Visa application procedures must pay particular attention to children travelling without an immediate family member and photo ID’s must be taken of children and their accompanying adult. The aim of such procedures should be the protection of the child and the promotion of her/his best interests.
- Registration of children’s biometric data, both in the country of origin and in the destination country, could be useful but should be aimed only at the child’s protection and the promotion of her/his best interests, and not for immigration control purposes (e.g. expulsion enforcement). The registration should not be traumatizing and criminalizing, and child-friendly procedures should be adopted. Moreover, if applied, it should be subjected to strict controls in light of the right to privacy and the use of data.
- States should adopt national legislation according to the Hague Convention on Inter-Country Adoption in order to avoid inappropriate behaviour by adoption agencies and to prevent abusive practices in legal international adoptions.

## **Chapter 5 – Recovery, assistance and protection of trafficked persons**

- In order to effectively address trafficking as well as meeting state’s obligations under international human rights law Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers.

## Identification

- To allow proper identification of trafficked persons all involved actors – government actors, law enforcement, NGOs, local social welfare organisations, labour unions, labour inspections and other labour related agencies – should be trained and a system of referral should be in place.
- In order to establish contacts with presumed trafficked persons and to build the necessary confidence and trust, outreach work, drop-in centres and hotlines should be developed. This is particularly important since research indicates that only a limited number of trafficked persons are identified by law enforcement agencies. The majority of trafficked persons seem to be identified through outreach work of NGOs, local authorities, hotlines, clients, colleagues and other citizens.
- In light of the little experience that is gained with the identification of trafficked persons in other sectors than the sex industry, specific attention should be paid to information and training of labour unions, labour inspections and other labour related agencies in order to enable them to identify and properly refer trafficked persons. A specific budget line should be created to develop specific methods and information materials, targeted at those sectors where trafficking is likely to take place, such as domestic work, construction, agricultural labour and the garment industry.
- Agencies (including law enforcement, labour, social service, health and education agencies, outreach workers, hotlines, etc.) should co-operate and share information so as to ensure that trafficked children are identified and assisted as early as possible. In cases where there is suspicion that the child is a victim of trafficking, the child should be referred to the appropriate child welfare authorities. After placing the child in a safe accommodation, appropriate measures need to be taken to identify and assist the child and, if the child is accompanied, to assess the relationship between the child and the accompanying adult. Where the age of the trafficked person is uncertain, due to the absence of papers or to false identity papers, and she/he claims to be less than 18 years of age, the presumption should be that she/he is a child and she/he should be provisionally treated as such.

## Reflection period and residence status

- The Council Directive on the residence permit issued to third country nationals victims of trafficking in human beings or to third country nationals who have been subjects of an action to facilitate illegal immigration and who cooperate with the competent authorities, should be adapted to include the following provisions:

### *Reflection period*

If there is the slightest indication to suspect that a person may be trafficked, a reflection period should be granted of no less than three months. Purpose should be to allow the trafficked person to (begin to) recover and to make an informed decision

about her/his options, that is, whether to assist in criminal proceedings, to pursue legal proceedings for compensation, to enter a social assistance programme or to choose for immediate return home. Part of the reflection period should be the obligation to refer the trafficked person to support agencies, which can provide her/him with appropriate assistance. For the authorities the reflection period enables the identification of the trafficked person including determining whether or not the person indeed is a victim of trafficking. In dealing with the reflection period account should be taken of the fact that, for a number of reasons, severing ties with the criminal circuit often takes the form of a gradual process rather than an immediate decision. In the case of children, there should be the possibility of extending the reflection period.

#### *Temporary residence permit*

Following the reflection period, a temporary residence permit should be granted to identified trafficked persons for a period of at least six months, with the possibility of renewal, on one (or more) of the following grounds:<sup>153</sup>

- the willingness of the trafficked person to press charges and act as a witness in the criminal case;
- participation of the trafficked person in a social assistance programme aimed at her/his social inclusion either in the country of destination or the country of origin;
- the involvement of the trafficked person in a civil procedure to claim compensation for damages;
- social assistance programmes should be open to all trafficked persons, regardless on which of the above listed grounds a temporary residence permit is granted and should include access to the labour market, vocational training, education and other services aimed at enabling the trafficked person to regain control over her/his life and to build a sustainable future.

#### *Long term or permanent residence permit*

Following a temporary residence permit, trafficked persons should qualify for a long term or permanent residence permit on one (or more) of the following grounds:

- having successfully completed a social assistance programme and having found employment.<sup>154</sup> In this case, her/his temporary residence permit should be transformed into a work permit and thus be subjected to the regulations for migrant workers;
- humanitarian grounds.<sup>155</sup> Criteria should include the risk of retaliation against the trafficked person or her/his family; the risk of prosecution in the country of origin for trafficking-related offences; the perspectives for social inclusion and an independent, sustainable and humane life in the country of origin (taking into account risks of stigmatisation and discrimination); the availability of adequate,

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<sup>153</sup> These grounds should qualify for both the granting of the initial granting of a temporary residence permit and the renewal of such a permit.

<sup>154</sup> Including establishment as a self-employment worker.

<sup>155</sup> UN TrafProt Art. 7.2; UNHCHR, *op. cit.*, Principle 11: “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 or to the safety of their families.”

- confidential and non-stigmatising support services in the country of origin; and the presence of children. In addition, applications should be judged in the light of the principle of non-refoulement and of Art. 3 of the European Convention on Human Rights, which holds that no one should be subjected to inhuman or degrading treatment;
- asylum: trafficked persons should be entitled to seek and enjoy asylum in accordance with international refugee law.<sup>156</sup>

*Family members and children of the trafficked person*

- if there are substantial reasons to believe that family members of the trafficked person, including possible children, are at risk in the home country, such family members should be entitled to temporary or permanent residence on the same conditions as the trafficked person;
  - if a trafficked person is granted a temporary or permanent residence permit, the trafficked person should be entitled to family reunification with her/his children under the age of 18, who should be granted a residence permit on the same conditions as the trafficked person.
- In order to ensure that trafficked persons are not sent back to a situation that endangers their life, health or personal freedom and/or would submit them to inhuman or degrading treatment, any decision to deport or return a trafficked person, including trafficked children, should be preceded by a risk assessment. NGOs and other service agencies that provide assistance to the trafficked person concerned should be actively included in this process.
  - Trafficked children should always be granted a temporary residence permit, with all corresponding rights, in order to allow them adequate assistance. They should only be returned after a risk assessment is done and if the return is in the best interest of the child, safe and assisted. When they reach the age of majority, if no other kind of residence permit can be issued under the conditions laid down in national law (e.g. for employment or study reasons), full regard should be given to their vulnerable status and they should be allowed to remain in the host country for humanitarian reasons.
  - In the case of unaccompanied children all steps necessary shall be taken to identify and locate family members. Following a risk assessment and consultation with the child, measures should be taken to facilitate the reunion of the child with her/his family where this is deemed to be in her/his best interest. In all cases the view of the child, in particular regarding decisions on her/his possible return to her/his family, should be given due weight in accordance with its age and maturity.<sup>157</sup>
  - A solution should be found for the group of trafficked persons who have become victims of trafficking in their own or another country and who are in need of (immediate) protection whereas neither that country nor their own country is able or

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<sup>156</sup> UNHCHR, *op. cit.*, Guideline No. 1.6.

<sup>157</sup> UNHCHR, *op. cit.*, Nos. 8.4; 8.6.

willing to offer such protection, e.g. by an agreement between the EU Member States to offer residence to a certain number of victims in these situations.

### **Social assistance and the development of standards**

- Member States should establish appropriate structures for providing assistance and protection to trafficked persons. This should include at the minimum safe and appropriate accommodation, counselling, health care, free legal assistance, education, vocational and employment opportunities. All services must be provided on a voluntary and confidential basis, in a non-discriminatory and non-judgmental manner and in compliance with a number of basic principles derived from international human rights norms, in particular the respect for privacy, confidentiality, self-determination and freedom of movement.
- Member States should recognise the importance of a variety of service providers working with trafficked persons, including the NGO sector, and should adequately support, cooperate with and timely and transparently fund them.
- Organisations providing services to trafficked persons should offer multidisciplinary assistance and tailored solutions to trafficked persons through professionals who are specifically trained, amongst others in cross-cultural and gender-sensitive working methods. Working with interpreters and cultural mediators is strongly recommended, as it is the promotion and the support of self-help organisations/groups.
- Service providers for trafficked persons should develop standards, based on clear and measurable indicators, to regularly monitor and assess the quality and the suitability of their services and their performance. The EU should support the development of such standards as well as transnational co-operation between service providers.
- Specialised services should be provided to trafficked children to meet their specific needs, including their linguistic and cultural needs, and protect their rights. This includes among others suitable housing preferably in a family environment (e.g. foster families or residential settings specific for children and with appropriate adult support); specialised psychosocial services, etc. Older children should not be treated as *de facto* adults and placed in reception centres without adult support. If a child is found trafficked, a legal guardian should be appointed – temporarily<sup>158</sup> or permanently, depending on the circumstances - at the earliest possible stage in order to act in the best interest of the child and follow her/him throughout the whole process of assistance and protection.

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<sup>158</sup> A legal guardian should be appointed at least temporarily until the parents are located and it is ensured that the child can safely be returned to them.

## Witness protection and judicial treatment of trafficked persons

- It should be ensured that the Framework Decision on the standing of victims in criminal proceedings is fully applicable to victims of trafficking, independent of their legal status in the Member State concerned.<sup>159</sup>
- The European Commission should take the initiative for the development of a legally binding EU instrument covering the standing of trafficked persons in criminal proceedings, building on the Framework Decision on the standing of victims in criminal proceedings. Such a framework should include a broad definition to cover all trafficked persons, including children, as victims of crime, regardless of the degree of their participation in criminal proceedings, and include trafficked persons before, during and after criminal proceedings are taking place.
- Within such an instrument guidelines should be developed with respect to the following aspects:

*The right to respect:* This requires treating the trafficked person as a victim of crime and holder of rights, rather than a criminal, illegal migrant, prostitute or morally dubious person. Respect for trafficked persons should inform and guide all interventions.

*The right to information and advice:* This should include immediate access to support organisations and access to translation and free legal advice. Clear, accurate information needs to be given on options available to trafficked persons, including co-operation with police, and the consequences of these options, including victims and witness assistance and protection schemes. Full information should be given at all stages, with access to advice, and time to consider the information and options. Children should be informed in a manner that is understandable to them.

*The right to privacy:* Trafficked persons have the right to privacy and respect for their private and family life.<sup>160</sup> Many trafficked persons will suffer stigma from their community or others if details of their trafficking experience are made public. In addition, sharing of personal information of trafficked persons can increase security risks to them and their families. States should ensure privacy is protected by measures, including ensuring that trafficked persons' names and court proceedings are not publicised by the media, and that there are provisions governing the collecting and sharing of information of trafficked persons details between agencies.

*The right to protection:* Under Articles 2 and 3 of the European Convention of Human Rights states have a positive obligation to protect individuals. Protection offered to trafficked persons should be on the basis of individual risk assessment and need. It should be offered in consultation with the trafficked person. Usually practical forms of protection are more effective, cheaper, and less intrusive for the trafficked person than full scale witness protection programmes. With regard to unaccompanied children, a

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<sup>159</sup> Art. 7 of the Framework Decision on combating trafficking in human beings explicitly refers to some articles in the Framework Decision on the standing of victims in criminal proceedings.

<sup>160</sup> Article 8 of the European Convention of Human Rights (ECHR).

legal guardian should be appointed to protect her/his interest and ensure adequate protection of the child.

*Interrogation and investigation:* Guidelines should be developed for non-confrontational, non-judgemental investigative techniques that respect the trafficked persons' rights and recognise their status as a victim. In the case of children, specific child friendly procedures need to be adopted.

*Court procedures:* Special procedures should be developed that protect trafficked persons' right to privacy, including provisions for giving testimony without confronting the defendant, for example by video, limitation to cross examination on sexual history, and restrictions on media reporting of personal details. These should include special procedures adapted to the needs and rights of trafficked children.

*The right to compensation:*<sup>161</sup> The right to compensation should be enforced in both criminal and civil proceedings, as well as any State compensation schemes, and should apply not only for the injuries suffered by the trafficked person as a victim of crime, but also for the loss of wages that would have been earned had the trafficked person been correctly paid for the forced labour she/he undertook. States should put in place provisions, such as access to legal aid, and seizure of criminal assets, that in practice enable trafficked persons to claim compensation.

- Member States should take appropriate measures to ensure that trafficked persons, including children, are not detained, charged or prosecuted for violations of immigration law or for activities they are involved in as a direct consequence of their situation as trafficked persons.
- In line with Art. 23 of the Convention on Transnational Organised Crime (criminalization of the obstruction of justice) consideration should be given to establish as a criminal offence the intimidation of witnesses.

### **Return and long term assistance**

- Member States should establish appropriate return procedures with due regard to the privacy, safety, dignity and health of the trafficked person, in close partnership with NGOs and IOs. These procedures should be laid down in Protocols for the return of trafficked persons and should apply to all involved agencies. Such protocols/procedures should at least address the following issues: the prompt return of the person on her/his wish; information to the trafficked person on the applicable procedures and the available assistance in her/his home country to enable an informed decision; risk assessments regarding the safety of the trafficked person during and after return; confidentiality of any information relating to the person being trafficked; guarantees that no reference to the status of the person as being trafficked is made in any document related to her/his return (such as stamps in passports); the arrangement of proper identity documents; arrangement for basic necessities during

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<sup>161</sup> See for a more extensive treatment of the issue of compensation Chapter 6.5 and Exploratory paper 15.

travel.

- Member States should in co-operation with countries of origin and in close partnership with local NGOs develop voluntary and safe return programmes in countries of origin to ensure that trafficked persons who return to their home country have access to long term assistance and support in order to secure their safety and well-being, to enable them to find viable means of existence, to prevent re-victimization and reduce the risk of re-trafficking. NGOs providing these services should be adequately financed and co-operation between NGOs and other civil society organisations in countries of origin, transit and destination should be encouraged and facilitated.<sup>162</sup>
- The development of long-term assistance programmes should make an integral part of development co-operation policies.<sup>163</sup>
- Return and long term assistance programmes should aim at the empowerment of the trafficked person,<sup>164</sup> defined as the process through which an individual can develop her/his ability to stand independently, make her/his own decisions and show control over her/his life. They should rest on the following principles: voluntariness; protection of privacy and safety;<sup>165</sup> protection of the confidentiality of the relation between the service provider and the trafficked person; non-stigmatisation; freedom of movement of the trafficked person;<sup>166</sup> the treatment of trafficked persons in a respectful, non judgmental and non moralizing or patronizing way; the needs, views and concerns of the trafficked person should be at the centre. Elements of such programmes should be an individual needs and risk assessment; regularization of the documentation status of the person concerned; appropriate housing; health care; psychological assistance; legal aid; assistance in finding viable means of existence; and support of self-organisation.
- In the case of children special policies and programmes should be developed to ensure that they will be provided with appropriate physical, psychological, legal and educational assistance, housing and health care.<sup>167</sup> Children should only be returned after a risk assessment is done and if the return is in the best interest of the child, safe and assisted.

## **Chapter 6 –Law enforcement strategies**

### **Prioritisation, specialisation, coordination and co-operation**

- Specialisation of law enforcement must be ensured through necessary organisational structures and adequate education and training of competent personnel. CEPOL should

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<sup>162</sup> BD, pt. 15; UNHCHR, *op. cit.*, Nos. 11 and 12.

<sup>163</sup> The Hague Declaration, III, 3.4.

<sup>164</sup> BD, pt. 15.

<sup>165</sup> The Hague Declaration, III, 3.4.

<sup>166</sup> UNHCHR, *op. cit.*, No. 1.5.

<sup>167</sup> UNHCHR, *op. cit.*, No. 8.7; UN TrafProt Art. 6.4.

play a central role in this context. New types of specialisation, working methods and co-operation partners – such as agencies responsible for the control of working conditions and financial investigations related to irregular labour – need to be established in order to address forced labour exploitation in other sectors than the sex industry.

- The fight against trafficking in human beings must be clearly defined as a law enforcement priority. Adequate personal and financial resources must be allocated. A certain percentage of these resources should continuously be devoted to the fight of trafficking in human beings. At the lower level police officers should be encouraged and motivated to investigate in human trafficking cases.
- Pro-active, intelligence led investigative techniques without reliance on the testimony of the victims should be further developed. “Victimless” approaches, however, should never be used to legitimate a neglect of the necessity for protection and assistance of trafficked persons.
- At present Europol is not effectively used. This signifies a deficit in the area of exchange of information, the formation and functioning of joint investigative teams and the possibility for law enforcement agencies throughout the EU of benefiting from the information gathered in other Member States, which needs to be addressed.
- Financial incentives, for example through a European budget line, should be used to encourage Member States to regularly cooperate at EU level by involving European institutions such as Europol or Eurojust.

### **Money laundering, seizure of assets, financial investigations**

- It needs to be clearly established in EU legislation that trafficking in human beings is a predicate offence of money laundering and that its proceeds are subjected to money laundering instruments.
- Member States should be clearly obligated to take the appropriate measures to identify and trace proceeds of trafficking in human beings; these proceeds have to be subjected to confiscation and other measures such as freezing and seizing.
- Convicted traffickers should have confiscated such property or pecuniary resources that are disproportionate to their present or past known legal income, unless they are able to give a satisfactory explanation in that regard.
- Confiscated proceeds of trafficking should be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such fund that could be part of a more general compensation system for crime victims.

## **Restitution and compensation of victims**

- The Framework Decision on the standing of victims in criminal proceedings should be evaluated<sup>168</sup> and, where necessary, revised with particular attention to the compensation of trafficked persons.
- Provisions to enable trafficked persons to get compensation, in both civil and criminal proceedings, as well as through state compensation schemes, should include the right to free legal advice and assistance, and a stay of deportation while such proceedings are in progress.
- Trafficked persons have to be considered “victims of a serious crime against the person”<sup>169</sup> and “qualified victims of crime” and should have access to compensation schemes for victims of violent intentional crime in general.
- The compensation concept should include the prompt use of all European instruments to detect, freeze, seizure and confiscate the proceeds of the trafficking or the values in which they have been transformed or converted. Such proceeds should be used firstly for the purpose of compensation to trafficked persons.
- Adequate compensation instruments and procedures, for example national funds or a European Fund for the compensation of trafficked persons (EU citizens, residents in EU Member States and third country nationals), should be established in order to ensure equal and effective compensation to trafficked persons. A funding mechanism for a possible European fund could be based on the contributions of Member States (for instance, a percentage of the proceeds of trafficking confiscated in the criminal proceeding).
- The discussion on this matter should be opened at the highest political level – including a dialogue with relevant third countries – in order to identify needs and priorities and to encourage the elaboration of a European instrument and the progressive convergence and consistency of national legislation.

## **Anti corruption strategies**

- Anti-corruption strategies (as described in more detail in the Explanatory paper 15) should make an integral part of any policy to prevent and combat trafficking.

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<sup>168</sup> The evaluation procedure already started. Nevertheless, it should still be possible to pay specific attention to trafficked person in the ongoing debate.

<sup>169</sup> BD, pt. 13, sixth bullet point.

## Explanatory paper 1

### Relation and differences between UN and EU definitions, the concept of exploitation

#### Relation/differences between UN and EU definitions

The definitions that have been agreed at EU level include largely the same elements as those that were generally recognized at UN level by most governments and organisations around the world. Like the UN, the EU distinguishes between trafficking in human beings and facilitating illegal entry into a country (smuggling of migrants).<sup>170</sup>

On the other hand, the Framework Decision on Trafficking in Human Beings does not include all elements of the UN definition. In particular, the FD on THB does not apply to trafficking in human beings for the purpose of the removal of organs. Other parts of the EU definition are more precise<sup>171</sup> and reflect the character of the FD on THB as a legally binding instrument, forcing EU Member States to adapt their national legislation in order to comply with obligations at EU level in the area of criminal law harmonisation.<sup>172</sup>

A last difference is that the UN Protocols addresses trafficking in human beings and smuggling of migrants in a comprehensive way. They cover aspects of protection, assistance and repatriation of victims as well as prevention, co-operation (including information exchange and training), border measures and security of documents. The above-mentioned EU instruments, on the contrary, are mainly acts of EU legislation in the areas of criminal law and criminal proceedings.

Both the UN Trafficking Protocol and the EU Council Framework Decision on combating trafficking in human beings make a clear distinction between trafficking and prostitution as such. Neither instrument implies a specific positive or negative position on (non-coerced adult) prostitution as such, leaving it to the discretion of individual states how to address prostitution in their domestic laws. Consequently, the question of the definition of trafficking has to be distinguished from questions about the political and/or legal approach to prostitution that is followed or required in order to tackle the problem of trafficking in human beings.

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<sup>170</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (OJ L 203, 1.8.2002, p. 1) on the one hand; Council Directive 2002/90/EC of 28 November 2002 defining the facilitation of unauthorised entry, transit and residence (OJ L 328, 5.12.2002, p. 17) and Council Framework Decision of the same day on the strengthening of the penal framework to prevent such facilitation (OJ L 328, 5.12.2002, p. 1) on the other hand.

<sup>171</sup> For example the lack of a real and acceptable alternative to the victim except to submit to the abuse involved in cases, where authority or a position of vulnerability is abused, Article 1(1)(c) of the FD on THB.

<sup>172</sup> So far the Europol definition of trafficking in human beings differs from the one in the FD on THB and has to be adapted. See Chapter 6.

## **Forced or compulsory labour or services, slavery, practices similar to slavery, servitude**

Neither the UN Trafficking Protocol nor the FD on THB clarify what they consider being exploitation of another person's labour or services for the purposes of these instruments. On the other hand, terms such as 'compulsory or forced labour or services', 'slavery', 'practices similar to slavery' or – in the UN Trafficking Protocol – 'servitude' include qualifying characteristics distinguishing them from "ordinary" bad working conditions, even when a person might be socially or economically exploited.

Moreover, most of the terms involved have been used in previous international instruments such as the 1948 Universal Declaration on Human Rights. Article 4 states: "No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms." Article 1(1) of the 1926 Slavery Convention as amended by the 1953 Protocol defines slavery as "the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised."

Section I, Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956 does not contain a general definition of the latter. But it refers to debt bondage, serfdom, forced marriage, furthermore practices whereby a woman is transferred to another person for a value received or inherited by another person. These practices can be considered as the most relevant examples of practices similar to slavery, which the contracting state parties agreed to address.

Article 8 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 and Article 4 of the European Convention on Human Rights state that no one shall be held in slavery or servitude or be required to perform forced or compulsory labour. In the context of these instruments slavery is not only understood to mean the exercise of all or any powers attached to ownership, but also the actual de-facto destruction of the legal personality of a person. Nonetheless, the concept of slavery is generally interpreted as to refer to slavery in its classic sense.

Servitude represents a broader concept, covering conditions of work or service, which the individual cannot change or from which she/he cannot escape. It thus refers to a more general idea, covering all possible forms of one person's dominance over another person.<sup>173</sup>

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<sup>173</sup> Wijers, M., *The prohibitions on slavery and related practices and their relevance to the development of a contemporary definition of trafficking in persons*, Paper International Protection of Human Rights, May 2000.

Article 2(1) of the ILO Convention (No. 29) Concerning Forced Labour of 1930 defines forced or compulsory labour as “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.”

The 1930 Convention outlines the general concept of forced or compulsory labour “for the purposes of this Convention”, which is to suppress the use of such labour. This might be adequate to develop an appropriate policy instrument but is insufficient in order to apply a criminal law instrument aimed at combating trafficking in human beings. Further to a request of the German government, the ILO has conducted a study in order to achieve a more precise definition of forced or compulsory labour for the purposes of a criminal law instrument, which is required in order to implement the UN Trafficking Protocol and the FD on THB.

In the case of children, the UN Convention on the Rights of the Child provides for further specification in Article 32: “States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development”. Also, ILO Convention 182 on the Worst Forms of Child Labour provides for further specification.

## Explanatory paper 2

### The current context

At world level a clear progress, manifested in several resolutions and project funding, has been achieved by the UN in recent years. Above all, the UN has made possible the Convention Against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. The Protocol entered into force on 25 December 2003 and can be considered a landmark in the global endeavours to fight trafficking in coming years. However, only some of the “new” but most of the “old” EU Member States as well as the European Community have not yet ratified the Protocol.<sup>174</sup>

The UN Commission of Human Rights in its 60th session of April 2004 adopted a resolution to nominate a Special Rapporteur on Trafficking in Persons, especially women and children.<sup>175</sup> The mandate should focus on the human rights of the victims, and the Rapporteur would submit an annual report to the UN Commission of Human Rights, including the necessary recommendations on actions to be taken.

Other organisations and fora that have addressed trafficking include, for instance, the OSCE<sup>176</sup>, NATO<sup>177</sup> and ASEM (Asian European Meeting).<sup>178</sup> Currently, negotiations within the Council of Europe are under way on a Convention against trafficking in human beings.<sup>179</sup>

In the European Union trafficking in human beings has politically been at the core of the agenda in the field of justice and home affairs since 1996 when the Commission launched its first Communication<sup>180</sup> on the subject. Since then a series of policy developments, legislative acts and funding schemes have addressed the issue, among others the 1997 The Hague Ministerial Declaration on European Guidelines for effective measures to prevent and combat trafficking in women for the purpose of sexual exploitation.<sup>181</sup>

The main EU milestones in the field of counter-trafficking legislation are the adoption of

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<sup>174</sup> State of play on 15 September 2004: Belgium, Denmark, France, Portugal, Spain, Sweden, Cyprus, Estonia, Latvia, Lithuania, Malta, Poland, Slovenia (source: UNODC website).

<sup>175</sup> [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.2004.L.10.Add.12.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.2004.L.10.Add.12.En?Opendocument) and <http://www.un.org/News/Press/docs/ecosoc6113.doc.htm>

<sup>176</sup> Decision No. 2/03 of 2 December 2003 on Combating Trafficking in Human Beings, adopted by OSCE Ministerial Council in Maastricht. Furthermore, in May 2003 Ms Helga Konrad has been appointed OSCE Special Representative on Trafficking in Human Beings.

<sup>177</sup> <http://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic.htm>

<sup>178</sup> For more information: <http://asem.inter.net.th/>

<sup>179</sup> For more information: [http://www.coe.int/T/E/human\\_rights/Trafficking/2\\_Cahteh/](http://www.coe.int/T/E/human_rights/Trafficking/2_Cahteh/)

<sup>180</sup> COM(96) 567 final.

<sup>181</sup> Ministerial Conference under the Presidency of the European Union, The Hague, 24-26 April 1997.

the Framework Decision of 19 July 2002 on combating trafficking in human beings<sup>182</sup> approximating the criminal laws of the Member States, the Directive of 29 April 2004 on a temporary residence permit for victims of trafficking who cooperate with the authorities<sup>183</sup> and – with regard to some aspects of trafficking in human beings – the Framework Decision of 22 December 2003 on combating the sexual exploitation of children and child pornography.<sup>184</sup> Other acts such as the Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings<sup>185</sup> and the Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States<sup>186</sup> are relevant as well and demonstrate the attention to be paid to trafficking in human beings in a more horizontal context of extradition or surrender procedures.

A series of programmes (in particular, STOP, AGIS, DAPHNE, PHARE, TACIS, CARDS)<sup>187</sup> managed by the European Commission and providing funding opportunities for projects have been and are aiming at improving the prevention of and the fight against trafficking in human beings.

Organisations such as Europol<sup>188</sup> and Eurojust<sup>189</sup> have been set up and equipped with competencies in area of trafficking in human beings. New co-operation structures such as CEPOL<sup>190</sup> and the European Crime Prevention Network<sup>191</sup> are to some extent addressing the issue. Moreover, trafficking in human beings is a subject of co-operation not only between EU Member States but also a permanent topic in EU relations with third countries in Eastern and South-Eastern Europe, Central Asia and the Mediterranean region. Consequently, trafficking in human beings has been addressed in the framework of the Stabilisation and Association Process,<sup>192</sup> the European Neighbourhood Policy,<sup>193</sup>

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<sup>182</sup> OJ L 203, 1.8.2002, p. 1.

<sup>183</sup> Directive 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, OJ L 261, 6.8.2004, p. 19.

<sup>184</sup> OJ L 13, 20.1.2004, p. 44.

<sup>185</sup> OJ L 82, 22.3.2001, p. 1.

<sup>186</sup> OJ L 190, 18.7.2002, p. 1 (see Art. 2 (2)) of the act.

<sup>187</sup> For more information about:

AGIS: [http://europa.eu.int/comm/justice\\_home/funding/agis/funding\\_agis\\_en.htm](http://europa.eu.int/comm/justice_home/funding/agis/funding_agis_en.htm)

STOP (expired): [http://europa.eu.int/comm/justice\\_home/funding/stop/funding\\_stop\\_en.htm](http://europa.eu.int/comm/justice_home/funding/stop/funding_stop_en.htm)

DAPHNE II: [http://europa.eu.int/comm/justice\\_home/funding/daphne/funding\\_daphne\\_en.htm](http://europa.eu.int/comm/justice_home/funding/daphne/funding_daphne_en.htm)

PHARE: [http://europa.eu.int/comm/enlargement/financial\\_assistance.htm](http://europa.eu.int/comm/enlargement/financial_assistance.htm)

TACIS: [http://europa.eu.int/comm/europeaid/projects/tacis/index\\_en.htm](http://europa.eu.int/comm/europeaid/projects/tacis/index_en.htm)

CARDS: [http://europa.eu.int/comm/europeaid/projects/cards/index\\_en.htm](http://europa.eu.int/comm/europeaid/projects/cards/index_en.htm)

<sup>188</sup> Europol Convention, Art. 2(2), OJ C 358, 13.12.2000, p. 1.

<sup>189</sup> Council Decision of 28 February 2002 setting up Eurojust with a view to reinforcing the fight against organised crime, Art. 4(1)(a), OJ L 63, 6.3.2002, p. 1.

<sup>190</sup> OJ L 336, 30.12.2000, p. 1.

<sup>191</sup> OJ L 153, 8.6.2001, p. 1.

<sup>192</sup> European Commission, *The Stabilisation and Association Process in South East Europe*, Third Annual Report, COM(2002)202/2final, 30.3.2004, in particular pp. 20, 34, 35.

<sup>193</sup> Communication from the Commission, European Neighbourhood Policy, Strategy Paper, COM(2004)373 final, 12.5.2004, in particular pp. 6, 16, 21.

the Euro-Mediterranean Partnership<sup>194</sup> and the EU-Africa Dialogue.<sup>195</sup> As regards policy developments, the Brussels Declaration has set the agenda for future action against trafficking in human beings at the level of the European Union. The setting up of the Experts Group is one element in the implementation of the Brussels Declaration.

However, although a number of political declarations and legally binding instruments are in place, they are often not yet effective or fully implemented. This requires that the political commitments made over the past years must be turned into action. Moreover, a number of additional measures are needed. At the same time, the context in which further action should be taken at the EU-level presents in 2004 interesting prospects.

First, a first wave of enlargement bringing ten central and eastern European countries into the Union took place on 1 May 2004. All these countries have been and are affected by trafficking in human beings, some of them not only as countries of destination or transit but also to a considerable extent as countries of origin. The specific impact of trafficking in human beings on these countries might influence their sensitivity to the problem and their commitment to counter-trafficking measures. As a consequence the EU approach to trafficking in human beings and the EU relations with countries outside the EU may also change, not least as regards Eastern and South Eastern Europe.

Secondly, as regards the EU institutions, elections to the European Parliament were held in June. Among the new members of the European Parliament are again at least some stakeholders in the fight against trafficking in human beings. In October a new Commission will take up its term in office. Both institutions, the EP and the Commission, are now established with full participation from the new Member States.

Thirdly, the new Constitution for the EU, agreed upon by the Heads of State or Government on 18 June 2004 but still to be approved in coming referenda in some Member States, provides a series of novelties as regards decision making, instruments, etc., in the field of justice and home affairs. Trafficking in human beings is explicitly addressed in a number of provisions of the Constitution.<sup>196</sup> According to Article III-168(1) the Union shall develop a common immigration policy aiming at, *inter alia*, “the prevention of, and enhanced measures to combat illegal immigration and trafficking in human beings.” Article III-168(2)(d) demands framework laws establishing measures in the area of “combating trafficking in persons.” However, “smuggling of migrants” might be the more appropriate term in this context as the crucial element of trafficking in human beings is the exploitation of the trafficked person for forced labour or services, slavery or slavery like practices and not the question whether or not that trafficked person illegally

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<sup>194</sup> Euro-Mediterranean Partnership, MEDA, Regional Indicative Programme 2005-2006, in particular pp. 21, 24.

<sup>195</sup> Council Document 15197/02 PESC 553 COAFR 98 MED 48 ACP 165 DEVGEN 187, Africa-Europe Dialogue (Follow-up to the Cairo Summit) – Second Ministerial Meeting Ouagadougou, Burkina Faso, 28 November 2002, Annex 2, Draft Action Plan to Combat Trafficking in Human Beings, especially Women and Children.

<sup>196</sup> Provisional consolidated version of the draft Treaty establishing a Constitution for Europe as set out in Document CIG 86/04 of 25 June 2004, see in particular Articles II-5, III-168(2)(d), III-172(1).

crossed a border.

Fourthly, the financial perspectives for the EU between 2007 and 2013 began to be discussed during the spring 2004.<sup>197</sup> Under the heading “Giving full content to European Citizenship”, migration and security issues are taken into account as priorities for the enlarged EU.<sup>198</sup> The Commission also touched upon the issue in its Communication “Area of Freedom, Security and Justice: Assessment of the Tampere programme and future orientations”.<sup>199</sup> The Communication stresses the justice and home affairs dimension as one of the Union’s priority policies.<sup>200</sup> Furthermore, the Commission points out that the new financial perspective also reflects the growing importance of Justice and Home Affairs matters, as the establishment of the area of freedom, security and justice is the central element of the new heading “European Citizenship.”<sup>201</sup> “Future financial instruments will be of a significant total amount – and will complement the existing and future legal instruments, notably by strengthening the operational aspect of the policies in the field of freedom, security and justice.”<sup>202</sup> This situation offers the opportunity to financially support not only selected innovative projects indicating improved methods to prevent and combat trafficking in human beings, but also sustainable structures providing protection and assistance for trafficked persons as well as appropriate law enforcement capacities specifically targeting the perpetrators in this area of crime. Whereas, logically, in the previous period the emphasis lay on the development of new institutions, structures and mechanisms and the identification of best practices, the challenge now is to consolidate identified successful initiatives and structures. Adequate funding should therefore be made available in order to strengthen the instruments and mechanisms that have been created over the last years but would not be able to survive without further financial EU input. Particular attention should thereby be paid to civil society organisations that provide protection and assistance to trafficked persons.

Fifthly, the conclusions of the Tampere European Council on 15-16 October 1999, setting the agenda for justice and home affairs, will be evaluated and, most likely, a “Tampere II-agenda” will be elaborated during the second half of 2004. The Tampere-Communication addresses trafficking in human beings in the context of a “genuine common policy of management of migratory flows”<sup>203</sup> as well as “action to prevent and combat terrorism and specific forms of crime.”<sup>204</sup> The Commission is right in pointing out that “with regard to trafficking in human beings, particularly women and children, preventive and enforcement action must continue to be combined.”<sup>205</sup> On the other hand, by addressing “a stronger fight against trafficking in human beings and the development of an effective policy on

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<sup>197</sup> Communication from the Commission to the Council and the European Parliament. Building our common Future. Policy challenges and Budgetary means of the Enlarged Union 2007-2013, COM(2004) 101 final/2, 26.2.2004.

<sup>198</sup> COM(2004)101final/2, p. 19.

<sup>199</sup> COM(2004) 401, 2.6.2004.

<sup>200</sup> COM(2004) 401, 2.6.2004, p. 4.

<sup>201</sup> COM(2004)101, 10.2.2004, pp. 4, 7.

<sup>202</sup> COM(2004) 401, 2.6.2004, p. 16.

<sup>203</sup> COM(2004) 401, 2.6.2004, Chapter 2.4.

<sup>204</sup> COM(2004) 401, 2.6.2004, Chapter 2.10.

<sup>205</sup> COM(2004) 401, 2.6.2004, p. 15.

returns and readmission”<sup>206</sup> in the same sentence the impression may be given that trafficked persons are above all illegal migrants, who should primarily return to and be readmitted by their countries of origin. Presuming that this is not the Commission’s intention, the Group recommends adapting the language in communications and other political papers in order to undoubtedly underline the Commission’s commitment to a holistic and integrated, human rights-based approach.

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<sup>206</sup> COM(2004) 401, 2.6.2004, p. 10.

## Explanatory paper 3

### Meaning and consequences of a human rights based approach

#### The meaning of a human rights based approach

The Brussels Declaration acknowledges that trafficking in human beings constitutes a serious violation of human rights and expresses the need for a human rights based approach to trafficking.

Important instrument in the development of such an approach are the Principles and Guidelines on Human Rights and Human Trafficking elaborated by the UN High Commissioner on Human Rights.<sup>207</sup>

Underlying a human rights based approach is the recognition that trafficking in human beings is both a cause and a consequence of human rights violations. Taking into account the inextricable link between the prevention and eradication of trafficking in human beings and the protection of the human rights of trafficked persons, as well as to ensure that trafficking is not simply reduced to a problem of migration, public order or organised crime, the Experts Group considers the integration of a human rights perspective fundamental for the analysis of the phenomenon of trafficking and the development of an effective response to it.<sup>208</sup>

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<sup>207</sup> United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002.

<sup>208</sup> See for an extensive discussion of the relation between human rights protections and the repression of trafficking in persons. See also: *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, ECOSOC, Commission on Human Rights, Fifty-sixth session, 29 February 2000 (E/CN.4/2000/68); *Position paper on the draft protocol to Prevent, Suppress and Punish Trafficking in Women and Children, submitted by the Special Rapporteur on Violence Against Women*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 20 May 1999 (A/AC. 254/CRP.13); *Remarks by the Special Rapporteur on Violence Against Women, Ms Radhika Coomaraswamy*, to the Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Fourth session, Vienna, 7 July 1999; *Message from the UN High Commissioner for Human Rights, Mary Robinson*, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Fourth session, Vienna 28 June-9 July, 1999; *Informal Note by the United Nations High Commissioner for Human Rights*, to the Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 1 June 1999 (A/AC.254/16); *Note by the International Labour Organization for the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the additional legal instrument against trafficking in women and children*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Fourth session, Vienna 28 June-9 July 1999, 16 June 1999 (A/AC.254/CRP.14); *Note by the Office of the United Nations High Commissioner for Human Rights, The United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, to the Ad hoc Committee on the Elaboration of a

Essentially, a human rights approach integrates the norms, standards and principles of the international human rights system into legislation, policies, programmes and processes. Essential elements of a human rights based approach are the observance of human rights norms, including the principle of non-discrimination, standard setting and accountability, recognition of human beings as subjects and holders of rights, including the right to security, participation and the integration of a gender, and where applicable, an ethnic perspective. More generally, it could be said that a human rights approach places people and their human rights at the centre of the agenda.

As such a human rights based approach offers a conceptual and normative framework that should give direction to the further development of policies in the area of trafficking. This is in line with the emphasis put in the EU on the respect for and the protection and promotion of human rights, democracy and the principle of non-discrimination. At the same time it offers a framework to monitor and evaluate anti-trafficking policies, practices and actions for their real and potential impact on trafficked persons and other groups concerned.

### **Observance of human rights norms**

It is a recognised principle of international human rights law that States have a duty to respect and protect the rights of individuals to exercise their human rights. This obligation includes the duty to investigate alleged violations of human rights, to punish violators of human rights and to provide effective remedies to victims of human rights violations.<sup>209</sup> All elements carry equal value and are prerequisites in order to achieve a balanced and effective approach to trafficking.

In addition, measures should comply with existing obligations of States under international and European human rights law as set forth in the major human rights instruments – in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination of Women, the Convention on the Rights of the Child and the European Convention on the Protection of Human Rights –, the EU Charter on Fundamental Rights and other standard setting documents, including respect for the principle of non-refoulement.<sup>210</sup> At a minimum measures must not conflict with or

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Convention against Transnational Organized Crime, Eighth session, Vienna, 21 February-3 March 2000, 8 February 2000 (A/AC.254/27).

<sup>209</sup> See *inter alia* Art. 2 of the International Covenant on Civil and Political Rights (ICCPR) and Artt. 2 and 3 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

<sup>210</sup> Also relevant in this context are: the *International Convention on the Protection of the Rights of All Migrant Workers and their Families*; the *Slavery Convention*; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery*; the *Forced Labour Convention*; and the *Abolition of Forced Labour Convention*. See also: the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 of 29 November 1985; and *Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice*, adopted by General Assembly Resolution 52/86, 2 February 1998.

otherwise undermine human rights law.

Guiding principle is that anti-trafficking instruments should not only be consistent with the respect for and the protection of human rights but should also not create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and practices that further undermine or adversely affect the human rights of persons, in particular the rights of trafficked persons, women, migrants, internally displaced persons, refugees and asylum-seekers. As stated by the UN High Commissioner on Human Rights, Mary Robinson: “That [...] is the only way to retain focus on the trafficked person: to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organised crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously held rights of individuals working in prostitution”.<sup>211</sup>

### **Principle of non-discrimination**

A fundamental rule of international human rights law, which is of particular importance to the situation of irregular or illegal migrants and other vulnerable or marginalised groups, including prostitutes, is respect for the principle of non-discrimination.<sup>212</sup>

Following this principle, it should be ensured that anti-trafficking measures, especially, but not only, those aiming at prevention, cannot be used to directly or indirectly discriminate against women or other groups, or adversely affect the human rights of individuals as set forth in the major international human rights instruments, such as the freedom of movement, the right to leave one’s country, the right to migrate legally or to earn an income.

Moreover, it must be ensured that trafficked persons are not subjected to discriminatory treatment in practice or law and that protections for trafficked person are applied without discrimination, particularly with respect to gender, ethnicity, immigration status, and/or the fact of a trafficked person’s having been trafficked formerly or having participated in the sex industry.

### **Standard setting and accountability**

Accountability means that it is not only a duty of governments, intergovernmental bodies and other relevant actors to make every effort to fulfil their human rights obligations, but

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<sup>211</sup> *Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime, Fourth session, Vienna 28 June- 9 July 1999.*

<sup>212</sup> See *inter alia* Artt. 2 and 7 of the Universal Declaration of Human Rights (UDHR), Artt. 2 and 26 of the ICCPR and Art. 2 of the International Covenant on Economic, Social and Cultural Rights (ICESR), but also the Statute of the International Criminal Court, Art. 21(3).

also that mechanisms should be in place to ensure accountability. Human rights commitments that are relevant in the context of trafficking include the (positive) obligation to prevent and combat trafficking and to protect, assist and provide redress to the victims, as well as the (negative) obligation to ensure that measures do not adversely affect or infringe upon the human rights of the groups affected. Moreover, it includes the duty to remedy the underlying human rights abuses that create the conditions for trafficking.

Accountability can more easily be determined by the translation of human rights commitments into concrete standards and by setting out goals and specific targets and benchmarks, along with indicators by which progress can be measured. Important aspects are the allocation of adequate resources and the gathering of comprehensive and accurate data which can form the basis for more effective policies and which can be used to formulate benchmarks and indicators of progress. Another important aspect is the establishment of mechanisms to monitor and evaluate the human rights impact of anti-trafficking laws, policies and programmes. NGOs and grassroots organisations play an important role in this process.

### **Recognition of human beings as subjects and holders of rights**

Within a human rights approach human beings are seen as subjects and holders of rights, including the right to protection from criminal exploitation. This recognition implies the identification of the human rights claims of right-holders along with the corresponding human rights obligations of duty-bearers, as well as the identification of immediate, underlying and structural causes of human rights violations. Corresponding strategies, while respecting the vulnerable position of trafficked persons, aim for empowerment, participation and self-organisation of the people concerned.

In the context of trafficking this principle implicates that:

- trafficked persons are seen as subjects accorded with rights. This includes the identification of minimum standards of treatment to which all trafficked persons are entitled as well as the identification of the corresponding responsibilities of state bodies;
- trafficked persons are seen as active actors seeking to change their situation as well as victims of a crime and a serious human rights violation who are entitled to effective remedies;
- assistance and support should go together with strategies which aim for empowerment, emancipation and participation of trafficked persons and other affected groups;
- strategies aim to remedy the underlying human rights abuses that create the conditions for trafficking.

## Trafficked persons as holders of rights

A human rights approach opposes the instrumentalising of trafficked persons. The right to protection, assistance and redress of trafficked persons as victims of a serious human rights violation is considered a right in its own based on international human rights law, and is not made contingent upon the willingness or capacity of the trafficked person to cooperate in legal proceedings and/or to give evidence. Such recognition implies the identification of minimum standards of protection and assistance to which *all* trafficked persons are entitled, regardless of their assistance to or value for the prosecution. One of the basic elements of such a standard is the non-criminalization of trafficked persons for crimes due to their being trafficked.

Moreover, the absence of adequate protection and assistance may prevent trafficked persons from reporting to the authorities and may inadvertently expose trafficked persons to further trauma and the risk of reprisals by traffickers, including the risk of being re-trafficked. A neglect of victim issues is therefore not only not in accordance with international human rights law, which clearly provides that victims of human rights violations such as trafficking should be provided with access to adequate and appropriate remedies,<sup>213</sup> but may also compromise the effective implementation of anti-trafficking legislation.

Recognition and protection of the rights of trafficked persons, on the other hand, provide an important incentive to trafficked persons to report to the authorities and act as witnesses, and thus contribute significantly to achieving law enforcement objectives.

A critical component in the effective detection, investigation and prosecution of traffickers is the willingness of trafficked persons to assist in prosecutions. This willingness is strongly related to the protection of the safety and respect for the privacy of trafficked persons, the availability of assistance, their general treatment by the police and judicial authorities, and the risk they incur of being deported and/or arrested, detained or prosecuted for offences arising out of their status of being trafficked, such as illegal border crossing, involvement in the sex industry or the use of false documents.

Of special importance is the issue of confidentiality of legal proceedings relating to trafficking in persons. The right to privacy is enshrined in international human rights law. Its protection is particularly important in trafficking situations where the continued safety of the trafficked person must be a paramount consideration.

Areas of victim assistance and protection include the right to pursue criminal, civil or other actions against traffickers/exploiters; procedural protections in court cases; availability of witness protection and legal assistance; access to fair and adequate remedies, including compensation; the provision of temporary and, if necessary,

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<sup>213</sup> See e.g. Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly Resolution 40/34 of 29 November 1985; Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, adopted by General Assembly Resolution 52/86, 2 February 1998.

permanent residence status; access to safe and adequate shelter; the availability of social, psychological and health care on a voluntary and confidential basis; and their safe and, to the extent possible, voluntary return to their country of origin.<sup>214</sup> Important to note is that the right to a safe return includes the right *not* to be repatriated if such repatriation would expose the trafficked person to a real risk of further human rights abuses, such as the risk of reprisals by the traffickers, of being re-trafficked, of oppressive or discriminatory measures from the authorities and/or of being subjected to inhuman or degrading treatment.

In the case of child victims of trafficking full account needs to be taken of their specific needs, rights and vulnerabilities, in accordance with the relevant conventions.<sup>215</sup> Their best interest should be considered paramount at all times.

### **Trafficked persons as subjects**

Trafficked persons are seen as subjects and active actors seeking to change their situation. Strategies aim at giving them the power, capacities and access needed to take back control of their lives and towards facilitating their speaking up for their own rights. Participation of the groups affected is seen as conditional to the development of effective change strategies. Essential questions are how do they define the problem, what are their problems, motives and needs and in what do they want to be protected?

### **Prevention**

Within a human rights based approach, preventive measures should primarily aim at strengthening the position of the affected groups, in particular women and including persons engaged in the sex industry, and at providing them with the legal instruments to defend themselves against human rights abuses along with the right to be defended by the state against coercion and exploitation. Measures that can add to the marginalisation or stigmatisation of the concerned groups must be avoided, as they can easily be at odds with the protection of human rights and may create or exacerbate existing situations that cause or contribute to trafficking in persons.

Preventive strategies are based on an analysis of the factors that increase vulnerability to trafficking, including economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women, gender discrimination and

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<sup>214</sup> See for a comprehensive survey of the necessary safeguards: UNHCHR, *op. cit.*; and Global Alliance Against Trafficking in Women (GAATW), Foundation against Trafficking in Women (STV) and the International Human Rights Law Group (IHRIG), *Human Rights Standards for the Treatment of Trafficked Persons*, 1999 (<http://www.inet.co.th/org/gaatw/SMR99.htm>).

<sup>215</sup> Convention on the Rights of the Child; the Optional Protocol to the Convention of the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography; and the ILO Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, No. C 182 (1999).

other forms of discrimination; legal factors such as a lack of appropriate legislation and corruption in the public sector; and international factors such as the growing feminisation of labour migration on the one hand and the increasingly restrictive immigration policies of recipient countries on the other hand in combination with a demand for cheap, unprotected and exploitable migrant labour and services.

## **Participation**

A human rights approach requires a high degree of participation and co-operation of all actors involved, including relevant sectors of civil society, in particular national human rights institutions and NGOs dealing with trafficked persons, as well as the relevant groups in the target industries for trafficking, including those being exploited (directly, through their advocates and through organisations of civil society). An important aspect of participation is accessibility, including access to policymaking processes, information, resources and redress or complaint mechanisms. Building links and partnerships between governmental agencies, relevant sectors of civil society and international organisations forms an essential part of the development, implementation and evaluation of anti-trafficking measures.

## **Integration of a gender and ethnic perspective**

Although trafficking affects both men and women, it is not a gender-neutral phenomenon. Women are affected in different ways than men in terms of the sectors into which they are trafficked, the forms of abuse they suffer and the consequences thereof. To understand the specific ways in which women are affected, trafficking should be placed in the perspective of gender-inequality, traditional female roles, a gendered labour market and the worldwide feminisation of poverty and labour migration. Also in other aspects, trafficking is not a “neutral” phenomenon, but is closely related to and generated by discriminatory practices and unequal power relations, including those based on race or ethnic background. The integration of a gender and ethnic perspective is therefore essential to the analysis of trafficking, the development of counter policies and the provision of protection and assistance.

In connection to the need to include a gender and ethnic perspective, it must be noted that current counter trafficking policies have tended to exclusively address the trafficking of women into the sex industry, thus neglecting trafficking affecting men and trafficking into other sectors. This has resulted in a serious lack of knowledge, legislation and appropriate services for men and women trafficked into other industries, and for interventions to concentrate on social assistance rather than positively claimed rights. From a human rights perspective it is imperative to overcome these limitations.

## Explanatory paper 4

### Combating trafficking through protection of migrants' human rights

In the conclusions of the European Council Meeting in Tampere EU-Member States regarding the establishment of an area of freedom security and justice stated that there is a requirement to develop common policies on asylum and migration. "These common policies must be based on the principles which are both clear to our own citizens and also offer guarantees to those who seek protection in or access to the European Union" (Conclusion 3). The need for a "more efficient management of migration flows at all their stages" (Conclusion 22) as well as the necessity to secure "the rights of the victims (...) with special emphasis on the problems of women and children" (Conclusion 23) were expressed in this occasion.

The European Commission, in its Communication on immigration, integration and employment of June 2003, predicts the necessity of labour migration to the EU as part of a response to fill economic and demographic gaps and in order to meet the objectives of the Lisbon European Council of making the EU the most competitive and dynamic knowledge-based economy in the world, but also to deal with growing irregular migration pressures onto the EU and the alarming involvement of organised smuggling and trafficking crime networks. It also calls for comprehensive integration policies towards legally admitted migrants.

The European Thessaloniki Council (June 2003) stressed the need for exploring legal means for third country nationals to migrate to the Union, taking into account the reception capacity of the Member States, within the framework of enhanced co-operation with the countries of origin. It also called for an analysis of the labour markets in the EU, especially the relationship between the legal and illegal labour markets and the possibility of establishing quotas for entry of third country nationals, to countries that cooperate with regard to readmission, should be examined. A set of measures relating to the control of irregular migration and the countering of traffickers and smugglers were also decided upon.

Most recently the European Commission, in its communication on Tampere June 2004, has reiterated the importance of a managed migration policy allowing regular migration, and an integrated approach to combating trafficking.

However, in reality States, and European policy responses to trafficking have tended to concentrate on identifying trafficking as a crime, and apprehend, disrupt and punish traffickers (Tampere Conclusion 48). Hence the Palermo Protocol provides for the mandatory criminalization of trafficking and provision of penalties, with discretionary provision for assistance and protection of witnesses. European response has reflected this,

with most recently the Directive for Short Term Residence Permits, within a migration framework, only applying to those who assist in criminal proceedings.

Yet to effectively combat trafficking, as the Brussels Declaration recognises,<sup>216</sup> the whole spectrum from prevention to prosecution and protection needs to be addressed. Thus, the underlying factors, including the undeniable increasing demand for (labour) migration, must be addressed. Strategies that only focus on law enforcement are unlikely to be effective without addressing the requirement for migrant labour.

In parallel to this the exploitation that is the end result of trafficking also needs to be addressed. The majority of trafficked persons work in the informal sectors, which with globalisation and trade deregularisation is growing. Policies to prevent exploitation in the workplace, both formal and informal, need to be addressed in combating trafficking.

### **Migration a solution for those seeking for a better life**

There are estimated to be over 120 million migrant workers and family members in the world today,<sup>217</sup> with an increase in recent years.<sup>218</sup>

The growing inequality of wealth within and between countries is increasing, leading more people to make the decision to migrate in order to seek a better life abroad. Instead of tackling xenophobic reactions to the issue of migration, many governments have sought political advantage by promoting more restrictive immigration policies. Such policies only reduce the opportunities for regular migration, thereby providing greater opportunities for traffickers to operate. With the increasing informalisation of the global economy there is greater flexibility of labour markets – both the movement and deskilling of labour. Yet governments in developed countries are generally reluctant to publicly recognise their dependency on both skilled and unskilled migrant labour.

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<sup>216</sup> Brussels Declaration “The comprehensive European policy against human trafficking needs to address the entire trafficking chain, comprising countries of origin, transit and destination alike, targeting recruiters, people who transport the victims, exploiters, other intermediaries, clients, and beneficiaries. Also the development of a broader policy on migration management can offer a substantial contribution in reducing and preventing trafficking in human beings. Furthermore, root causes of trafficking, not least including unemployment, poverty, gender inequalities, including the status of girls, social and cultural attitudes, and the demand for sexual services, cheap labour and other forms of exploitation must continue to be at the forefront of the long-term efforts to fight human trafficking effectively. A global approach to trafficking must address all forms of exploitation, including sexual exploitation, labour exploitation, in particular child labour, and begging.”

<sup>217</sup> ILO, *Facts on Migrant Labour*, Geneva, 2003.

<sup>218</sup> The number of people residing outside their home country has increased from 105 million in 1985 to 175 million in 2000 (IOM, *World Migration*, Geneva, 2003, p. 7).

## **Ageing population in the EU – Increasing demand for migrant workers**

Low fertility rates and longer life expectancy means that most developed countries have an ageing population. This will lead to labour shortages, skills shortages and an increased tax burden on the working population in order to support and provide social benefits to the wider population. Old age dependency ratios, already at breaking point in many Organisation for Economic Co-operation and Development (OECD) countries at a ratio of five to one, will fall to three to one over the next 15 years.<sup>219</sup> The proportion of adults over 60 in high-income countries is expected to increase from eight per cent to 19 per cent by 2050, while the number of children will drop by one third.<sup>220</sup>

Even if European governments rigorously promote policies to put more people into the job market (e.g. discouraging early retirement or improving child care facilities) this will not change the fact that their economies will become increasingly dependent on migrant workers in the coming years

## **Increasing informalisation generates increased vulnerability**

The demand for workers is not only in the skilled sector, but also in the unskilled, and often unregulated sector. In the skilled sector shortages are more likely to be met through managed migration (quota entry systems for doctors, professionals, etc.). As skilled, regulated migrants, these workers are in a strong legal position to negotiate their terms and conditions, and unlikely to face exploitation. Governments are likely to welcome their managed migration as a means to meet skill shortages, with little risk of public perception of a drain on countries resources.

However the demand for workers in unskilled occupations such as domestic service, agriculture, or entertainment sectors is increasingly likely to be met by migrant workers, as available national workers leave these usually unskilled and low paid occupations for work with better terms and conditions. The resulting shortage is filled by migrant workers. In these unskilled sectors, there is often little regulation or organisation, and often occupations that are by their nature isolated and not conducive to organisation and collective negotiation (for example domestic service is isolated in the house, or home workers).

Globalisation, and increasing deregularisation of the work force, increases this vulnerability of the unskilled migrant worker. Many previously formal sectors, such as construction, agriculture or transport are becoming increasingly informalised. Some sectors are moving to where labour conditions provide least protection for employees. Other sectors are becoming informal through the use of contractors or sub contractors. In

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<sup>219</sup> There are 32 developed states in the Organization for Economic Co-operation and Development (OECD) (IOM, *op. cit.*, p. 68).

<sup>220</sup> United Nations Populations Division 2002, *World Population Aging 1950-2050*, New York. Quoted in McKinley, B., *International Migration and Development – The Potential for a Win-Win-Situation*, presentation at G77 Panel for Migration and Development, New York, 20 June 2003, p. 7.

all these scenarios organisation of workers, and enforcement or claiming of labour standards is increasingly difficult. Labour is cheap, expendable and exploitable, and so vulnerable to trafficking.

## **Feminisation of migration**

Traditionally women have had less access to education and skilled labour markets, and women's work has been down graded and labelled as 'unskilled'. With the opening up of traditional societies women have become more aware of opportunities, and wanted to seek positive improvements to their situation, often through migration. At the same time it appears that shrinking traditional labour markets (for example with the break up of the CIS countries) have disproportionately affected employment opportunities for women.<sup>221</sup> The break down of traditional society roles has seen increasing numbers of women becoming responsible for the family income, and seeking to maintain this through remittances from migration.<sup>222</sup> IOM estimates that 50% of migrants are female. Yet migration policies and opportunities are male orientated. Female migrants are less likely to have access to established migration routes, with the accompanying knowledge and networks.

Women are more likely to migrate into unskilled, unregulated sectors, in particular sex work and services and domestic service, two sectors that are often not seen as 'work', that have minimal protection or regulation, with workers often physically isolated. As Anderson and O'Connell Davison<sup>223</sup> note "(...) we need to recognise that trafficked/not free persons are very often exploited in contexts that are socially imagined to involve non-market relations, or that are viewed as occupying some twilight zone between market and non-market relations. Thus domestic work is not fully understood as 'work' when it takes place in private households (...). Meanwhile, 'prostitute' is often taken to refer to a category of person (a sub-person) rather than a category of 'worker', and as such cannot be imagined as a rights-holder. This returns us to the immensity of political problems that surround questions about 'trafficking', for there is no international consensus as to how, if at all, the various areas of social and economic life in which trafficking and related abuses occur should be regulated by the state, or whether market relations should apply in these areas".

Thus in particular women's inability to access regulated migration, and their propensity to work in unregulated unskilled sectors, leaves them more vulnerable to trafficking and exploitation. However when we talk about the need for gender sensitive migration policies, as a response to trafficking, we need to consider the extent to which States see the acceptance of informal sectors such as sex work and services, or domestic work, as part of

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<sup>221</sup> Scanlan, S., *Combating Trafficking through Migration*, cited in Taran, P., *Getting at the Roots. Stopping Exploitation of Migrant Workers by Organized Crime*, ILO, Paper, Turin, February 2002.

<sup>222</sup> "Odyssee nach Schengenland", in *Die Zeit*, No. 3, 8 January 2004. In the year 2001 the estimated amount of remittances of regular and undocumented migrants to the developing countries was 60 billions US \$, 20% more than the development aid of the developed countries.

<sup>223</sup> Anderson, B. and J. O'Connell Davidson, *Trafficking. A Demand Led Problem? A Multi-Country Pilot Study*, Save the Children Sweden, 2002, p. 54.

the market economy that requires regulation, and protection.

### **Managed migration as a contribution to economic and social development**

The demand for migrant workers will be filled by irregular migration unless policy makers recognise that it is in their national interest to facilitate and manage this process. Countries of destination benefit from the contribution migrants make to the economy through their work, their innovation and their tax contributions. If channels for regular migration were opened up, migrants would not have to put themselves in the hands of smugglers and traffickers and would also be in a better position to defend their labour rights in the receiving country. Governments in countries of origin could also better manage the migration process in order to make sure it contributes to, rather than undermines, their own country's economic and social development.

Uncontrolled migration can have a negative impact on developing countries, particularly those that already have significant problems in terms of education, adult literacy, nutrition, child mortality, and loss of social cohesion and social relationships. These countries can ill afford to lose their most skilled professionals to satisfy recruitment shortages in developed countries and must try to ensure that migration is planned and contributes to sustainable development.

Jointly developed migration programmes between countries of origin and destination can maximise the positive impact of migration on development while limiting depletion of skilled labour in countries of origin ("brain drain"). Such programmes would include the option of short-term migration and of return to the country of origin. They may also include training to enhance the migrants' skills base while abroad and to facilitate the sharing of information, contacts and expertise with local staff when they return. They may also contain agreements on how to maximise the impact of remittances in order to promote long-term development in the country of origin.

Managed migration policies also need to consider how to manage long-term migration for countries of destination. Short-term migration can often be unsatisfactory, in removing workers who have developed appropriate skills and settled in countries of destination. For both the migrant and employer, countries should recognise the possibility for long-term migration for those who have settled in countries of destination.

### **The effect of restrictive migration policies on trafficking**

As noted above, states policies in promoting immigration controls and reducing opportunities for regular migration, have not been effective in preventing migration. Rather they have had the effect of creating a market for irregular migration, often as organised serious crime, through trafficking and smuggling of people. Fewer opportunities for legal migration, in combination with strong push- pull factors, have led people to use ever desperate means to migrate, and to being vulnerable to both smuggling and

trafficking.

It is important to understand the difference between smuggling and trafficking, although on the ground they can often be difficult to distinguish, and smuggling can change into trafficking. In accordance with the Palermo Protocol trafficking goes beyond the simple facilitation of illegal border crossing that occurs with smuggling, to involve human rights abuses such as forced labour, exploitation, with the use of threats, force, etc. As such trafficked persons are victims of crime.

In his symposium “Getting at the Roots”<sup>224</sup> Patrick Taran examines vulnerability to trafficking rather than smuggling. Research seems to show that there is a greater vulnerability to trafficking where there is lack of access to regularized migration routes, lack of experience of migration between countries, and lack of regulation of the labour market. Thus in Europe a large proportion of trafficking is reported from Eastern European Countries such as Moldova, Romania and Albania. Prior to the opening of borders to accession countries large numbers of trafficked persons were reported from Poland, Ukraine and similar countries. With opportunities for more formalised migration from these countries, numbers of trafficked persons from these countries appear to have decreased.<sup>225</sup>

As the ILO states “ultimately labour trafficking would not take place if job seekers had more freedom of geographical movement and freedom of access to employment. Smuggling occurs because borders have become barriers between job seekers and offers. Trafficking occurs not only when borders are barriers to labour supplies meeting demands, but when no knowledge is available about proper migration channels, when employment is itself illegal and/or underground, and where conditions of work much worse than legal minimums are tolerated or ignored”.<sup>226</sup>

### **The need for transparent regulated migration policies**

Legal migration schemes can also increase vulnerability to trafficking and forced labour, when restrictive conditions are attached. For example, Israel provides a visa scheme for migrant workers. It is illegal to charge migrant workers for job placement in Israel, and the work permit is bound to a specific employer. The reality of this scheme is that most workers pay between \$2000 and \$15000 to employment agencies for a permit. They are bound to remain with their employer, and so cannot complain about exploitative labour practice. If they leave the employment, they are deported. An estimated 90% of employers in agriculture and construction retain the employees’ passport.<sup>227</sup> However the visa requires the worker to stay with the original employer. Similar provisions in the Gulf States effectively bind domestic workers to their employers.

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<sup>224</sup> Taran, P., *op. cit.*

<sup>225</sup> Scanlan, S., *op. cit.*

<sup>226</sup> ILO, *Stopping Forced Labour: Global Report*, Geneva, 2001.

<sup>227</sup> Ka. LaOved, *Tel Aviv*, Presentation to Stability Pact, Belgrade, 23.03.04.

Legal migration schemes need to be open and accessible to all and avoid situations of dependency. Agencies facilitating migration should be regulated. Visas should not tie an employee to a particular employer or type of employment. Fees for providing work permits or visas should be clear and reasonable. Travel, visa and work permit documents should remain the property of the employee, and legislation should make retention of these documents by others illegal.

Safe migration needs to be promoted in origin countries. For many, migration is a survival strategy; for others, it is an opportunity to improve their lives; for still others, it is part of traditional migratory routes (for example young people leaving home to seek jobs). In this context, awareness raising campaigns of the dangers of migration and trafficking have limited impact. Trafficking and exploitation are less likely to occur where established migration routes exist, with accompanying knowledge and contacts. States should therefore promote information about safe migration, for example through education, youth exchange programmes, clear processes to facilitate migration and regulated employment/travel agencies.

### **Trafficking isn't just about border control, labour standards need to be enforced**

Policy responses to trafficking have tended to concentrate on the movement aspects of the crime. However, the true abuses that occur in trafficking are not the movement across borders, but the exploitative work conditions that trafficked person end up in. Thus while addressing the issue of managed migration can attack vulnerability to trafficking, and the very clear opportunities for trafficking that these policies create, the exploitation of abusive labour practices also need to be tackled by regulation of sectors into which people are vulnerable to being trafficked.

Although illegal migrants are more likely to be vulnerable to trafficking, and face more severe exploitation, all irregular migrant workers, even if they have initially willingly or legally crossed borders, are vulnerable to forced labour exploitation. ILO research initial findings are showing vulnerability to forced labour for persons trafficked within the Balkans, the CIS and Germany. They estimate as many as 20% of irregular migrants in the CIS has at some stage been locked up or exposed to some form of physical constraint.

The effect of the increasingly globalised economy is that both employment, and labour, can and will easily move with market forces. While some sectors are tied to a particular location because of demand factors, others will move to locations that provide the best economic opportunity. Often this will be where there is least regulation. In particular in the unskilled sector the migrant worker will follow – for many migrant workers their principle skill, that makes them attractive to employers, or indeed enables them to survive, is their ability to migrate to labour markets. Trafficking is most common in the unregulated sector.

In protecting migrant labour from trafficking therefore it is not only necessary to enable

safe, formalised migration. Accompanying this must be the enforcement of labour standards, with supporting inspections. This is most important in the irregular, unorganised or informal sectors, such as domestic work, in which work, and abuses are often hidden.

Supporting of labour standards need to occur on a multi dimensional level. Organisation of workers should be encouraged. Trafficked persons are often isolated, with limited access to either their own peer groups (for example in the case of domestic workers), or external groups (for example Chinese trafficked or smuggled migrants). Such isolation makes organisation difficult, and exploitation easier. Through organisation workers can become aware of rights they are entitled to, and seek to claim them.

Both formal organisation, for example through unionisation, and informal organisation, e.g. through church, community or outreach group, are important. Many European trade unions have been slow to organise in the informal sector, or for unregulated migrant workers. In other countries, unions are accessible to informal and migrant workers.<sup>228</sup> European unions are now beginning to look at these issues.<sup>229</sup> Access and organisation of trafficked persons at informal levels is also important. Often this can occur through community or church based links.<sup>230</sup>

Enforcement of labour standards is increasingly difficult to ensure. Increasing movement of labour, and use of contractors and sub contractors make the labour and supply chain harder to regulate. Policies to encourage companies to take responsibility for their supply chain throughout should be developed. However it remains the responsibility of States to ratify and ensure appropriate labour standards, including the ILO core standards.

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<sup>228</sup> For example, the General Nepalese Federation of Trade Unions (GEFONT) has 15 affiliated unions in sectors as diverse as agriculture, trekking and independent workers. It has three levels of membership – paid up, associate and signature, creating a total membership of over 670,000.

<sup>229</sup> For example German unions are working closely with Polish counterparts in the construction industry to provide advice to Polish workers on rights before they migrate, Dutch unions have opened their membership to sex workers and migrant workers to help them establish their rights, and in the UK the British collective of sex workers has become affiliated to the Trade Unions Congress (TUC).

<sup>230</sup> In the UK, Kalaayan, an organisation of migrant domestic workers, offers a drop in centre facility. Migrant domestic workers from the Philippines come into contact from a variety of sources, the church, local citizen advice bureaus, solicitors referrals, information given by the foreign office to all new migrant arrival, or contacts from other migrant domestics to name but a few. Once at the centre Kalaayan offers a variety of services including legal advice, and advocate organisation through unionisation. In the Philippines, Visayan Forum Foundation makes contact with domestic workers through outreach in the park on Sunday, where most domestic workers congregate. Former migrant domestic workers carry out the majority of initial outreach work.

## Explanatory paper 5

### National Referral Mechanisms

#### Definition of a National Referral Mechanism<sup>231</sup>

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

The basic aims of a NRM are to ensure that the human rights of trafficked persons are respected and to provide an effective way to refer victims of trafficking to services. In addition, NRMs can work to help improve national policies and procedures on a broad range of victim-related issues such as residence and repatriation regulations, victim compensation, and witness protection. NRMs can establish national plans of action and can set benchmarks to assess whether goals are being met.

The structure of a NRM will vary in each country. However, NRMs should be designed to formalize co-operation among government agencies and non-governmental groups dealing with trafficked persons. A NRM usually includes a national co-coordinator, who is often a high-level government official, and a roundtable made up of senior representatives of government agencies and civil society who develop recommendations for national policies and procedures regarding victims of trafficking. NRMs can include ad hoc working groups that deal with specific issues relating to victims. NRMs are likely to be most effective if they are founded on a formal co-operation agreement among the participants – for example, a memorandum of understanding – that sets out the specific role and duties of each participant.

An initial country assessment usually is the first step in establishing a NRM. Such an assessment can help determine which agencies and civil society organisations are the key stakeholders in anti-trafficking activities, which of them should participate in an NRM, what structure might be most effective for the NRM in a particular country, and what issues require most attention.

The assessment may be initiated and carried out either by a government agency or a non-governmental organisation. Based on the results of the assessment, an appropriate NRM structure, membership, and programme of action can be designed and implemented. If a country already has a national council against trafficking or another body or focal point dedicated to combating trafficking, this should also be taken into account when

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<sup>231</sup> The definition of the NRM has been extracted from: Kroeger, T. and J. Malkoc, B.H. Uhl, *National Referral Mechanism. Joining the Rights of Trafficked Persons. A Practical Handbook*, OSCE/ODIHR, Warsaw, 2004, pp. 15-16.

establishing a NRM.

Effective NRMs require good co-operation between government agencies and civil society. Often, victims of trafficking are first identified by law-enforcement personnel, but it is civil society organisations that provide shelter and other services to the victims. Thus, an NRM can be an essential structure for referring trafficked persons. NRMs should develop a dynamic process to ensure participation of civil society.

Internal monitoring, evaluation, and feedback should be a continuing part of NRM activities. Achieving these ends requires the involvement of a wide range of government agencies and non-governmental groups. A NRM should therefore seek to be as inclusive as possible in its membership and participation. Establishing NRMs in countries of destination, transit, and origin can help ensure a comprehensive and inclusive system of support targeted at, and accessible to, all trafficked persons.

A NRM should incorporate:

- guidance on how to identify and appropriately treat trafficked persons while respecting their rights and giving them power over decisions that affect their lives;
- a system to refer trafficked persons to specialised agencies offering shelter and protection from physical and psychological harm, as well as support services. Such support services entail medical, social, and psychological support; legal services; and assistance in acquiring identification documents, as well as the facilitation of voluntary repatriation or resettlement;
- the establishment of appropriate, officially binding mechanisms designed to harmonize victim assistance with investigative and crime-prosecution efforts;
- an institutional anti-trafficking framework of multidisciplinary and cross-sector participation that enables an appropriate response to the complex nature of human trafficking and allows its monitoring and evaluation.

Responsibilities and competencies of all actors involved in the NRM should be defined in such a way as to ensure protection and promotion of the human rights of all trafficked persons in all circumstances. When dealing with victims of trafficking, it is important to remember that all persons within the jurisdiction of a state are entitled to the protection of their human rights regardless of their background, nationality, activities they may have been involved in, or their willingness to cooperate with law-enforcement authorities.

NRMs are not rigid structures but flexible mechanisms that are tailor-made to fit each country's patterns of trafficking cases and its social, political, economic, and legal environment. That is why an NRM is not built from a single, general blueprint but is instead founded on a careful assessment of country-specific needs and conditions.

## **Explanatory paper 6**

### **Model for the establishment of a European Anti-Trafficking Network**

In order to enhance co-operation on the European level and to facilitate contacts as well as exchange of information and experience between Member States and the Commission the Experts Group proposes to establish a European Anti-trafficking Network. Such Network should build on the cooperative structures established on national level, in particular National Referral Mechanisms, and should cover prevention, victim protection and assistance as well as law enforcement and police and judicial co-operation. A Council Decision setting up such Network could be drafted taking into account the example of the European Crime Prevention Network (EUCPN).<sup>232</sup>

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<sup>232</sup> Council Decision of 28 May 2001 setting up a European Crime Prevention Network, OJ L 154, 8.6.2001, p. 1.

## DRAFT COUNCIL DECISION...../.....JHA

of .....

On the setting up of a European Anti Trafficking Network

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on European Union, and in particular Articles 30(1), 31 and 34(2)(c) thereof,

Having regard to the initiative of...,

Having regard to the Opinion of the European Parliament,

Whereas:

(...)

HAS DECIDED AS FOLLOWS:

### *Article 1*

1. A European Anti Trafficking Network, hereinafter referred to as the "the Network" is hereby set up.
2. Network national representatives and a Secretariat shall ensure the proper functioning of the Network in accordance with this Decision.
3. Measures against trafficking in human beings cover all measures that are intended to or contributing to reduce and combat trafficking in human beings. It include work by government competent authorities, criminal justice and law enforcement agencies as well as other public agencies concerned, regional and local authorities, international organisations, the voluntary and non governmental sector, academia, and the public supported by the media. The work include prevention of trafficking in human beings, support and assistance to victims of trafficking and law enforcement and judicial co-operation.

## *Article 2*

1. The Network shall consist of contact points designated by each Member State.
2. Each Member State shall designate not more than three contact points.
3. These contact points shall include at least one representative from the national authorities competent for the prevention of and the fight against trafficking in human beings, preferably from the Governmental Coordinator chairing the National Round Table and one representative from non-governmental organisations involved in the assistance and protection of trafficked persons.
4. Researchers, academics or representatives of the voluntary and non governmental sector specializing in this field, as well as other actors involved in work against trafficking in human beings, may be designated as contact points. Their respective status shall be clarified in accordance with national arrangements. In all instances Member States should ensure that a broad spectrum of actors involved in work against trafficking in human beings are involved through the appointed contact points.
5. The Commission shall also designate a contact point. Europol and Eurojust are associated with the work in matters with which they are concerned. Other relevant bodies may be associated with the work.
6. Each Member State shall ensure that its contact points have sufficient knowledge of at least one other official language of the Union to enable them to communicate with the contact points in the other Member States.

## *Article 3*

1. The Network shall contribute to developing the various aspects of working against trafficking in human beings at Union level and shall support anti trafficking activities at local and national level.
2. On the basis of the Union's acquis so far developed in the field of trafficking in human beings and the Brussels Declaration taken note of by the Council on 8 May 2002, the Network shall in particular:
  - (a) facilitate co-operation, contacts and exchanges of information and experience between Member States and between international, national and non-governmental organisations, as well as between Member States and the Commission, other constituent entities of the Council of the EU and other groups of experts and networks specialising in work against trafficking in human beings;
  - (b) develop a set of minimum standards and benchmarks in the fields referred to in Article 1 to be endorsed by the Council;

- (c) prepare and implement regular rounds of evaluation, if necessary including visits, of the Member States' prevention and fight against trafficking in human beings as referred to in Article 1(3);
- (d) in co-operation with the National Rapporteurs and the European Rapporteur on Trafficking in Human Beings, where applicable, collect and analyse information on existing anti-trafficking activities, the evaluation thereof, including a human rights impact assessment, and the analysis of best practices, and collect and analyse existing data on criminality and on its development in the Member States, in order to contribute to considerations on future national and European measures;
- (e) contribute to identifying and developing the main areas for research and training on trafficking in human beings;
- (f) organise conferences, seminars, meetings and other activities designed to promote consideration of specific matters relating to trafficking in human beings, and to disseminate the results thereof;
- (g) organise activities that stimulate and improve the exchange of experiences and best practices;
- (h) develop co-operation with candidate and applicant countries, third countries and international organisations and bodies;
- (i) provide its expertise to the Council and to the Commission, where necessary and upon request, with a view to assisting them in all matters concerning trafficking in human beings;
- (j) report to the Council on its activities each year, through the competent working bodies, and indicate the areas for priority action in its work programme for the following year. The Council shall take note of and endorse the report and forward it to the European Parliament.

#### *Article 4*

To accomplish its tasks, the Network shall:

- (a) favour a multidisciplinary and human rights based approach;
- (b) be in close contact, through the contact points, with anti-trafficking bodies, local authorities, local partnerships and civil society as well as with research institutions and non-governmental organisations in the Member States;
- (c) set up and operate a website, containing its regular reports and any other useful

- information, particularly a compendium of best practices and an overview of relevant reports and materials;
- (d) endeavour to use and promote the results of projects, relevant for the prevention of and fighting of trafficking in human beings, funded through Union programmes.

#### *Article 5*

1. The Network shall hold its first meeting on...
2. The Network shall meet at least once every six months on the invitation of the Presidency of the Council at that time.
3. In conjunction with meetings of the Network, the Network National representatives, made up of one representative from each Member State designated in accordance with Article 2(3), shall meet to decide on the matters referred to under Article 5(4).
4. The Network national representatives shall decide on the Network's annual programme including a financial plan. They shall, in particular, determine:
  - the priority fields to be examined;
  - the main specific actions to be carried out (seminars and conferences, studies and research, training programmes...);
  - the structure of the website.

They shall also draw up the annual report on the activities of the Network.

The decisions of the Network national representatives shall be adopted by unanimity.

The Network national representatives' meeting shall be chaired by the representative of the Member State, which is holding the Presidency of the Council at the time. They shall draw up their Rules of Procedure, to be adopted by unanimity.

5. The Secretariat for the Network shall be provided by the Commission.
6. The Network Secretariat and its activities shall be financed from the general budget of the European Union.
7. The Secretariat shall be responsible for drafting the Network's annual programme and the annual report on the Network's activities. It shall carry out everyday Network activities involving collating, analysing and disseminating information in liaison with the national contact points. It shall assist the Network members in devising, formulating and implementing projects. It shall establish and maintain the website of the Network. When performing its functions, the Secretariat shall work closely together with the Network National representatives.

*Article 6*

The Council shall evaluate the activities of the Network in the three years following the adoption of this Decision.

*Article 7*

This Decision shall take effect on the day of its adoption.

Done at Brussels,

For the Council  
The President

## Explanatory paper 7

### Balancing data protection and human rights concerns and the interest of law enforcement<sup>233</sup>

#### The use of “restricted notices”

The practice of so-called ‘restricted notices’ protects endangered trafficked persons. Over and above general data protection regulations, “restricted notices” guarantee that data are not transmitted to external third parties.

This practice entails that inside state authorities, the data of the endangered person are used but marked only with an anonymous number, the identity of which is known only to specialist official who treats it as classified information. Where applications are made by external third parties or other authorities, the specialist officer informs the relevant police or witness protection office. They will then examine the compatibility of the application with the interest of protecting the endangered person.<sup>234</sup>

#### Transmission of data between criminal prosecution authorities and counselling agencies

Co-operation agreements must include regulations guaranteeing that the identity of the trafficked person will not be forwarded by the criminal prosecution authorities to counselling agencies without the trafficked person’s agreement. In the same way, counselling agencies must not be pressured to divulge the identity of their clients, or other information relating to them, to the criminal prosecution authorities without the proper authority to do so.

#### Transmission of data in the Schengen Information System (SIS)

The SIS has the capacity to store personal data on persons convicted or “suspected” of involvement in offences.<sup>236</sup> The lack of control over the data by trafficked persons finding her/himself in the system is caused by the *de facto* practical obstacles in contesting the

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<sup>233</sup> This section is a revised version of the Chapter “Fundamental Principles on Data Protection” in Kroeger, T. and J. Malkoc, B.H. Uhl, *National Referral Mechanism. Joining the Rights of Trafficked Persons. A Practical Handbook*, OSCE/ODIHR, Warsaw, 2004, p. 93.

<sup>234</sup> On this issue see § 4 of the German Law for Harmonising Witness Data Protection – Use of data of Persons in Police Witness Protection programmes.

<sup>235</sup> In accordance with limitations set out in Art. 102 of the Schengen Convention, 1990.

storage or accuracy of her personal data on the SIS.

It is possible to obtain access to data stored on the SIS; however, this may only be done upon request and in accordance with the law of the Member State in which the claim is raised.<sup>237</sup> Member states are given wide discretion in assessing the need for such access. This proves a practical impossibility for a trafficked person already repatriated to her country of origin and often unaware of her/his data stored on the SIS. Also, deletion of factually inaccurate or unlawfully stored data is possible on appeal before the relevant court or authority in a Member State, again providing only a legal possibility of appeal, but not a practical one, where the trafficked person has already been repatriated or deported.<sup>239</sup>

Information on an actual or alleged trafficked person could lead to a possible refusal of legitimate entry, residence or employment in the EU in the future. Without a real and not just technical possibility of appeal against the information the trafficked person may in this regard be exposed to long-term consequences, especially in light of the fact that the length of time for which data are stored may vary anywhere from 1 year to 10 years.

In constructing the new SIS II system and to accommodate the information flowing from acceding states, consideration should be given to the drafting of a provision, which would specifically exclude alleged and actual trafficked persons from the SIS database. At the very least, the Schengen Convention should impose a specific obligation on Member States to notify a trafficked person upon request if her/his data are stored in the SIS, putting at least some of the control over the data back into the hands of the trafficked person.

## **Data protection and the media**

While not integral to co-operation agreements, data protection in regard to the media is extremely important. Cases of human trafficking arouse avid media interest. This demands careful evaluation of press freedom on the one hand and the right of the victim to control over their own person data on the other.

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

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

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<sup>237</sup> Art. 109 of the Schengen Convention, 1990.

<sup>238</sup> Artt. 112 and 113 of the Schengen Convention, 1990.

## **Data protection in contact with institutions in the country of origin**

In all cases of contact with institutions from the trafficked person's country of origin, for example embassies for the purpose of acquiring new documents or with the police or public prosecutors in the course of bilateral or international criminal prosecution treaties, it must be borne in mind that there is not always a guarantee that information will not be forwarded (including to associates of the perpetrators) in the country of origin.

Moreover, making it known that a person has been the victim of human trafficking and that they have testified as a witness can have serious consequences for the victim, for example:

- stigmatisation;
- endangerment from perpetrators in the homeland;
- criminal prosecution of the victim in countries where prostitution is illegal.

It is therefore important to be sure that the country of origin in question guarantees an appropriate level of protection in the processing of personal data.

## **Right to silence/right to refuse to give evidence**

An important component in data protection legislation is the trafficked person's trust in the discretion of expert counsellors. This can lead to conflicts, especially between counsellors and the police. While the priority for the counsellor is the stabilisation of the trafficked person, the mandate of the police is criminal prosecution. This may result in the police attempting to access information given by the client in confidence via the counsellors. Regulations are needed to protect counsellors and the affected persons from any obligation to pass on information against the will of the trafficked person.

In order to access help and support, the trafficked person must have protected space in which they can talk about their experiences. The particular situation of trafficked persons makes the establishment of a relationship of trust extremely difficult, since it is precisely through the abuse of the trust relationship that the human trafficker operates.

Given these experiences, and threats from the perpetrators, trafficked persons are highly mistrustful. They are often traumatized and fear reprisals, whether against themselves or their family members, if they trust other people and divulge information about perpetrators. In addition, they fear the consequences of revealing their own illegal status. However, if the counsellor is to be able to assess the client's situation and offer the necessary help, the counsellor must have the full details of the client's story. This means that often the presumed trafficked person will first have to admit to punishable offences (illegal entry to the country, illegal work). This is a prerequisite for explaining resolutions to the client for the situation into which she/he has been forced, as well as the possibility of testifying against the perpetrators.

Psychological stabilization can only be successful where the victim has been fully able to recount her/his story including highly personal details (for example: prostitution, rape). Given her/his fear of stigmatisation this may happen in the counselling agency where the victim trusts the discretion of the counsellor.

In order for the necessary protective measures (witness protection, long term leave to stay in the destination country) to be arranged, the client will have to reveal everything she/he knows about the perpetrators known to her/him and about their threats against her/him.

All these points above require a special relationship of trust between the counsellor and the client. Without the assurance of confidentiality however, the client is left only with a choice between accepting the consequences of telling her/his story or going without help. In revealing the details of her/his story the client will fear the result of the illegal status becoming known, consequent arrest and expulsion and the reprisals threatened by the perpetrators. Faced with this predicament, trafficked persons remain silent as a rule, or else recount their experiences only very selectively.

Experience has shown repeatedly that in these situations the full range of support cannot be made available and, from the perspective of the authorities responsible for criminal prosecution, important witnesses are lost.

This can be avoided where the affected persons alone are in charge of the divulgence of their information, in order to give them control over the possible consequences, especially the degree to which they and their families in the country of origin are endangered.

This requires counselling professionals to have a duty of confidentiality and a right to refuse to give evidence.

### **Counsellors' duty of confidentiality**

The professionals working in counselling institutions have a particular duty of confidentiality. This commitment means that the clients can be sure that the information about their life, which they need to relate to the professional counsellors in order to secure their help, is protected.

### **Counsellors' right to refuse to give evidence**

In addition, counsellors (including interpreters) must possess a comprehensive right to refuse to give evidence, protecting them from being forced to supply investigating authorities or the court with information entrusted to them by clients in the course of their professional duties. Only when both the duty of confidentiality and the right to refuse to give evidence are in place, a relationship of complete trust can be established.

In the drawing up of a right to refuse to give evidence, it should be borne in mind that interpreters involved in counselling discussions must be included.

The following is a possible legal text of a right to refuse to give evidence in criminal proceedings: “Employees or representatives of counselling agencies for victims of human trafficking are entitled to refuse to give evidence concerning information entrusted to them in the course of their professional duties.”

## Explanatory paper 8

### Recommended types of training

#### Training needs

At present, there is a range of training material, developed and published at the international level through the work of UNDP Romania and the Stability Pact via the International Centre for Migration Police Development (ICMPD) in Vienna.<sup>240</sup> However comprehensive, those materials focus mainly on law enforcement and partly on the justice systems (awareness raising). Further, while in the law enforcement part there is a clear distinction between generalist (basic) and specialist levels, there is no such distinction as far as the judiciary is concerned, where these levels should also be recognised – for instance in child protection matters.

Another important aspect is training of all other actors in combating trafficking, such as migration, frontier and consular personnel, labour inspection personnel, international peacekeepers, IOs, IGOs, NGOs, etc. That is the core of the so-called “interagency” or “multidisciplinary” approach, which is the direction in which training efforts should be pointed.

In particular the following needs can be identified:

- Training for multi-agency and national anti-trafficking co-ordination teams at the policy level, with a view to fostering the development and implementation of comprehensive, coordinated and multi-disciplinary national counter trafficking strategies and action plans, and the establishment and support of comprehensive national mechanisms for the identification, referral and assistance of victims.<sup>241</sup> There must also be specific training modules focused on child trafficking;
- Counter-trafficking operations training and the appropriate use/management of proactive, intelligence led investigative tactics;
- Joint training of all actors involved in the specific measures concerned, i.e. for police and prosecutors in anti-trafficking criminal investigations techniques; for prosecutors and judges on the court procedures, or for labour officials and police officers to ensure the monitoring and regulation of private employment agencies as well as the detection of forced labour exploitation;
- Special training programmes on child trafficking for law enforcement personnel and other concerned agencies dealing with trafficked children. Such training should focus on the specific rights and needs of child victims.

Already developed materials (and adapted as necessary) should be used effectively and

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<sup>240</sup> <http://www.icmpd.org/>

<sup>241</sup> See National Referral Mechanism in Chapter 3.7.1 and Explanatory paper 5.

supplemented by new ones that should fill the gaps. The next logical step is delivering that training through a series of national and international seminars and workshops, but also through study visits, exchange of officials, peer training, etc. In all of these the multiplier effect (train the trainer) should be pursued whenever possible.

### **Training for law enforcement officials**

Training for law enforcement officials should aim at strengthening the capacities of law enforcement officers to contribute to the countering of human trafficking (prevent and/or detect cases of trafficking, adequately protect and support trafficked persons, and carry out effective anti-trafficking investigations in line with human rights principles).

The training is needed at the non-specialist level as well as the special investigators level, and should aim at enhancing the overall law enforcement response to the trafficking crime.

The *generalist level training* should target all non-specialist police (including border police and customs officials) of all ranks (recruit and front line). The objective of this training is to release the potential of non-specialist police (front-line and recruit police officers) to:

- provide the initial response to trafficked persons: better identification and treatment/protection of victims;
- contribute to anti-trafficking investigations: low-level counter trafficking intelligence gathering, in support of the special investigators' tasks;
- enhance co-operation with NGOs.

The *specialist level training* should target specialised counter-trafficking investigators that hold specific responsibility for the crime (including prosecutors, as appropriate) and aim to:

- develop the capacity and investigative skills of specialist anti-trafficking investigators;
- enhance co-operation of specialised investigators in the region according to a regional investigative standard.

These two levels of training are complementary and mutually reinforcing. Law enforcement training institutes should be the locus of institutionalised anti trafficking training as part of the general police training curriculum.

### **Training for border guards, customs officials and consular staff**

In addition to prevention of trafficking through border controls – with due respect to the freedom of movement of persons in line with relevant national and international legislation – border guards have a role in monitoring/surveilling suspected traffickers and in identifying missing persons (if recorded in the SIS) and possibly trafficked persons. Particularly with an eye to the identification and appropriate referral of missing and possibly trafficked persons they should be involved in training to support the

implementation of National Referral Mechanisms. Additionally it could be considered that border guards hand out leaflets with pan European hotline numbers to all passengers, including possibly trafficked persons. Specific attention needs to be paid to the identification and proper treatment and referral of possibly trafficked children.

### **Training for judges, prosecutors and attorneys**

In addition to the general awareness raising part, training for this target group should cover: effective implementation of national anti-trafficking legislation, the rights and needs of victims of trafficking during investigation and court procedures, victim protection and assistance during prosecution and trial, specialist investigative techniques, specific aspects of criminal proceedings on trafficking cases, and international judicial co-operation.

### **General training of international military and police peacekeepers and related civilian contractors**

Special anti-trafficking measures as well as training schemes must be in place for international military and police peace-keepers and related civilian contractors. These measures should cover:

- introduction of codes of conduct in the training of employees of international organisations in conflict or post-conflict areas to reduce the demand for cheap and exploitable labour;
- provision of appropriate training on anti-trafficking policies and practices;
- designation of women as formal representatives at peace discussions in post-conflict situations and including them in the new governments;
- known human rights abusers and organised criminals should not be part of governments.

### **Special training for those who deal with trafficked children**

Law enforcement and other officials, NGOs, social personnel and any person that could come in touch or deal with (possible) trafficked children need specific training on the needs and rights of children. On the general level agencies should be trained in identification and referral of possibly trafficked children, child sensitive methods of working and the appropriate standards of care. On the specialist those who deal with children in the context of the criminal justice systems should be trained in the specific procedures that apply to child victims and witnesses, apart from training in child friendly methods of working. Training needs to be given by appropriate experts (i.e. not necessarily state entities) and should be focused not only on the needs, but also on the rights of the child victims of trafficking.

## Explanatory paper 9

### Models of identification procedures

Trafficked persons may be identified either by government actors and law enforcement or by NGOs, local social-welfare organisations, labour unions labour inspections and other labour-related agencies, particularly if they are trained and if a system of referral is in place. In order to build confidence and trust, and to establish contacts with presumed trafficked persons, outreach work, drop-in centres and hotlines should be developed within support systems.

#### Outreach work and drop-in centres

Outreach work is being carried out through so-called fieldwork or street work,<sup>242</sup> often for the purpose of providing health education to persons active in the sex industry.<sup>243</sup> Other forms of street work may be targeted at unaccompanied children.

Outreach work is a crucial element in supporting presumed trafficked persons in the environment in which they are forced to work. A respectful and empathetic approach by social workers, combined with basic information on health promotion and support structures can build trust between the target groups and professionals.<sup>244</sup> This can empower a presumed trafficked person to enter the support structure. Furthermore, outreach work can sometimes enable NGOs to observe and map the phenomenon of trafficking and to conduct needs analyses for its victims.<sup>245</sup>

Apart from the existing ones, which are mostly linked to the sex industry, new forms of outreach work need to be developed by unions and other labour related organisations targeted at the specific sectors in which trafficking is likely to take place, such as construction sites, agricultural labour and the garment industry.

In addition to outreach work, drop-in centres should be established as part of the identification cycle. That is, easily accessible centres in the environments where trafficked persons may work and where people, if they wish so anonymously, may walk in for information, assistance and other services. Drop-in centres could be particularly important

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<sup>242</sup> See for a more extensive description Explanatory paper 10.

<sup>243</sup> See EUROPAP (<http://www.europap.net/>) and TAMPEP (<http://www.europap.net/links/tampep.htm>).

<sup>244</sup> This experience is shared by numerous non-governmental organisations in North America, and in Western and Central Europe. One example can be viewed in *Dortmunder Mitternachtsmission*, Germany (<http://standort-dortmund.de/mitternachtsmission/>).

<sup>245</sup> Regione Emilia-Romagna, *On the Road, Article 18: Protection of Victims of Trafficking and the Fight against Crime (Italy and the European Scenarios). Research Report*, On the Road Edizioni, Martinsicuro, 2002, p. 248.

for domestic workers, which may not be reached through forms of outreach work, due to their isolated position as workers in private households.

## Hotlines

Hotline<sup>246</sup> numbers for trafficked persons and/or for victims of different crimes, including trafficking in human beings, are being implemented through media campaigns. Different types of materials (e.g. leaflets, stickers, info guides, etc.) with basic information on support structures and hotline numbers can be distributed during outreach work, in means of transportation and in potential venues attended by trafficked persons but also by colleagues and the general public, that – as previously underlined – can play an important role in the process of identification and referral.

Specific – tailor-made – information materials should be developed for the different sectors in which trafficking is likely to take place. At present the experience with hotlines is mostly limited to trafficking in the sex industry, it is not yet clear whether they also will be successful in reaching trafficked persons in other sectors. It is also not yet clear whether a general hotline – addressing trafficking in all sectors – would do or whether it would be more effective to establish hotlines per sector. For example, the stigma on prostitution could prevent trafficked persons in other sectors to make use of general hotlines.

## Identification of trafficked persons by law-enforcement and labour authorities

In 2002, research on victim-support programmes in South-Eastern Europe highlighted that only a third of all women presumed to be trafficked for the sex industry were identified by law-enforcement agencies. Moreover, the majority of trafficked women were not referred to support programmes and shelters but were sent to detention centres and prisons in order to be subsequently deported.<sup>247</sup>

There are numerous reasons for this trend:

- trafficked persons are being threatened by traffickers not to contact the police;
- trafficked persons do not trust law-enforcement authorities because of previous experiences and because of their illegal status in the countries of destination;
- trafficked persons are often suffering from post-traumatic stress disorder and – like other victims of torture – they keep silent during initial interrogation by law enforcement about the serious violations they may have suffered;<sup>248</sup>

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<sup>246</sup> See for a more extensive description Explanatory paper 10.

<sup>247</sup> Limanowska, B., *Trafficking in Human Beings in South-eastern Europe: Current situation and Responses to Trafficking in Human Beings in Albania, Bosnia and Herzegovina, Bulgaria, the Federal Republic of Yugoslavia, the Former Yugoslav Republic of Macedonia, Moldova, Romania*, ODIHR/UNICEF/UNOHCHC, 2002, p. 152.

<sup>248</sup> For a comprehensive overview on the psychological state of mind of trafficked women see Animus Association Foundation/La Strada Bulgaria, *Trafficking in Women. Questions and Answers*, Sofia, 2002.

- law-enforcement agencies often lack personnel and appropriate infrastructure – including specialised interpreters – to conduct proper interrogation of presumed trafficked persons. This is particularly true in the case of small police stations confronted with a large number of presumed trafficked persons in the wake of a raid.<sup>249</sup>

This means that questionnaires or lists of indicators, when they are in place and used by law enforcement in order to identify presumed trafficked persons, can be considered as only one tool in clarifying the crime. They often cannot determine conclusively whether a person has been trafficked. Additional measures and training is needed.

As said before, little experience has been gained with the role that labour inspections and other labour related authorities can play in the identification of trafficked persons in other sectors than the sex industry. There is a clear need for training and the development of new methods and materials here.

### **Identification of trafficked children**

Agencies (including law enforcement, social service, health and education agencies, labour inspections, hotlines, out reach workers, etc.) should co-operate and share information to ensure that trafficked children are identified, assisted and, if applicable, appointed a legal guardian, as early as possible. Relying only on initiatives to address the issue at borders has limited effectiveness for two reasons: first the difficulty of establishing the precise relationship between the child and accompanying adult (if accompanied), but most importantly because in many cases the exploitative nature of the relationship between the adult and child only becomes evident once in the country of destination.

Questionnaires or lists of indicators for use by front-line police and border personnel should take into account the specificities of trafficking in children, cover the entire cycle of the trafficking process and relate to the perception of (trafficked) children. In cases where there is a suspicion that the child is a victim of trafficking, the child should be referred to the appropriate child welfare authorities. The latter should be responsible for taking any decision concerning the integration of the trafficked child in the host country, its return to her/his home country or resettlement in a third country, independently from immigration or police authorities.

After placing the child in a safe accommodation, appropriate measures need to be taken for the identification and assistance of the child (e.g. assessing the psychological and physical condition of the child, interviewing the child, contacting the consulate for the child's identification, consulting the database of missing persons, etc.). If the child is accompanied by an adult, the relationship between the child and the accompanying adult

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<sup>249</sup> Southeast European Co-operative Initiative (SECI), *Evaluation report of Operation Mirage. A SECI Effort to Combat Trans-Border Trafficking of Human Beings & Illegal Migration*, Bucharest, 2003, p. 7.

needs to be asserted. The child should be separated from the adult only if this is considered to be necessary to protect the child. In this case measures should be adopted to reduce to a minimum the trauma of the separation and the length of time that the child stays separated from the adult pending the assessment of the relationship between them.

Where the age of the trafficked person is uncertain, due to the absence of papers or to false identity papers, and she/he claims to be less than 18 years of age, the presumption should be that she/he is a child and she/he should be provisionally treated as such. Age assessments should take into account physical, psychological and cultural factors and should be carried out by independent professionals with appropriate expertise. In making an age determination, children should be given the benefit of the doubt, in accordance with current UNHCHR guidelines.<sup>250</sup>

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<sup>250</sup> United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002.

## Explanatory paper 10

### Reflection period and residence status

Prompt assistance and protection measures should not be connected with the direct co-operation of a trafficked person with the criminal justice system. In several cases, in fact, a trafficked person does not have relevant information about the criminal organisation; or the criminals have already been prosecuted; or more likely, initially, she/he is too scared for their own or their relatives' safety to press charges. Nonetheless, these factors do not diminish her/his "victim status" and the need and the right to receive help and support. In fact, a person who is being offered care, a safe accommodation, counselling, contact with other trafficked people who reported their traffickers is keener to press charges. It is thus fundamental to guarantee to victims of trafficking the possibility to join a social assistance programme in the receiving country regardless of their unwillingness or impossibility to file a complaint against the criminals who trafficked and exploited them. A victim of trafficking is a person whose human rights have been violated and as such she/he must be treated and assisted. Finally, a human rights approach is an important means to fight organised crime, since also those trafficked people, otherwise reluctant to contact NGOs or the law enforcement agencies, can provide useful information to carry out investigation against traffickers and exploiters.<sup>251</sup>

At the moment most trafficked persons are very reluctant to report to the authorities, which is one of the reasons why traffickers can act with impunity. Some reasons for this are inherent to the crime of trafficking itself and include fear, dependency, confinement, isolation, threats, blackmail, debt bondage and physical violence. Other reasons, however, can be found in the failure of current policies to ensure trafficked persons a minimum standard of protection and assistance.

Many trafficked persons have no legal residence status. Reporting to the authorities will thus expose them to the risk of arrest, detention and (immediate) expulsion. In addition, trafficked persons might risk criminal charges because of entering, staying or working illegally. When deported, they are likely to find themselves in a situation where they have no means of existence, no possibility to pay back debts they might have incurred to pay the original recruiters, no place to go if they cannot return to their family or community, no medical or other aid, no protection from the authorities against reprisals from the traffickers and no guarantee that they themselves will not be arrested or harassed by those same authorities if they have left the country illegally or have worked in the sex industry. Moreover, deportation does not automatically mean escape from traffickers. The internationally organised character of trafficking means that in many cases traffickers re-

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<sup>251</sup> Regione Emilia-Romagna, *On the Road, Article 18: Protection of Victims of Trafficking and the Fight against Crime (Italy and the European Scenarios). Research Report*, On the Road Edizioni, Martinsicuro, 2002.

establish control over their victims the moment they return to their home country.

In addition, apart from the ordeal of the court case itself, testifying against the traffickers, especially in cases of organised crime, increases the risk of reprisals without any guarantee to the trafficked person that she/he will receive adequate protection either from the state in which the criminal proceedings take place or her/his state of origin. Moreover, testifying heightens the chance that it becomes known in her or his country of origin that she/he has been a victim of trafficking. This may have far reaching consequences for the trafficked person's future perspectives, in particular in cases of trafficking for prostitution.

Under these circumstances, very few persons consider pressing charges or acting as a witness a viable option. As a result, traffickers run an extremely low risk of being caught and prosecuted. Even when caught, chances of a conviction are low due to the unwillingness of victims to testify against them. Conversely, if a victim is provided with appropriate assistance and support that promote her/his safety, well being and trust in the institutions of the hosting country, she/he will be more likely to press charges and give evidence against her/his perpetrators. Therefore, protection of trafficked persons is the cornerstone of effective prosecution of traffickers.

Such protection should not be dependent on the willingness or capacity of trafficked persons to act as a witness. Those victims who do not wish to testify as witnesses – or are not required as witnesses because they possess no relevant information or because the perpetrators cannot be taken into custody in the destination country – require equally adequate protection measures as those who decide to testify against their violators.<sup>252</sup> Under no circumstances should the safety of the trafficked person be subordinate to the needs of the prosecution.

Moreover, protection should not be provided at the discretion of states in each separate and individual case. In order to effectively encourage trafficked persons to report to the authorities, to press charges and act as witnesses, they must know beforehand that they can rely on the state to provide assistance and protection. At this moment, such guarantee is missing in most if not all EU Member States. If states are not willing to guarantee such protection as a right rather than a favour, it will not have the effect intended.

Special attention should be paid to trafficked children, i.e. persons below the age of 18, in that their best interests should be a paramount consideration in all policies and procedures involving them in accordance with the Convention on the rights of the child and other relevant treaties.

Protection should include the following elements.

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<sup>252</sup> UNHCHR, *op. cit.*, Guideline No. 6.

## **Reflection period**

If there is the slightest indication that a person may be a victim of trafficking, a reflection period of not less than three months should be granted. A period of three months is the minimum time frame to ensure that the presumed trafficked person receives appropriate assistance, such as secure housing, psychological counselling, medical and social care, and legal consultation. These measures are pre-requisites for the trafficked person to take back control over her/his life and to consider her/his options, including taking an informed decision on whether to assist in criminal proceedings, to pursue legal proceedings for compensation claims, to enter a social reintegration programme or to immediately return home. In the case of children, extension of the reflection period should be possible.

A stay of deportation removes the fear of immediate deportation. It serves two purposes: first, it allows the trafficked person time to recover and retake control over her/his life, and, second, it enables the effective prosecution of traffickers by encouraging victims to report to the authorities and to act as witnesses. For the authorities, the reflection period enables the identification of the trafficked person, including determining whether or not the person concerned is trafficked indeed.

## **Temporary residence permit**

If the person – both adult or under the age of 18 – is identified as a victim of trafficking, a temporary residence permit, including the right to work, should be granted for a period of at least six months with the possibility of renewal, regardless of the victim's willingness to co-operate as a witness and regardless of whether perpetrators are prosecuted. Ground for granting such temporary residence permit should be, separate and apart from the trafficked person's willingness to press charges and/or to testify, the participation of the trafficked person in a social assistance programme, aimed at enabling her/him to regain control over her/his life and to build a sustainable future. Such social assistance programmes should include access to education and vocational training.<sup>253</sup> The separation of the residency procedure from participation in criminal proceedings allows focusing on the trafficked person's needs, rather than the need to obtain evidence for the prosecution and thus contributes to avoid re-traumatisation of the person concerned.

If the trafficked person decides to be a witness in the criminal case or to claim compensation in a civil case, she/he should be entitled to a temporary staying permit at least until the end of the legal proceedings.

Trafficked children should be granted a temporary and/or permanent residence permit on humanitarian grounds, and the corresponding rights, including access to full protection and assistance, independent of their willingness or capacity to cooperate with the authorities and to testify against the traffickers or exploiter, in accordance with the

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<sup>253</sup> A good practice is the Italian model which provides for residency permits for trafficked persons who are considered to be in danger as a result of leaving their situation of exploitation and who are willing to engage in a social assistance and integration programme. See also Chapter 5.4.

principle of the “best interests of the child”. When child victims of trafficking reach the age of majority, if no other kind of residence permit can be issued on the basis of ordinary national law (e.g. for employment or study reasons), full regard should be given to their vulnerable position and they should be allowed to remain in the host country for humanitarian reasons.

## **Assistance**

During both the reflection period and the temporary residence permit, the trafficked person should be entitled to receive legal, medical and other necessary aid, including safe housing and counselling in her or his own language.

## **Permanent or long term residence permit**

Following the temporary residence permit, trafficked persons should be entitled to a long term or permanent residence permit, either on humanitarian or refugee grounds or because they successfully have completed the social assistance programme and have found sustainable employment (including the establishment as self-employed worker). In the latter case her/his temporary residence permit should be transformed into a work permit and thus be subjected to the regular regulations for migrant workers.

If there are substantial reasons to believe that it is unsafe for a trafficked person to return home because of the risk of retaliation from the traffickers or of criminal prosecution for status-related offences by the authorities in the home country, or if there are other pressing humanitarian reasons, trafficked persons should qualify for a permanent residence permit, regardless of their having acted as witnesses. Criteria for the granting of a permanent residence permit on humanitarian grounds should include:

- the risk of retaliation against the trafficked person and/or her or his family and the capacity and/or willingness of the authorities in the home country to provide protection against such reprisals;
- the risk of criminal or administrative prosecution by the authorities of the home country for status related offences, e.g. having crossed the border illegally or having worked in the sex industry;
- the lack of perspectives of social inclusion in her/his community in the country of origin, including a sufficient standard of living, taking into account the specific background of the trafficked person, the possible disruption of family ties and, in the case of trafficking for prostitution, social attitudes (stigmatisation and discrimination) and state policies on prostitution;
- the lack of availability of adequate, confidential and non stigmatising support services;
- the presence of children.

Moreover, the principle of non-refoulement and the Art. 3 of the European Convention on Human Rights, which holds that no one should be subjected to inhuman or degrading treatment, must be taken into account. If the trafficked person runs a real risk of being

subjected to such a treatment upon return to her or his home country, including the likelihood of being re trafficked, a permanent residence permit should be granted. In addition, trafficked persons should be entitled to seek and enjoy asylum from persecution in accordance with international refugee law.

### **Risk assessment**

In order to ensure that trafficked persons are not sent back to a situation that endangers their life, health or personal freedom, or submits them to inhuman or degrading treatment, states should be obliged to make a risk assessment before deporting or returning a trafficked person at any stage of the process, from the identification of a (suspected) trafficked person up till the possible application for a long term residence permit. The purpose of such risk assessment is to actively investigate whether or not the trafficked person runs a real risk on reprisals, e.g. because (members of) the criminal network are still active in the country of origin, whether family members in the home country have been subjected to threats, whether the authorities in the home country of the trafficked person are able and willing to provide protection against intimidation from the traffickers, whether the trafficked person runs a risk of prosecution by the authorities in the home country for status related offences and whether adequate and confidential assistance is available. If applicable, the information from the criminal case should make part of such risk assessment. NGOs and other agencies that provide assistance to the victim should be included actively in this process, as they are most likely to have relevant information. Moreover, the right to privacy of the trafficked person should be respected, meaning that no information about the person shall be given to third parties without the permission of the trafficked person.

### **Children and family members of trafficked persons**

In many cases trafficked persons have children and/or other family members at home whose safety can be put in danger if they decide to (try to) escape the trafficking network and/or decide to press charges and act as a witness. Evidently traffickers not only threaten the trafficked person her/himself, but also – and often very effectively – the people the trafficked person cares about most. Many cases are known where family members are beaten up or children are kidnapped in order to silence or intimidate the trafficked person. This means that trafficked persons not only have to take care of their own safety but also have a responsibility to protect the safety of their children and family. The safety of children and family often is an essential consideration in the decision whether or not to take action against the traffickers. Measures to protect the trafficked persons should therefore be extended to include family members, including access to temporary and permanent residence status in the country of destination.

At the minimum trafficked persons who are granted a temporary and/or permanent residence permit should have the option to bring their children to the country of residence to see them safe. This also forms an important part of their recovery process. Under the

present situation, this is almost never allowed. Moreover, in most cases they even cannot visit their children due to visa restrictions. In practice this might mean that, in particular when the trafficked person decides to act as a witness, due to the often lengthy duration of the legal proceedings, she/he might not be able see her/his children for two-three years or more.

### **Trafficked children**

Trafficked children should equally be entitled to a temporary and/or permanent residence permit and the corresponding rights, independent of the child's willingness or capacity to cooperate with the authorities, in accordance with the principle of the "best interests of the child" as laid down in the Convention on the Rights of the Child.

In the case of unaccompanied children all steps necessary need to be taken to identify and locate family members and measures should be taken to facilitate the reunion of the child with her/his family where this is deemed to be in her/his best interest. In all cases the view of the child, in particular regarding decisions on her/his possible return to her/his family, should be given due weight in accordance with its age and maturity.<sup>254</sup>

However, children should only be returned if the return is in the best interest of the child, and if the return is safe and assisted. To ensure that it is safe for a child to return, a risk assessment should always be made prior to any decision on return of the child to her/his home country or family.

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<sup>254</sup> UNHCHR, *Guidelines on policies and procedures in dealing with unaccompanied children seeking asylum*, Geneva, 1997, Guidelines Nos. 8.4, 8.6.

## Explanatory paper 11

### Social assistance and the development of standards

#### Why do we need standards?

Currently the assistance provided to trafficked persons differs from country to country and often also within the same country. In order to guarantee that all trafficked people have their human and civil rights protected and, therefore, have access to a wide range of services, common standards should be developed at national and international level through the setting up of a National Referral Mechanism (NRM) that, *inter alia*, is responsible for the development of criteria and recommendations to efficiently run anti-trafficking frameworks.<sup>255</sup> The setting up of shared standards would be a fundamental step to ensure the provision of qualitative and qualified services in every country. Furthermore, it would make the mechanisms put in place transparent, clear and accessible, for the benefit of trafficked persons.

Since trafficking often is a transnational crime, it is crucial that assistance and protection are organised across borders and that a “common language” among service providers is developed. Standards should then represent a means for common understanding and action that would greatly contribute to the better functioning of the services set up and, most of all, to aptly address the trafficked persons’ needs.<sup>256</sup> Exchanges and co-operation with agencies concerned with victim assistance within and from countries of origin, transit and destination is thus fundamental to develop and improve standards through exchange of good practices that can foster innovation.

The employment of standards would endorse the development and implementation of assessment procedures of the assistance measures and of the service providers. The use of common indicators would guarantee the comparability of different data. Furthermore, standards are a means to ensure professionalism (rather than good-will activities, which can do an incredible harm), but also to avoid the potential abuse of power over the trafficked persons by assistance organisations. Assistance based on common standards and on monitoring and evaluation procedures would enable trafficked persons to take a well-informed, autonomous and conscious decision about their future life.<sup>257258</sup>

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<sup>255</sup> See also Explanatory paper 5.

<sup>256</sup> BD pt. 13, 6th bullet point.

<sup>257</sup> Based on the definition of the CAT-Project-Christian Action and Networking funded by EU-Stop-Programme (2002-2003): “We want to assist women (potentially) affected by trafficking in a way which enables them to take a well-informed, unpressurised autonomous decision about what they want to do with their life in the future.”

<sup>258</sup> BD 13, 2<sup>nd</sup> bullet point.

## Underlying principles for the assistance of trafficked persons

The following principles should underlie the assistance of trafficked persons:

- *A trafficked person is a subject and a holder of rights*

Any assistance measure provided to trafficked persons should comply with the following human rights norms:<sup>259</sup>

- be *non discriminatory* in regard to nationality, gender, legal status and be non-judgemental in respect of the trafficked person's former experiences and her/his current choices and behaviour;
- *confidentiality*: service providers are not allowed to use or/and transfer to a third party any information provided by the trafficked person without her/his consent;
- *safety and fair treatment*: service providers must guarantee protection from harm and retaliations and avoid any form of re-victimisation throughout the period of assistance of a trafficked person;
- *respect for decisions*: any decision must be taken by the trafficked person on a consensual and fully informed basis. Service providers must respect the decisions and the time required to reach them. Often, the resolution to leave any form of exploitative conditions is a process that can take time and that can imply that a trafficked person may temporarily continue to stay with the trafficker or exploiter. This should not impede the trafficked person to fully enjoy her/his human and legal rights, even in case she/he decides to go back to the perpetrator. This approach contributes to the empowerment of the trafficked person and fosters confidence between the contact person of the service provider and the assisted person;
- *empowerment* should be the underlying principle of all assistance provisions targeting trafficked persons. The latter should evaluate and decide what they want to do with their life. Empowering trafficked persons means "to promote the self-actualisation or influence<sup>260</sup> of the persons", by assessing their skills and their potential to be developed, providing them with training and awareness that build confidence and professional skills (...) in order to actively participate in all levels of economic, political, and social life."<sup>261</sup> The principle of empowerment should also be applied to prevent risk-groups from being trafficked.

- *Rights of children*

Rights of children should be duly taken into account in accordance with the UN-Convention on the Rights of the Child. Especially in case of doubt and in case there are reasons to believe that the trafficked person is under 18 years of age, she/he should be considered and treated as a child. As soon as a trafficked child is identified, the child protection system of the country to which the child is trafficked should promptly appoint a legal guardian that will have the duty to act in the best interest of the child. Furthermore, any decision concerning the future of the trafficked child (i.e. integration in

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<sup>259</sup> GAATW, *Human Rights in Practice. A Guide to Assist Trafficked Women and Children*, Bangkok, 1999, pp. 24-25.

<sup>260</sup> <http://www.m-w.com/cgi-bin/dictionary?book=Dictionary&va=empowerment>

<sup>261</sup> <http://www.irex.org/civilsociety/womens.asp>

the host country, return or resettlement in a third country) should be taken by the child welfare authorities of the hosting country independently from the immigration or police authorities.

- *Clarity of expectations/Clarity of obligations*

A trafficked person should be fully informed what to expect from the service provider and the professionals she/he is in contact with and what is expected from her/him. She/he must be aware that she/he is responsible for her/his decisions and actions.

- *Clarity of roles*

All key-actors providing support and protection to trafficked persons should ensure their co-operation and acknowledge and respect their distinct roles.

- *Tailored measures*

There is no “recipe” for assistance valid for all trafficked people; service providers should in fact offer services tailored to the individual needs of the persons they assist. In the case of trafficked children their views should be sought and taken into account according with their age and maturity. Moreover, the active involvement of the final beneficiaries of the intervention in the process of developing services, activities and materials is essential.

- *Multidisciplinary co-operation*

Given the manifold nature of trafficking, a multi-agency approach is indispensable to address the needs of trafficked people. Local multidisciplinary assistance teams comprising various key-organisations providing distinct services and different professionals – such as social workers, outreach workers, doctors, psychologists, lawyers, public officers, law enforcement officers, labour inspectors, trade unions personnel – should be set up at local level in order to address the different needs of trafficked persons. These teams – led by a specialised organisation or through a specialised steering committee – should cooperate on systematic basis, respecting one another’s role and duties that might be defined through joint memoranda of understanding. The implementation of such team/units allows for a broader awareness raising among professionals of all categories and may contribute to reach a greater number of trafficked persons. Teamwork allows sharing the “burden” of a case and the split-up of responsibilities and information. Ideally each member of the team has only the type of information she/he needs to carry out their work in order to minimise the risk for the trafficked person. The teams should cover an adequate area to ensure that also rural districts are covered.

Trafficked children should be given special attention by including care providers and psychologists specialised on children in the assistance system.

All local multidisciplinary assistance teams should be connected with the National Referral Mechanism in order to guarantee an appropriate response and promptly answer to the target’s needs.

- *Training and supervision*

Professionals providing assistance to trafficked persons need a thorough preparation (by specialised independent organisations) and regular professional supervision/debriefing in order to ensure the quality of the work and to protect them from possible risks connected to the work. Training measures should include intercultural competence to fully and correctly understand a trafficked person accordingly to her/his individual cultural background. Moreover regular updating on changes in legislation should be supplied. It should be a duty of service providers and law enforcement agencies to get involved in prevention and training schemes, preferably through cross-sectoral training organised jointly by NGOs and public officials of different departments. Legal guardians for trafficked children should be included in appropriate training courses.

- *Work with interpreters and cultural mediators*

Assistance providers should ensure the involvement of interpreters and cultural mediators in their work. Due to security risks it is of outmost importance to set up criteria for the selection of competent and trustworthy interpreters, which should be trained to act with the necessary sensitivity and to master the specific terminology. The presence of cultural mediators – where appropriate belonging to the same nationality or ethnic group of the trafficked persons assisted in the team – is crucial to gain the persons' confidence and build a trusting relationship. As they deal with a sensitive issue, both interpreters and cultural mediators should have regular supervision.

- *Data collection and analysis*

All service providers should keep records of the quantitative and qualitative data of the cases assisted. Such data should be anonymous and used to elaborate reports and researches in order to contribute to investigate the changes occurring in the field of trafficking and, consequently, to plan proper social interventions in favour of trafficked persons.

- *Trans-nationality*

International exchanges and collaboration with service providers of other countries of origin, transit and destination should be integral part of any assistance system. This approach allows for collegial support both in the assistance of trafficked persons in the hosting country and in exploration of the return options, moreover it represents a significant source for the transfer of innovative approaches and the improvement of the standards applied.

- *Quality standards*

Assistance providers should develop common quality standards based on measurable and transparent indicators.

## Services to support and assist trafficked persons

An effective assistance and protection system for trafficked persons should be based on a set of multiple specialised services managed by a multi-disciplinary team of trained professionals that offer a tailored programme co-elaborated by the victim and the assistance provider, and a constant connection with the NRM. Such a system should comprise the following services and activities:

- *Mechanisms for crisis intervention*

Non-bureaucratic mechanisms for crisis intervention should be in place around the clock, all year round, to provide prompt assistance in emergency cases of trafficked persons looking for help.

- *Shelters*

To provide a safe place to stay: this allows the trafficked person to recover, to reflect on the decisions to make, to be regularly assisted, to plan and to carry on her/his personalised programme. Different types of accommodation can be provided, also according to the stages of the person's programme, namely: flight and emergency shelter, care shelter, autonomy house. Family placement and non-residential programme<sup>262</sup> may be considered as alternative solutions to community shelters. Foster families and residential settings with appropriate adult support should be maintained as the most suitable housing choices for trafficked children; older children should not be treated as *de facto* adults and placed in reception centres without any adult support. In no way detention centres or custody measures can be maintained as appropriate options neither for adults nor for children. The shelters may differ in size, capacity and time of staying, accordingly to each organisation's decision, and should grant a safe and positive environment. They should all provide cultural and religious appropriate meals, lodging, and a set of activities aimed at fostering the person's empowerment and autonomy: accompaniment to social and health services upon request, language classes, social activities, free legal and psychological counselling, tutoring, access to education and vocational training, job placement, child care. It is fundamental that the location of any type of accommodation remains confidential to avoid the risk to be detected by the criminal organisation and to endanger the hosts' and the working team's safety.

- *Social and health services*

Trafficked persons should have the right to access all state-provided health and social services. Medical examinations and tests should be provided only upon the assisted person's request and, in no case, they should be mandatory. The hosting organisation may accompany the person to the service and initially serve as mediator between the

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<sup>262</sup> This option is foreseen for those who enjoy an autonomous and liable accommodation usually shared with "significant others", such as partners, family members or friends. In this case, the assisted persons are supported by the assistance agency whose professionals regularly and frequently meet and visit them. This alternative values as fundamental a woman's or a man's personal network in order to support her/his social inclusion in the receiving country.

two parties.

- *Social counselling*

To assess the situation of the person; consider her/his options; check her/his willingness to access the social protection scheme or return back home; develop an individualised programme; evaluate the opportunity to cooperate with the competent authorities.

- *Psychological counselling*

To help the trafficked person to overcome the feelings of fear, shame, disorientation and improve her/his self-esteem and self-reliance. The traumatic experiences suffered by trafficked persons may be an obstacle that impedes them to acknowledge their needs and their status, the counselling of a psychologist is thus fundamental to support them in the process of self-identification as a subject and a holder of rights. Psychological counselling can be provided on individual basis or through group sessions.

- *Free legal counselling*

To provide the person with information about her/his rights and legal options. The organisation may help her/him to find a lawyer and accompany her/him to court. It is advisable to include a legal consultant or a lawyer in the organisation's staff, who can take care of all legal procedures (e.g.: application for temporary residence permit, withdrawal of the expulsion order, application for family reunion, legal representation, etc.) and relationships with the law enforcement agencies and public prosecutor's office.

- *Education, vocational guidance, training and job placement*

The organisation through qualified internal staff or external agencies should provide a diversified set of options to allow the hosted person to improve her/his educational and professional skills. This is an important step to foster not only the person's professional inclusion but also the social one in the receiving or home country. Different types of training courses may be offered in view of the person's needs and the local offer. It is essential to enhance the skills formerly acquired and to aim at the assisted person's insertion in stable sectors of the labour market in order to avoid unfavourable work conditions that may lead to a new form of exploitation.

Services and activities should be provided by professionals specifically trained to work in the field of social inclusion and trafficking, such as: psychologists, outreach workers, social workers, cultural mediators, legal consultants. The team should develop and share a common strategy primarily aimed at protecting and empowering the trafficked persons. The special situation of trafficked children and the need for specifically trained personnel and a longer accompaniment should be taken into account.

The organisation should provide regular sessions of supervision to the working team, the risk of burn-out is very high in this field and, therefore, it is fundamental to support the

operators in order to improve the quality of the services provided and to avoid a high turnover.

## **Assistance and prevention**

Some services for trafficked persons are both measures for assistance and prevention. The agencies providing these specific services should be part of the local referral and assistance systems as well to the NRM in order to swiftly address the trafficked persons to the appropriate services and to share information on the development of the phenomenon of trafficking.

- *Outreach work*

Outreach work should be carried out by a team of operators that directly contact the target groups where they work or live and provide them with health, legal and social information, written materials (in the main languages spoken by the target reached) and health prevention materials. They may also accompany them to the health and social services. This kind of approach is of great importance to people who are often in a difficult position for their being irregular migrants and, therefore, “invisible” persons by definition. The presence of cultural mediators (belonging to the same nationality or ethnic group of the target) in the outreach team is fundamental to gain the persons’ confidence and build a trusting relationship. Outreach workers should also be in contact with club and brothel owners and employers in other sectors where trafficking is likely to occur, in order to sensitise them in regard to the issues of trafficking and promote the adoption a code of conduct aimed at fighting trafficking and exploitation.

- *Drop-in centres*

Drop-in centres are a place of first contact for trafficked persons, practitioners and professionals that assist them. The drop-in workers provide the users with health, legal and social information, written materials (in the main languages spoken by the final beneficiaries of the intervention), and may also accompany trafficked persons to the health and social services. Also in this case, the collaboration of cultural mediators is essential. Furthermore, due to its direct contact with the target group and the constant mapping out of the phenomena addressed, this activity – along with the outreach work – can give relevant information about the features and the changes occurring in the field of trafficking and social exclusion; such data can be used to plan and implement innovative models of intervention.

- *Hotlines*

Free of charge hotlines enable trafficked persons or potential trafficked persons to find helpful information and to seek assistance; it may also provide information to social workers, law enforcement officers and the population at large. Information should be given in the various languages spoken by the target group. It is useful to establish a toll-free number operating at national level, composed of a single central switchboard – that operates as a filter for the calls – and some territorial branches located in different regional or interregional areas throughout the country. This service must

work in strong collaboration with all the agencies providing care and assistance services – at local and national level – to trafficked persons. In this manner, the toll-free line can function as a referral system and a sort of national “resource database” to promptly respond to specific needs (accommodation availability, work placement, and so on). Its institution would greatly contribute to share methods and know-how on regular basis. Any established hotlines should include specialised staff in the needs and rights of trafficked children. The establishment of hotlines at the international level would also represent a key-tool both to assist trafficked persons and to raise awareness among potential victims of trafficking.

- *Information materials*

Leaflets, brochures, stickers, videos, posters, billboards, special info-kits, radio and TV commercials are useful means to reach trafficked persons or potential trafficked persons and provide them with practical hints and information. All these materials should convey a clear-cut message, in the main languages spoken by the target group, and adapted to the cultural code of the beneficiaries.

### **Quality of assistance providers: Indicators**

All types of counter-trafficking agencies (NGOs, local authorities, IOs, IGOs, etc.) should include in their activities the monitoring and the evaluation of the services provided to assist trafficked persons or potential trafficked persons. Given the fact that anti-trafficking programmes generally work in manifold areas (social, legal, psychological, health, vocational, occupational) and at different phases of the trafficking process (before, during and after), it is fundamental that they define clear goals associated to specific activities. Clear goals not only serve as assessment indicators but their inclusion into the activities also facilitates the development, the management and the reporting of the intervention.<sup>263</sup>

In order to monitor and evaluate the quality of a given service, it is necessary to establish a set of indicators before its implementation or, at least, at an early stage of its implementation. The typologies of indicators to adopt may be those suggested by the European Commission and, then, adapted to the context of trafficking in human beings:<sup>264</sup>

- *output indicators*: which assess a programme performance through the evaluation of quantifiable data (e.g. activities conducted, persons served, materials distributed, number of job placement provided, etc.); output may also take the form of facilities, works, and immaterial services (e.g. training, consultancy, information);
- *input indicators*: which refer to the human, financial and material resources allocated for an activity or a programme (e.g. money spent to equip an outreach unit, to buy

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<sup>263</sup> Population Council/Frontiers Program, *Anti-Trafficking Programs in South Asia: Appropriate Activities, Indicators and Evaluation Methodologies*, Kathmandu, 2001.

<sup>264</sup> EC-DG XVI, *The New Programming Period 2000-2006: Methodological Working Paper 3 (Indicators for Monitoring and Evaluation: An Indicative Methodology)*, May 1999, p. 8.

prevention materials to distribute to the target, the number of social workers employed in a service, the working hours allocated for psychological counselling, etc.);

- *process indicators*: which refer to the quality of the process in an activity or programme (e.g. does the timing of an activity meet the needs and the situation of the trafficked persons? Do the latter understand the information and what is expected from them? Is the crisis intervention quick enough to meet the trafficked persons' needs?);
- *result indicators*: which measure the direct and immediate effect produced by a specific activity or programme on the direct beneficiaries (e.g.: increased awareness of their civil and human rights among the trafficked persons assisted, acquisition of new labour skills, self-referral to the local health services, decrease in number of trafficked persons, number of persons benefiting from a social programme, etc.);
- *impact indicators*: which consider the positive and negative outcomes of an activity or a programme beyond the immediate effects on its direct beneficiaries (e.g.: change in knowledge and attitude of population in regard to commercial sexual exploitation of children, etc.); certain impact indicators can be observed among direct addressees after a few months or in the long term.

The *main general indicators* that may be employed to evaluate the quality of the agencies that provide services to trafficked persons are those of:<sup>265</sup>

- *Relevance*: it assesses to what extent the service provided is relevant in relation to the trafficked persons' needs and priorities (e.g. do the legal information provided meet the person's needs? Are the drop-in centres office hours suitable for the target group? Are the languages spoken by the operators of the local anti-trafficking help line those of the target group?);
- *Efficiency*: it compares the outputs, results, and impact achieved with the resources used to measure the performance of an activity and of its management (e.g. were the professional profiles of the social workers adequate to meet the specific needs of the target group? Did the skills transferred through the training courses favour the access to the labour market?);
- *Effectiveness*: it compares the outputs, results, and impact achieved with those originally planned (e.g. Was the shelter's availability sufficient to host the actual number of people looking for help? Was the quantity of the information materials – leaflets, brochures, stickers... – distributed by the outreach unit sufficient to reach the entire target group?);
- *Utility*: it measures the impact of the activity on the target group in relation to its needs (e.g. how many trafficked persons joined a scheme of social protection? How many were granted a temporary residence permit? How many found a job?);

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<sup>265</sup> Idem, p. 9.

- *Sustainability*: it assesses to what extent the changes can be expected to last after the activity has been completed (e.g. will the assisted person access to the social and health services autonomously? Will the person assisted use the information provided and the social and job skills acquired to avoid the risks of being re-trafficked?).

A high level of consistency among needs, objectives, activities and their planned results proves the good quality of the services provided by a counter-trafficking agency. Such consistency is essential to meet the needs of the selected target group and, thus, to guarantee the short- and long-term success of a social intervention.

## Explanatory paper 12

### Witness protection and judicial treatment of trafficked persons

#### Definition of witness/victim requiring protection

Measures to protect trafficked persons as witnesses and victims in criminal procedures should not be narrowly confined to those who give evidence in court, or cooperate with law enforcement. Rather they should apply to all trafficked persons, who as victims of crime will be witnesses to a crime, to protect them and help mitigate the effect of the crime. The trauma suffered by a victim of crime and the risk faced as a witness to a crime exist from the commission of crime to beyond the conclusion of court proceedings. Cooperation with law enforcement, and giving evidence in court, may by their nature increase the trauma and risk, and require special additional provisions and protection.

#### Access to information and advice

Transparency of procedures and honesty of information is important. Trafficked persons will have been frequently deceived and used. It is important that they are given full accurate information to enable them to make informed decisions and begin to regain control of their lives. Provision of accurate information, and support at an early stage will better enable trafficked person to build cooperative relationships with law enforcement and other officials.

At minimum trafficked persons should receive the following:

- *Immediate contact with support organisations and information on the type of support they can obtain*<sup>266</sup>

This includes their entitlement to a form of residence permit, as well as other forms of support.<sup>267</sup> On identification a trafficked person should immediately be put in contact with a NGO support provider;

- *Access to translation and legal assistance free of charge*<sup>268</sup>

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

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<sup>266</sup> Framework Decision on the standing of victims in criminal proceedings provides states shall provide information on the types of services or organizations to which they can turn for support – Article 4(1)(a) and the type of support they can obtain Article 4(1)(b).

<sup>267</sup> See Chapter 5.4 and Explanatory paper 9.

<sup>268</sup> Framework Decision on the standing of Victims, Articles 4(1) and 4(1)(f).

■ *Provisions for reporting the offence*

The trafficked person should be informed of provisions for reporting a criminal offence, and procedures. This should be done in a language they understand, and with the assistance of free legal aid to understand the legal consequences of actions. Social or psychological support should also be provided when giving this information as appropriate;

■ *Decision to cooperate*

The trafficked person should be given time to decide whether they wish to cooperate with law enforcement prior to being interviewed. The decision to cooperate is difficult, and has severe implications for the trafficked person, which needs to be fully understood and considered. Trafficked persons are often traumatised and may take some time before they can fully consider their position. While law enforcement may want immediate information, so they can apprehend and arrest suspects, they should wait until the trafficked person is able to make an informed decision. This lessens the likelihood of re-victimisation of the trafficked person, and is likely to lead to better evidence in the long run.

The decision to cooperate with law enforcement should be made at a neutral venue. A friend, NGO service provider or other supporter should be present to assist and advise. The following information should be provided:

- their role in connection with criminal proceedings, especially their rights and duties;<sup>269</sup>
- an accurate assessment of the risks they face in cooperating with the authorities
- accurate information about the degree and nature of protection they can expect, and the consequences of this protection;<sup>270</sup>
- the ability to obtain legal aid;<sup>271</sup>
- the ability to obtain compensation;<sup>272</sup>
- the outcome of investigation and the release or detention of the trafficker;<sup>273</sup>
- the effect of co-operation on their legal rights to stay in country, and other opportunities to stay;
- provisions for voluntary repatriation;
- provisions for guaranteeing privacy/likelihood of media intrusion;
- requirements to attend court, give testimony, etc.

The refusal to cooperate should not affect assistance and protection measures that are necessary for the safety or reintegration of the trafficked person. In particular, access to measures such as reflection delay, residence permit, and support services should not be dependent on the decision to cooperate.

Special provision will be needed for co-operation of minors. States may consider

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<sup>269</sup> Ibid. Article 4(1)(d).

<sup>270</sup> Ibid. Article 4(1)(e).

<sup>271</sup> Ibid. Article 4(1)(f).

<sup>272</sup> Ibid. Article 4(1)(g).

<sup>273</sup> Ibid. Article 4(2).

appointing a guardian, parent or other person to present the best interests of the child, and to provide consent of the child. The degree to which the child her/himself will be able to give full consent will depend on a series of factors, including the maturity and age of the child. Wherever possible the child's wishes should be taken account of.

## **Access to support from NGOs during the trial**

In cases related to the trafficking of persons, the victim of the crime should have the possibility of receiving support from a social organisation in the investigation, interview and trial. In such cases a social worker may be permitted to take part in the proceedings, dependent on the type of legal system, if there is a need of protection of social interest or important individual interest.<sup>274</sup> The interests of children should always be represented by an appropriate adult.

## **Investigation and interview**

### *Interview*<sup>275</sup>

Interviews of trafficked persons should meet the following standards:

- interviews should be conducted by personnel trained in trafficking and post traumatic stress disorder. For children, interviewers should be specifically trained in interviewing children;
- the interviewer and interpreter should be of the same sex as the trafficked person;
- the interview should take place in a non confrontational, non judgmental, and professional environment;
- the trafficked person should be free to leave at any time during the interview. Interviews should not be more than two hours long, and there should be assessment with counsellors, social workers, etc., as to the length and frequency of interviews;
- the trafficked person should be able to have a social worker, NGO worker, psychological or other support present during the interview. If a child, a parent or guardian or appropriate adult to protect the child's interests should be present;
- the interview questions and technique should be non confrontational and non judgmental;
- in cases involving sexual exploitation, questions regarding the trafficked person's sexual history not immediately relevant to the allegations should not be asked.<sup>276</sup>

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<sup>274</sup> Ibid. Article 13(1)(c).

<sup>275</sup> See International Centre for Migration Policy Development (ICMPD), *Regional Standard for Anti Trafficking Police in South-Eastern Europe*; Vienna, 2003.

<sup>276</sup> Framework Decision on the standing of Victims, Article 3: "Each Member State shall take appropriate measures to ensure that its authorities question victims only insofar as necessary for the purpose of criminal proceedings." See also footnote to ICMPD training manual and International Criminal Court (ICC) guidelines on sexual offences.

### *Physical examination*

Physical examination of a trafficked person should only occur where absolutely necessary for the purposes of the investigation. It should be conducted by a trained medical practitioner of the same sex. A counsellor or supporter should be present if requested by the trafficked person. Results of the medical examination should be used for the purpose of the investigation only and for no other purpose. The trafficked persons must give their informed consent to examination. Refusal to consent should not be seen as failure to cooperate with the authorities.

### *Recording the interview*

In some jurisdictions video recording of the testimony may be possible, and it may be possible for this to be used in court proceedings. Where such possibility exists the option of video recording should be given to the trafficked person. The possibilities for use of this instead of direct testimony should be explained. The fact that the trafficked person will be identified should be explained. There should be clear procedures to secure the video and prevent its circulation beyond those necessary for the investigation. There must be criminal sanctions in place for the circulation or showing of such tape beyond those specifically authorised.

### *Investigation*

Law enforcement should explore using intelligence led investigation methods, such as surveillance, money tracing and accountancy mechanisms, use of informants, etc., to avoid the need for direct victim testimony.

Awareness of the risks posed to victims in investigations should be paramount. Law enforcement should be particularly careful when making enquiries, for example in the victims home town, of the victims friends or associates, or trafficking suspects, that these inquiries should not lead to identification, social exclusion or risk to the victim, their friends or family.

## **Privacy**

All necessary steps should be taken to ensure the privacy of the trafficked person. These include:

- The media should be banned from publishing details likely to lead to the identification of a trafficked person, including name, address or photograph, where such publication could lead to risk to the trafficked person, or infringe their right to privacy under Article 8 of the European Convention of Human Rights. Such publication should be banned in cases involving sexual exploitation. Provision should also relate to passing

details to the media, not only in country of destination, but also in country of origin of the trafficked persons. Passing such information should be prohibited by criminal law though contempt of court or specific legislation. Bans should apply from initial identification of the trafficked persons (for example during brothel raids), to beyond the conclusion of court proceedings.

- Sharing information: strict guidelines need to be developed for the collection, sharing and dissemination of personal information on trafficked persons.<sup>277</sup> There are two issues to be born in mind when sharing information:
  - the privacy rights of the trafficked persons;
  - the security implications of information sharing.

Under Article 8 of the European Convention on Human Rights individuals are entitled to protection of their privacy. This extends to trafficked persons as victims of crime, who should not be treated as criminals due to any matter that has arisen as a result of being trafficked. Sharing of information on trafficked persons through law enforcement mechanisms such as Europol, Schengen Information System and other mechanisms need to bear in mind that the information is in relation to victims, not criminals. As such information held on systems should clearly be identified as in relation to victims of a crime. Care should be taken that the information is only used for the purpose that it is collected and not for other purposes (for example to prevent trafficked persons from crossing borders).

## **Risk assessment and safety**

The safety of the trafficked person, their close friends and family, both in destination and origin country, must be paramount consideration, and responsibility of law enforcement and others. States are obliged under the European Court of Human Rights (ECHR)<sup>278</sup> and UN conventions<sup>279</sup> to provide protection in circumstances for those at risk. The trafficked person is at risk from the very first contact with authorities. Risk assessment must be carried out from 1st contact, and constantly reviewed. Risks to close friends and family need to also be assessed, and safety provisions for them may also be necessary. Protection given should be based on risk assessment and need, not on whether co-operation or whether evidence is given. It is likely, but not always the case that risk will increase if evidence is given.

In dealing with risk, practical measures are those most likely to be effective. Full scale witness protection, involving change of identity, and/or relocation to a third country is not only expensive, but also less likely to be effective and is more traumatic for the trafficked person, and should only be considered as a last resort.

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<sup>277</sup> See Chapter 3.8.

<sup>278</sup> Articles 2 and 3 of the ECHR right to life. See *Mastromatteo V Italy*, 24 October 2002 and *Osman v UK* 28 October 1998.

<sup>279</sup> UN TrafProt Article 6 para 5; Article 25 para 1 UN-TOCC.

Issues to consider in protecting trafficked person include:

- *Safe accommodation*

Accommodation may most appropriately be provided by NGO sector. Law enforcement should cooperate with the NGO sector. However the provision of safety should not be seen as the responsibility of the NGO sector. Risk of safety to trafficked persons should not be a justification for detention in a custodial environment.

- *Practical measures*

Practical measures can be effective ways of minimizing risk. For example the following should be considered:

- provision of panic alarms;
- provision of mobile telephone with immediate access to police numbers;
- police (if necessary plain clothes) accompanying to scenes of crime, court, etc.;
- Separate entrances to court and waiting areas;
- Testimony through video link, or behind screens.

- *Change of location and or identity*

Removing the trafficked person to a location away from where they were trafficked to, or trafficked from, and or changing their identity may be considered. This can include relocation to a third country. Some policies have tended to concentrate on relocation to safe third countries as practical response to ensuring trafficked persons safety. However in practice this should only be used as a policy of last resort, where all other protection measures are not appropriate, and with full discussion and consent of the trafficked person. Relocation to third countries is problematic, and likely to have significant risks attached, as well as increase the trauma of the trafficked persons, and their risk of being re trafficked. Relocation would require a trafficked person to cut off links with their families and friends and support network. In a third country, the trafficked person may not speak the language, may not have access to labour markets, or appropriate skills, and may not have access to social support networks.

If relocation occurs, then it must be culturally and socially appropriate. Full support measures including language classes, vocational training/employment, shelter and financial assistance, and support networks, include contact with appropriate local NGO service providers should be provided.

Relocation will also have to include the trafficked person's family. Again full support measures should be provided. Problems will occur as expecting trafficked persons and family members to sever contacts with their friends, family and community are unrealistic and unlikely.

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

## In court procedures

Again, practical measures, such as ensuring separate waiting areas, are as important to consider as more formal measures such as witness anonymity. Clear information for the trafficked person as to what protection and measures they can expect should be given at the earliest possible stage, to minimize continuing trauma.

### *Giving testimony*<sup>280</sup>

Articles 6(1) and 6(3)(d) of the European Convention on Human Rights generally provides that court proceedings should be in public, with the defendant given the opportunity to cross examine witnesses in person. However there can be exceptions to this to protect the witness, providing the rights of the defendant are not prejudiced.

In *Van Mechelen v The Netherlands*<sup>281</sup> following the case of *Doorson v The Netherlands*<sup>282</sup> the court held that anonymity of witnesses could be allowed in exceptional circumstances, where:

- a) there was a well-founded threat of violence;
- b) the witnesses were heard in the presence of the defendants lawyer; and
- c) there was other (identification) evidence unrelated to those witnesses.

The procedures of the trial should ensure that the rights of the defendant to a fair trial are upheld. Thus any restrictions on the rights of a defendant to cross examine a witness, or provision for anonymity for a witness, should be such to counter balance any unfairness the defence may suffer. The fairness of the proceedings as a whole under Article 6 has to be considered.

Some jurisdictions (for example the UK) allow for evidence to be given from behind a screen, or by video link when the witness is vulnerable or at risk (for example a child, or allegations involving sexual offences). Other jurisdictions allow for interviews or video interviews to be admitted as evidence in chief, the witness only having to attend (for example by video link) for cross-examination. Systems based on the inquisitorial system (such as Belgium) can allow for preliminary examination of a witness by a judge, in the absence of the defendant. Such examination is provided to the defence. Depending on the system, and practice, the witness may be required to be cross-examined by the defence at a later stage in the proceedings. In the United Kingdom, in Special Immigration Appeals Tribunals evidence in relation to matters affecting national security can be heard anonymously, without the presence of either the defence or his lawyer. A lawyer specially appointed by the court is present to protect the defendant's interests. Although this provision only applies to national security, it may be argued it could be extended to allow anonymity of witnesses where there is serious risk to the witness.

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<sup>280</sup> For more detailed analysis, see ICMPD, *Draft Training Manual for Judges and Prosecutors*, Vienna, 2004.

<sup>281</sup> Judgement of the European Courts of Human Rights (ECHR), 23 April 1997.

<sup>282</sup> Judgement of the ECHR, 26 March 1997.

In the recent case of *S.N v Sweden*, 2 July 2002, the European Court of Human Rights, in considering a case involving sexual abuse of a 10 year old, where two video statements (one at the request of the defence) had been taken, stated: “The Court has had regard to the special features of criminal proceedings concerning sexual offences. Such proceedings are often conceived of as an ordeal by the victim, in particular where the latter is unwillingly confronted with the defendant. These features are even more prominent in cases involving a minor. In assessment of whether or not in such proceedings an accused received a fair trial, account must be taken of the right to respect for the private life of the perceived victim. Therefore the Court accepts that in criminal proceedings concerning sexual abuse certain measures may be taken for the protection of the victim, providing that such measures can be reconciled with an adequate and effective exercise of the rights of the defence”.

For trafficked persons the fear of confronting their trafficker in court may be significant. Research has shown that, after escape from the traffickers, the hardest thing for trafficked persons to do was to confront their trafficker in court.<sup>283</sup> Provisions to lessen the trauma for direct confrontation are important. On occasion protecting the witness from reprisals through anonymity may also need to be considered, although with the personal nature of many trafficking cases it is likely that the nature of the evidence will reveal the identity of the witness to the defendant, making witness anonymity impossible. With all procedures, it is important that it is clear from the outset what protections can be given, so the trafficked person is fully aware of what they will face when deciding to give evidence.

States should explore the possibilities of providing provisions to protect trafficked persons giving evidence in court proceedings that are consistent with the rights of the defence. These may include, depending on the legal system, and the nature of the risk to the trafficked person:

- giving evidence in chief by pre recorded video or written statement;
- giving evidence by video link;
- cross examination of the trafficked person by an inquisitorial judge, or lawyer appointed by the court, in the absence of either the defendant, or defence lawyer;
- anonymity of the witness from the defendant.

States should have clear procedures in place, and inform the trafficked person when they make the decision to give evidence, of what protections they will have.

#### *Evidence of previous sexual or moral behaviour*

In cases related to sexual offences, the defence may seek to introduce evidence in relation to the trafficked person’s previous sexual behaviour – to show that exploitation did not occur, or to try to cast doubt on the integrity of the witness.

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<sup>283</sup> Anti- Slavery International, *Human Traffic Human Rights: Redefining Victim Protection*, Pearson, E., London, 2002.

A model how to address this issue is Section 7 of the UNMIK-Regulation No. 2001/4<sup>284</sup> which explicitly provides that except with the leave of the president of the panel of judges, it shall not be permissible for a defendant charged with trafficking “to introduce evidence of the alleged character or personal history of the alleged victim”. A defendant may petition the president of the panel of judges to allow the introduction of such evidence. The president will then conduct a hearing in-camera allowing for the defendant and the prosecution to be heard on the subject. But the introduction of such evidence will only be allowed if the president is satisfied that the evidence is of such relevance and its omission would be so prejudicial to the defendant, that this would result in a miscarriage of justice for the defendant. In such cases, the president will still establish the limits within which such evidence or questions may be introduced.

### *Practical issues*

If a trafficked person, their friends or family are to attend court to give evidence, practical protection is important. Issues to consider include:

- safe escorts to and from the court building;
- separate waiting, eating and toilet areas;
- fixed hearing dates, with minimal waiting time;
- clear explanation of court procedures – with previous visit to the court premises if necessary;
- screens, clearing of the public gallery, removal of media, as provided for by national law;
- presence of a supporter or advisor, as allowed by national law.

### *The right of the victim to be present and be heard*

UN Convention on Combating Transnational Organized crime and the UN Trafficking Protocol both provide that states should make provisions in appropriate cases subject to their domestic laws to enable the victims’ views and concerns to be heard. For some victims involvement in the criminal justice procedures is an important part of their recovery – to see those who have offended against them brought to justice. States should make provision for this to occur. Often the effect of the use of video testimony, or other investigative methods, and the early return of the trafficked person to their country of origin, can make it difficult for them to return and participate fully in proceedings when they wish to do so.

States can also make provision for trafficked persons’ views to be heard through means such as joining them as a party to the criminal proceedings (in jurisdictions that allow this), or victim impact statements.

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<sup>284</sup> United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 2001/4 of 12 January 2001 on the prohibition of trafficking in persons in Kosovo (<http://www.unmikonline.org/regulations/2001/reg04-01.html>).

## **Training**

Training for all those who come into contact with trafficked persons, in particular law enforcement officers, immigration officials, lawyers, prosecutors, judges and court staff, on the particular rights and needs of trafficked persons, must be provided by States.<sup>285</sup>

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<sup>285</sup> See Chapter 4.5 and Explanatory paper 8.

## **Explanatory paper 13**

### **Return and long term assistance**

#### **Why is there a need for return and long-term assistance programmes?**

Trafficking does not end with the return of trafficked persons to their homes, nor are the problems trafficked persons face solved by simply returning home. On the contrary, the possibilities to protect victims in their home country are generally much less than the protection that can be offered in Western European countries. Often, the criminal network that trafficked them is still active in their home country. Moreover, in a number of countries of origin the rule of law functions only to a limited extent. Corruption and involvement of the authorities in trafficking may pose a serious problem. Apart from the issue of safety and lack of protection, victims may face a number of other problems on their return. Especially when they have been trafficked for prostitution, they may be exposed to stigmatisation, discrimination, and rejection by their families and social exclusion when their predicament gets known in their community. Evidently, these risks increase when they have given testimony in the country to which they were trafficked, and/or when they choose or are obliged to do so after their return to their home country. A change of venue very often is no option as many countries of origin do not have a social security system, meaning that trafficked persons are completely dependent on their families for accommodation, means of subsistence and the possibility to find work. Moreover, in a number of countries citizens are not free to choose their place of residence. In general, trafficked persons have a legitimate interest in keeping silent and hiding their experiences for their environment. This obviously forms an obstacle in asking for protection and assistance. In addition, trafficked persons may risk to be prosecuted themselves, e.g. for having left the country illegally, for having made use of fraudulent identity papers and/or for having worked in prostitution.

All trafficked persons, irrespective into which industry they were trafficked, face the problem of finding viable employment – which in many cases is precisely the reason why they decided to migrate to another country to try and find work elsewhere and improve their perspectives. Often this problem is aggravated by the fact that they or their families still have debts to the original recruiters that they have to pay off under the threat of sanctions. This means that trafficked persons who return to their home country in many cases find themselves back in even worse conditions than the ones they originally started from, thus exposing them to the risk of being re-trafficked as the only available alternative. Trauma as a consequence of being trafficking, characterized by lack of faith in the future, inability to build trusting relationships and reduced ability to assess risk, may further add to their vulnerability to abuse. In addition, many trafficked person do not dispose anymore of their identity papers as these were confiscated by the traffickers, or have been travelling on false identity papers.

Still a great number of victims want to return. Others are forced to return because they do not qualify for a temporary residence permit or because the temporary residence permit has expired and they do not qualify for a permanent residence status or asylum.

At the same time, many countries of origin have difficulties in providing victims of trafficking with appropriate support and assistance. Often there is a lack of specialised structures supported by the government, adequate services addressing the specific needs of victims and established frameworks for long-term assistance to trafficked persons. Both in countries of destination and in countries of origin, assistance measures are mostly short-term and do not provide sustainable social and economic alternatives.

In order to prevent trafficked persons from being re-victimized and/or re-trafficked and to protect their safety it is essential to establish appropriate, preferably voluntary, return procedures and programmes, the latter offering long term assistance to enable trafficked persons to regain control over their lives and build an independent life. Such programmes should start in the country to which the person was trafficked and should continue after the trafficked person has returned to her/his home country. To this aim close co-operation between NGOs in countries of destination, transit and origin is needed. They should be accessible independent of the trafficked person's capacity and willingness to cooperate as a witness. Return programmes should be considered as remigration programmes to avoid stigmatisation of trafficked persons.

Within a human rights framework such programmes should aim for the long-term recovery and empowerment of trafficked persons. Empowerment could be described as a process through which an individual can develop her/his ability to stand independently, make her/his own decisions and show control over her/his life. It implies the involvement and active participation of trafficked persons as opposed to treating them as passive victims.<sup>286</sup> Essential elements are the creation of conditions to become economically and psychologically independent, opportunities for work, which includes access to information, education and training, physical and mental health services and the active participation of the trafficked person her/himself.

## **Return procedures**

Return procedures should at least include the following elements:

- on the wish of the trafficked person to return, she/he should be repatriated without undue or unreasonable delay;<sup>287</sup>
- the safety of the trafficked person should be paramount:<sup>288</sup> no identified trafficked person shall be deported against her/his will before a proper risk assessment has been made in order to ensure the trafficked person's safety. Such a risk assessment must cover the physical safety of the victim as well as the possibilities for social inclusion in

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<sup>286</sup> Definition from GAATW, "The process of recovery from trafficking", in *Alliance News*, Issue 19-20, July/December 2003, Bangkok, 2003.

<sup>287</sup> OSCE, Action Plan V.7.1.

<sup>288</sup> OSCE Ministerial Council Decision No. 1, para 1; UN TrafProt Art. 8.2.

- the country of origin;<sup>289</sup>
- the financial costs for the return should be covered by the EU Member State in which the victim is exploited, unless otherwise provided in agreements between the state of destination and origin;
  - information about her/his right to access to diplomatic and consular representatives from her/his State of nationality. If the person concerned wished so, she/he shall be assisted in contacting her/his consulate or embassy;<sup>290</sup>
  - information regarding the available assistance in her/his home country. The decision whether or not to make use of such services, however, shall be with the trafficked person; if she/he decides to make use of available support services in the country of origin the receiving service agency shall be informed timely and properly;
  - arrangement of proper identity documents.<sup>291</sup> To this aim co-operation agreements should be made between countries of destination and origin. Countries of origin should be encouraged to appoint contact persons at their embassies and consulates to deal with trafficked persons and to take care that they are properly trained;<sup>292</sup>
  - no reference should be made of the status of the person as a victim of trafficking in any identity papers;
  - no confidential information should be given to the authorities in the home country without the consent of the trafficked person;<sup>293</sup>
  - basic necessities such as clothing and food during the return process should be taken care for.

## Return and long term assistance programmes

In close partnership with NGOs, programmes should be established in countries of origin to ensure that trafficked persons who return to their home country are provided with long term assistance and support to ensure their well-being, to facilitate their social inclusion, to prevent re-victimisation and to reduce the risk of re-trafficking.

During and after return, the trafficked person should be properly accompanied and their well being should be effectively monitored. In case of a trafficked person under the age of 18, prior to her/his return, contact between the child and her/his family should be facilitated and long-term assistance should be proposed to the child and the family. Child victims of trafficking should never be forcibly returned to their country of origin and/or if the family has not been traced or does not agree or is not able to provide the child immediate and long-term care; other suitable care-givers different from the family may be considered only if the child agrees.

To ensure proper assistance and support NGOs providing these services to returning

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<sup>289</sup> See para 5.3.

<sup>290</sup> United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002, Guideline No. 6.3.

<sup>291</sup> BD, pt. 15; OSCE Ministerial Council Decision No. 1, para 1, OSCE Action Plan V.5.

<sup>292</sup> UNHCHR, *op. cit.*, Guideline No. 6.3 (see footnote 4); UN Trafficking Protocol, Art. 8.4.

<sup>293</sup> Positions of the Members of the Experts Group differ on this issue.

trafficked persons should be adequately financed. Co-operation between NGOs and other civil society organisations in countries of origin, transit and destination should be encouraged and facilitated.<sup>294</sup> The development of long-term assistance programmes should make an integral part of development co-operation policies.<sup>295</sup>

Return and long-term assistance programmes for trafficked persons should rest on the following principles:

- voluntariness: it is the trafficked person who decides whether he or she wants to make use of the available services;
- protection of the privacy and safety:<sup>296</sup> no personal information regarding the trafficked person, including name, address and health status shall be made public or disclosed to third parties, including law enforcement, without her/his consent;
- protection of the confidentiality of the contact between the service provider and the trafficked person;
- freedom of movement:<sup>297</sup> under no circumstances should the trafficked person be detained, locked in or otherwise limited in her/his freedom of movement;
- the needs, views and concerns of the trafficked person should be at the centre;
- non-stigmatisation: programmes shall be developed in such a way that they do not stigmatise trafficked persons. Preferably they shall be part of general programmes for returnees;
- trafficked persons shall be treated in a respectful, non judgmental and non moralizing or patronizing way;
- programmes should aim at the empowerment of the trafficked person<sup>298</sup> defined as the process through which an individual can develop her/his ability to stand independently, make her/his own decisions and show control over her/his life;
- independence of the service providing agency;
- differentiation between adults and children: it is as much inappropriate to treat a child as an adult as it is to treat an adult as a child;
- in the case of children special policies and programmes should be developed to ensure that they will be provided with appropriate physical, psychological, legal, educational, housing and health care assistance.<sup>299</sup>

Elements of such programmes should be:

- needs and risk assessments in order to develop a programme which answers to the personal needs and situation of the trafficked person and adequately protects her/his safety;
- regularisation of the documentation status of the person with regards to national identity papers, national insurance numbers, medical cards and other necessary documentation;
- appropriate housing, including safe shelters and facilitating access to independent

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<sup>294</sup> BD, pt. 15; UNHCHR, *op. cit.*, Guidelines Nos. 11, 12 (see footnote 4).

<sup>295</sup> The Hague Declaration, III, 3.4.

<sup>296</sup> The Hague Declaration, III, 3.4.

<sup>297</sup> UNHCHR, *op. cit.*, Guideline No. 1.5 (see footnote 4).

<sup>298</sup> BD, pt. 15.

<sup>299</sup> UNHCHR, *op. cit.*, Guideline No. 8.7 (see footnote 4); UN TrafProt Art. 6.4.

- housing;
- health care, psychological assistance, free legal aid and, if necessary, social and economic benefits;<sup>300</sup>
  - advice and assistance in finding sustainable employment opportunities, including access to education and vocational training, in order to enable the trafficked person to attain economic independence;<sup>301</sup>
  - if requested, contacts with the family of the trafficked person in order to sensitise them and enhance their acceptance of the trafficked person;
  - encouragement and support of self-organisation.

### **Concepts used in the context of return and reintegration**

In the context of assistance to returning trafficked persons a number of different terms are used, e.g. repatriation, rehabilitation, reintegration, integration, recovery, social inclusion.<sup>302</sup> These terms, however, are not neutral and reflect underlying values and attitudes towards trafficked persons. The choice of terms may therefore be important to avoid stigmatisation and support empowerment of trafficked persons. Rehabilitation, for instance, is often used in particular in the context of trafficking for prostitution. As this word is more commonly used in relation to criminals, it suggests that there is something inherently disreputable with the person that needs to be corrected, that a conscious effort needs to be made to change that person's mindset or redirect negative behavioural patterns. Moreover, it objectifies the trafficked person, as a person can only be rehabilitated but cannot 'rehabilitate' on its own. A more appropriate term would be integration and reintegration to respectively describe the process of integration of the trafficked person in the country of destination and origin. Others prefer the term social inclusion as this describes more adequately the active and two-way character of the process as an interaction between the person and her/his context and also implies a sense of 'belonging and being involved'. Underlying the choice of terms are certain principles of working in a human rights framework, such as self-determination, autonomy and empowerment.

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<sup>300</sup> OSCE, Action Plan V.7.3; UNHCR Guideline No. 6.8. (see footnote 4).

<sup>301</sup> BD, pt. 15; UNHCHR, *op. cit.*, Guideline No. 6.8 (see footnote 4).

<sup>302</sup> See for a more extensive discussion of concepts GAATW, "The process of recovery from trafficking", *op. cit.*

## Explanatory paper 14

### Money laundering, seizure of assets, financial investigations

#### General remarks

Trafficking in human beings, as defined by the UN Trafficking Protocol, is “transnational” in nature and a cross-border phenomenon. The majority of human trafficking cases involve organised criminal groups that engage in preparing, planning, directing or controlling criminal activities in several States. Usually, their effect, the exploitation of the trafficked person, occurs in another State than the one where that person has been recruited or first transported or harboured. Human trafficking as migration-related crime brings aspects of the globalisation<sup>303</sup> of crime to the foreground. The speed of communications between persons and the ease of movement of people, goods, money and information have not only changed dramatically but also facilitated criminal action such as money laundering that has a negative impact on the international financial market, epitomising the globalisation of crime.

In the Financial Action Task Force Report (FATF) on money laundering typologies (2000 and 2001), “trafficking in human beings was noted as a growing source of illegal funds in last year’s exercise,”<sup>304</sup> especially in relation to cash transaction, which remains the major form in which illegal funds are generated, especially in many regions of the world outside the FATF membership. Trafficking in human beings creates huge amounts of cash. Cash proceeds are usually found before or at the beginning of the laundering process (for example when sexual services of a trafficked person are paid) although laundering schemes have been noticed, in which proceeds had been converted back to cash in order to break the paper trail. The utility of cross-border reporting requirements was mentioned by the FATF experts but also a recent study conducted in Europe (“Money penny Project”) reiterates the need for tracing cash movements across borders.<sup>305</sup>

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<sup>303</sup> “Globalisation” has been defined as “an evident loss of borders respect of everyday operations in different dimensions of the economy, of information, ecology, technology, trans-cultural conflicts and civil society (...). Money, technologies, goods, information, pollution, go beyond borders, as though didn’t exist. Even things, persons and ideas which Governments would like to keep out of their countries (drugs, illegal migrants, critics of the violation of human rights) find their way in (...) so globalisation translates into a killing of distance (Beck, U., *Che cos’è la globalizzazione. Rischi e prospettive della società planetaria*, Carocci, Roma, 1999, p. 39).

<sup>304</sup> No. 52 of the report ([http://www1.oecd.org/fatf/pdf/TY2001\\_en.pdf](http://www1.oecd.org/fatf/pdf/TY2001_en.pdf)).

<sup>305</sup> Directive 91/308/EEC, I as amended, provides for Community-wide controls on currency movements in excess of EUR 15.000 when the transactions are made via the financial institutions. But a large sums of money of dubious origin are entering and leaving the Community which cannot be detected by this mechanism. Cash movements should be subject to the principle of obligatory declaration at the external frontiers, as suggested in the Report on controls on cross-border cash movements and the Proposal for a Regulation on the prevention of money laundering by means of customs co-operation COM (2002) 328).

## Money laundering, seizure of assets, financial investigations

The Council Framework Decision of 19 July 2002 on combating trafficking in human beings (preamble; consideration 8) underlines the necessity of introducing sanctions on perpetrators sufficiently severe to allow for trafficking in human beings to be included within the scope of instruments already adopted for the purpose of combating organised crime, such as Council Joint Action 98/733/JHA of 21 December 1998 on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union<sup>306</sup> and Council Joint Action 98/699/JHA of 3 December 1998 on money laundering, identification, tracing, freezing, seizing and confiscation of the instrumentalities and the proceeds from crime.<sup>307</sup> In the latter the Member States agreed to make all serious offences, as defined in the Joint Action, predicate offences for the purpose of the criminalization of money laundering.

In recent years, there has been a trend towards a much wider definition of money laundering based on a broader range of predicate or underlying offences in order to facilitate the international co-operation in prosecuting organised criminal activities and confiscating the proceeds of crimes.

Money laundering should be criminalized worldwide not only on the basis of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988 (the Vienna Convention) but also in respect to the United Nations Convention against Transnational Organized Crime, 2000 (the Palermo Convention): the Parties should apply the crime of money laundering to all serious offences with a view to including the widest range of predicate offences and should adopt legislative measures (similar to those set forth in the Vienna and Palermo Conventions) enabling their competent authorities to confiscate the proceeds from clearly defined money laundering or predicate offences.

An interpretative analysis of the European legal instruments shows that trafficking in human beings can be considered as a predicate offence of money laundering.

However, Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering – as amended by Directive 2001/97/EC of the European Parliament and of the Council of 28 December 2001 – does not provide a homogenous list of crimes as predicate offence of money laundering.

The directive establishes that predicate offences of money laundering crime should include at least trafficking in drugs (as defined in Article 3 of the Vienna Convention), activities of criminal organisations (as defined in the Joint Action 98/733), fraud (as defined in the Convention on the protection of the European Communities' financial interests), corruption and “an offence which may generate substantial proceeds and which is

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<sup>306</sup> OJ L 351, 29.12.1998, p. 1.

<sup>307</sup> OJ L 333, 09.12.1998, p. 1.

punishable by a severe sentence of imprisonment in accordance with the penal law of the Member State”. Before 15 December 2004, Member States shall amend the definition provided for in this last sentence, in order to bring this definition in line with the definition of a serious crime in Joint Action 98/699/JHA. In any case they are free to designate any other offence as a criminal activity for the purposes of the Directive. But present EU legislation does no common substantial definition of money laundering. The range of predicate offences is variable within the European Union.

In relation to the possibility of including trafficking in human beings in the “list” of predicate offences of money laundering Article 3 (Penalties) of the Framework Decision on combating trafficking in human beings has to be taken into account. It establishes that each Member State shall take the necessary measures to ensure that an offence referred to this Framework Decision is punishable by effective, proportionate and dissuasive criminal penalties (which may entail extradition). In particular, each Member State shall ensure that the offence is punishable “by terms of imprisonment with a maximum penalty that is not less than eight years” where it has been committed in aggravating circumstances. Therefore it can be concluded, that trafficking offences, which usually generate substantial proceeds, are punishable by a severe sentence of imprisonment. But a clear qualification of human trafficking as predicate offence of money laundering in the Directive is needed and attention has to be drawn to the possibility of using the prevention system established in the Directive in order to combat human trafficking.

Furthermore, the Council Framework Decision of 26 June 2001 on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime<sup>308</sup> sets up some additional goals for prosecuting all types of crime, which are committed for the purpose of obtaining a profit and shall comprehensively ensure the tracing, freezing, seizing and confiscating of the proceeds of crime.<sup>309</sup> The fundamental importance of this aspect is underlined by the provision on “value confiscation.”<sup>310</sup> At international level, a mandatory provision applies to trafficking in human beings.<sup>311</sup> But again, a more transparent and clearer regulation could facilitate investigations in human trafficking cases.

Finally, various national legislators have introduced confiscation provisions requiring a

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<sup>308</sup> OJ L 182, 5.7.2001, p. 1.

<sup>309</sup> The direction already indicated by the Council of Europe Convention on money laundering, search, seizure and forfeiture of the proceeds of crime, signed in Strasbourg on November 8<sup>th</sup>, 1990.

<sup>310</sup> “Legislation and procedures on the confiscation of the proceeds of crime also should allow, at least in cases where these proceeds cannot be seized, for the confiscation of property the value of which corresponds to such proceeds.”

<sup>311</sup> Article 12 of the Palermo Convention: “States Parties shall adopt, to the greatest extent possible within their domestic legal systems, such measures as may be necessary to enable confiscation of: (a) Proceeds of crime derived from offences covered by this Convention or property the value of which corresponds to that of such proceeds; (b) Property, equipment or other instrumentalities used in or destined for use in offences covered by this Convention. 2. States Parties shall adopt such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.” With regard to the relation between Convention and the Trafficking Protocol Art. 1 of the Protocol says that the offences established in accordance with the latter shall be regarded as offences established in accordance with the Convention.

less challenging evidentiary basis with regard to certain crimes. Even though the formulation of such provisions is different, all the formulations are based on the following concept: the persons convicted of certain serious crimes should have confiscated such property or pecuniary resources that are disproportionate to their present or past known income unless they are able to give a satisfactory explanation in that regard. In practice, this means an inversion of the “burden of proof” in cases of continuous criminal behaviour resulting from membership in an organised criminal group.<sup>312</sup> Such a way may be considered as well with regard to trafficking in human beings.

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<sup>312</sup> Examples of such provision is the Art. 12-*sexies* of the Italian Law No. 356/1992; this article establishes, in case of conviction for certain criminal offences, including participation in a Mafia-type organisation, extortion, kidnapping as well as a number of drug offences, mandatory confiscation of all monies, property and other pecuniary resources, which are under the direct or indirect control of the offender, when their value appears to be out of all proportions to his income and he is unwilling or unable to provide a satisfactory explanation. The "burden of a satisfactory explanation", becomes only effective for the offender, once prosecution has established his criminal liability for one of the offences mentioned in Art. 12-*sexies*, Law 356/1992. The Italian Constitutional Court (*Corte Costituzionale*) and Supreme Court (*Corte di Cassazione*) in various instances had to consider whether this article did comply with the presumption of innocence as provided by Art. 27 para 2 of the Italian Constitution. Both courts concluded that the presumption of innocence as a principle of criminal law was not applicable to Art. 12-*sexies*, Law. 356/1992. According to the courts, the purpose of the provision was not to sanction the offender, but rather to eliminate the resources for financing future criminal activities. The recent Italian law on trafficking in human beings (No. 228/2003) inserted in the Art 12-*sexies* also the mention of the offences related to trafficking in human beings and reduction in servitude or slavery.

## Explanatory paper 15

### Restitution and compensation of victims

#### Current situation

The issue of compensation as it has been addressed at EU level with regard to crime victims in general is highly relevant in the context of human trafficking. The presidency Conclusions of the European Council in Tampere 1999 called for the drawing up of minimum standards on the protection of the victims of crime, in particular on crime victims' access to justice and on their rights to compensation for damages, including legal costs.

#### *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*

A first step in this direction was made with the Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings that apply to victims in general. This includes an obligation for Member States to ensure that crime victims can obtain a decision on compensation from the offender in the course of criminal proceedings. Member States shall also take measures to encourage the offender to provide adequate compensation to victims. Beyond these provisions, however, compensation to crime victims is not addressed.

The Council Framework Decision on the standing of victims in criminal proceedings covers the “penal part” of victim support and addresses the question of compensation from a limited and strictly procedural point of view only. In many cases, the victims cannot obtain compensation from the offender, for example when the offender cannot be successfully prosecuted or lacks the means to compensate the victim. In addition trafficked persons are often deported from the country prior to any criminal trial, or civil procedure taking place, and are unable to have their interest in obtaining compensation represented. Often legal assistance for gaining compensation, in either criminal or civil procedures, is not available. Other sources, such as compulsory or private insurance, may neither provide an adequate cover for the losses sustained by the victim. Consequently victims are in a very negative situation.

The Framework Decision on the standing of victims in criminal proceedings does not solve these problems as it includes only a mandatory provision for each Member State to ensure that victims are entitled to obtain a decision with reasonable time limits on compensation by the offender.

### *Directive on compensation*

In order to further develop the relevant EU legislation, on 28 September 2001 the Commission presented a Green Paper on compensation to crime victims<sup>313</sup> and, in fact, on 29 April 2004 the Justice and Home Affairs Council adopted the Directive on compensation to crime victims.<sup>314</sup> It shall ensure that the compensation aspect is duly covered at European level. However, there is not any provision regarding the possibilities for the crime victim to get compensation from the offender.

The objective of this new directive is limited to ensure that all EU citizens, and all legal residents in the EU, can receive adequate compensation for the losses they have suffered in case they fall victim to a crime within the EU. This objective is pursued through the creation of a minimum standard for state compensation to crime victims. The goals are:

- a. to ensure that the possibilities afforded in practice for the crime victim to get state compensation are not negatively influenced by in which Member State the crime is committed;
- b. to facilitate access to compensation in situations where the crime took place in another Member State than that of the victim's residence (cross-border situations).

In practice, the victims covered by the directive will be able to apply for state compensation in all Member States (choosing between the State where the crime was committed and the State where the victim lives). Unfortunately, this new instrument will be applicable only to a part of the victims of trafficking: EU citizens or non-EU persons with a permit of residence in one of the Member States at the time of their victimisation.

Therefore, the majority of trafficked persons (third country nationals without a legal residence status) will not be included in the benefits of this system. More precisely, there will be two different channels for the compensation of the victims depending on their status and causing a discrimination between the victims of the same crime (not only the same type of crime, but also the same criminal conduct: the victims of the same offender will be treated in different way depending on their status as EU citizens or legal residents).

### *European Convention of 1983 on compensation to victims of crime*

Looking at the Council of Europe, the European Convention of 1983 on compensation to victims of crime<sup>315</sup> has to be mentioned, which sought to introduce a minimum standard for state compensation schemes.<sup>316</sup> According to its Article 3 compensation shall be paid by the State on whose territory the crime was committed to nationals of the States party to this Convention and to nationals of all member States of the Council of Europe who are

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<sup>313</sup> COM(2001) 536 final.

<sup>314</sup> Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims, OJ L 261, 6.8.2004, p. 15.

<sup>315</sup> <http://conventions.coe.int/Treaty/EN/Treaties/Html/116.htm>. 14 EU Member States are parties of the Convention and four of them signed it (source: <http://conventions.coe.int/Treaty/EN/cadreprincipal.htm>).

<sup>316</sup> European Convention on compensation to victims of crime, Preamble, third consideration.

permanent residents in the State on whose territory the crime was committed. But it does not include any concrete measures to facilitate access to state compensation in cross-border situations.

### *Domestic schemes*

Individual European countries have developed State compensation schemes for victims of serious crime. At the same time, countries are beginning to develop and implement legislation for the seizure of criminal assets, which has the potential to access traffickers' assets for victims of traffickers.

In conclusion, it is evident that the compensation aspects are one of the essential steps also for the social reintegration of the victims. Nevertheless, the possibility for trafficked persons of getting adequate compensation is not well developed at European level. A joint European effort could express particular solidarity with the trafficked persons without prejudice to existing national systems on compensation to victims of crime.

# Explanatory paper 16

## Anti-corruption strategies

### The phenomenon of corruption

#### *Different viewpoints, different definitions*

The phenomenon of corruption can be tackled in different ways. According to the approach (criminal law, social, criminal or economics), some expressions of the phenomenon can be put together under the notion of *corruption*.

From a criminal law point of view, corruption remains limited to the penalization. According to that point of view, one can only speak about corruption when all the components of the crime are known and can actually be proved.

This however limits too much the phenomenon of corruption thus preventing a complete approach and the tackling of the problem. Criminal law makes up just one of the many instruments enabling a reaction against the emergence of sociably undesirable phenomena and, after all, serves as an ultimate remedy.

From a sociological and criminological point of view, corruption is generally defined as a deviation or an abuse of power. This is the case when a person is a civil servant or works in an organisation and serves other objectives or other interests than those according to the law. Since public authorities are very often the victim of corruption, corruption generally is restricted to the public sphere. It is clear, however, that also a private organisation can be the victim of corruption, for example the infiltration of criminal organisations in NGOs taking care of the victims of human trafficking.

Such an approach has the advantage of reducing the moral debate to its minimum. It is generally acknowledged that when one belongs to an organisation, in the private or in the public sphere, and enjoys a certain decisional competence within that organisation, that competence is always linked to objectives and standards of good professional behaviour. If that competence is exercised while neglecting these objectives in order to favour other interests, this implies by definition a behaviour that deviates from the norm. When corruption is formulated as a deviation of the normal exercise of power, a whole series of behaviours fall within the province of that definition.

Corruption has to be seen as a process that often starts with the emergence of deviant or deontologically unacceptable behaviour (a blurring of the norm).

If there is no appropriate reaction to that behaviour from the competent authorities, it

paves the way for a second stage in the process, which is corrupt behaviour. In this phase most of the components of the legal definition of corruption are there but the concrete evidence lacks. The last stage of the whole process of corruption is when according to the criminal law definition all the components can be collected and also be proved.

### **The causes at different levels**

As corruption is a complex phenomenon that can emerge in different ways, its causes can also be situated at different levels.

#### *Causes at the macro level*

Individuals, inevitably undergo influences from the global social context in which they work and live. Some economic factors such as general economic globalisation and the increasing intervention of the authorities in the economic organisation indisputably play a major role at that level.

Some evolutions in the administration create a fertile ground for corruption at the macro level. The more the occasions to corrupt are prevalent and the greater the interests at stake, the more the corruption will increase. The risk of corruption increases as soon as there are more contacts between the administration and the citizens (more possibilities) and the power of the administration is more significant (more possibilities and more important interests). In that sense the tendency of decentralisation, the increasing discretionary competences of public servants and the introduction of market ideology within the public authorities and the administration are factors that increase the risks of corruption.

Another macro cause of corruption is the lack of coherence and transparency of laws and regulations. Because of the excess of often complex rules decreed at different levels, citizens do not know any longer what they should stick to. This favours considerably the process of a blurring of the norm and of corruption. Moreover, this phenomenon strikes a blow at the confidence of the citizens in the law in general. The effectiveness and the fairness of the legal apparatus are indeed under pressure, which makes the perception of corruption less risky and less unacceptable.

Finally, still at the macro level, we should mention some causes linked to modified ethical concepts. Some consider that the increasing individualism and materialism and the decreasing civism can result into corruption. The perception of criminality is also changing. The fact that some reprehensible behaviour is being considered as less serious leads to a certain tolerance and a weakening of the legal norm.

#### *Causes at the meso level*

The causes of corruption located at the meso level are those that ensue from the direct professional environment. Both the intern regulation (and the absence of it) of the

organisation and its structure and culture can become fertile grounds for corruption.

It is obvious that the lack of clarity and transparency of the rules of a service or an organisation can be abused. Individuals, public servants or private persons, need points of reference to carry out correctly the tasks they have been given without being influenced.

Moreover, a distinction can be made between the causes of corruption at the structural level of the organisation and within the culture of the service or organisation. For the first category, we can quote the example of persons who are working for a too long period of time in sensitive sectors, like for instance social or police control in the sex business. An imperfect separation of the functions resulting in a lack of clarity regarding the question of responsibilities, insufficient remuneration and an extensive bureaucracy are all considered as elements making up a risk situation at the level of the organisation. Important causes of corruption can also be found at the cultural level of the organisation. The source of corruption can, indeed, be located at the management level, when it does not assume its responsibilities and refuses to follow a clear policy concerning the corruption practices. A lack of encouragement of the staff, a negative work climate, a blind confidence in subordinates and a lack of reaction to undeontological behaviour may become fertile grounds for corruption.

#### *Causes at the micro level*

Some persons are more sensitive to corruption than others. A person can, moreover, find himself in a specific situation that invites or leads to corruption. The moral attitude of the person can also play a role in the emergence of corruption.

## **Strategies for fighting against corruption**

### **Basic conditions for an anti-corruption project**

#### *The risk of a "Black Sheep" approach*

Considering the complexity of the phenomenon of corruption and its multiple causes, it is senseless to limit the reaction to certain aspects of the phenomenon. This approach, however, is seducing since it gives the organisation or the system the fallacious excuse to continue to function in the same way. When an organisation considers a case of corruption as an isolated case, we use the expression "*Black Sheep*," meaning it would be enough to remove the sheep from the herd in order to resolve all the problems. In most of the cases, however, because of the complexity of the phenomenon, a corruption problem is never *an individual problem but an organisational one*. That is why an anti-corruption project must aim at the *whole herd* and not only the *black sheep*.

### *The multi disciplinary and integrated approach of corruption*

The causes of the phenomenon of corruption are indeed located at *different levels*. Focussing on the reaction to the phenomenon via one level only seems thus useless.

An efficient strategy for fighting corruption tackles as many causes as possible and should be based on a multi disciplinary and integrated approach.

Elaborating such a strategy is not easy and requires a simultaneous activity at several levels. Bearing in mind an overall view and having a well-thought-out and prepared plan are obviously the required conditions to guarantee that the project succeeds. At the same time, a mechanism for a periodic evaluation and readjustment should be integrated.

The necessary integral and integrated character of an anti-corruption project implies that it focuses on preventive as well as repressive strategies.

An anti-corruption project takes each sector's specificity into account. The fact that the phenomenon of corruption requires a well-thought-out and integrated project does not mean, however, that it is possible to elaborate a general model for such a project that would be applicable to every situation.

An anti-corruption project must be applied at different levels and within different sectors (public and private). Consequently, it must be flexible enough and adaptable to different situations.

It is possible to start with a selection of a certain number of sectors particularly sensitive to corruption so that the anti-corruption project can focus on these sectors. The area of human trafficking and the economic sectors connected to it are good examples.

### **Preventive strategies**

#### *At micro level*

Elaborating a genuine integrated project to fight corruption requires above all an appropriate political climate. A genuine policy to fight corruption can only be implemented when authorities assume their responsibilities and have clearly delimited and verifiable competences.

Every anti-corruption project must be backed by a *general policy that clearly determines its policy objectives* and takes into account the multidimensional character of the corruption issue. This implies that the will to integrate the attention for corruption within the general policy exists, besides the elaboration of a concrete legislation and the creation of services that fight corruption.

As the major part of the corruption facts are linked to public corruption, authorities can efficiently play a preventive role, which is very important.

An efficient and attentive administration wishing to pay attention to the elaboration of a public mechanism that inspires confidence and authority is indispensable. The importance of a governmental policy that evaluates the public administrations and their functioning (external audit) and introduces, if needed, some adjustments, should not be underestimated as a strategy to fight corruption. The correct functioning and transparency of the administration eliminates a lot of the germs of the phenomenon of corruption. The 8<sup>th</sup> International Anti-Corruption Conference (IAAC) concluded in Lima in 1997 that: “All governments should operate in a transparent and accountable manner at all levels, with the public having access to information to the maximum extent possible. They should ensure that public accounts are open to public scrutiny. The role of civil society is most crucial at the national and local levels, where participation should be fostered by providing open access to decision-makers and the holding of public hearings in matters of importance.”

Transparency is also essential from a legislative point of view. The actual overabundance of laws and regulation often creates an inextricable judicial web that favours neither the citizens nor the control authorities.

Besides a solid legislative arsenal and the efficient functioning of public services in general, having a reliable control mechanism is of great importance. An efficient audit of the private institutions and public services plays a key role within the context of that control task.

Finally, the anti-corruption project must be well documented with regard to its complexity and concrete figures of the phenomenon. Until now, such figures were not available or at least insufficiently. It is thus necessary that the appropriate measures be taken in order to improve the quantitative vision on the phenomenon. An appropriate codification of criminal law files (in order to make the term *corruption* visible and no longer hidden by more general notions) and the instauration of obligatory information of the central service of corruption by the police services or the magistrates in charge of a corruption case should be a serious move forward.

At the very level we also have the importance of scientific research and the exchange of information regarding corruption.

Finally, a vibrant civil society enabling accountability and scrutiny of public policy and officials is an important factor in any anti corruption strategy.

#### *The meso and the micro level*

- *Selection and training*

Within an organisation or a service, the prevention of corruption and corruptive behaviour first goes through the application of particular selection criteria while recruiting and selecting staff. These criteria should not exclusively aim at experience, but should also focus on integrity, especially when the persons involved will have to

take up a post of confidence or accomplish tasks sensitive to corruption. A selection procedure may include an inquiry about the antecedents of the candidate, even with regard to its private life. When such an examination reveals antecedents such as dishonesty or inopportune relations, the candidate should not be engaged. As the private life has to be protected, it is not easy to analyse antecedents. The question, which must be considered, is to know until where to go when analysing the past of a (candidate) state employee.

Introducing a system of transparency concerning the financial situation of the person can also be useful. It is true that this method will not enable the detection of illicit transactions, yet such a system can play a major preventive role. Moreover, the declaration of the person concerned can constitute an important piece of evidence within the context of a disciplinary or criminal law procedure. The idea defended by some is to centralise these declarations within a Cell that manages dynamically the patrimonial register and realises the coupling of data stemming from other authorities (police, etc.) so that this financial publicity benefits from a supplementary dimension. It goes without saying that the eventual repercussions of such a system on the protection of the private life as well as the location where such a service would be implanted within a global anti-corruption project should first be analysed.

As far as training is concerned, it is important that the rules and procedures concerning the functioning of the organisation be accessible for everyone. Within that context, the ethical training and the creation of a balanced professional attitude deserve a particular attention; it is important that that training is not limited to the training phase but is followed up afterwards.

- *Optimisation of the organisational structure*

The administrative organisation or the organisational structure constitutes a major link of the whole anti-corruption project, which assumes an inventory of the departments sensitive to corruption within the organisation and an appropriate securing of these services. The members of an organisation or a public service should have an accurate description of their competences as well as a clearly elaborated description of their function. Everyone thus knows which are their own responsibilities, tasks and competences.

Within that context, an internal audit can be useful. A preventive audit can, indeed, enable the structural analysis of the vulnerable functions and lead to recommendations for the organisation or guarantee the protection of these functions. The sole financial analysis of an organisation leads already to positive results in many cases. Such an audit could be realised by the organisation itself or, if the need arises, like in France or in Hong Kong, by a central anti-corruption service.

In order to delimit, as far as possible, the seduction factor, it is appropriate to introduce in certain cases a rotational system (rotation of the location or of the function) for public servants. Thanks to these measures lasting contacts with dishonest people,

trying to subject people to inadmissible forms of influence (such as intimidation or financial corruption) would become more difficult. The rotational system is also guarantee for the public servant.

The reinforcement of the social control within the organisation (pride and peer control) may also play an important role in the prevention of corruption. This method avoids that public servants continue to work in an isolated way. A second form of internal social control uses teamwork. While working in teams of two or several persons, the seducing factor becomes restricted. This second option gives the opportunity to bow together over the problem and to find solutions without de-personifying the action of the public authorities.

Finally, at that level, it is appropriate to take a closer look at the detection of corruption thanks to the spontaneous denunciation of citizens. A mediation service could be created in order to control the correct application of the rules of the administrations and its abuse of power. Moreover, this service could also assume the communication with the citizen and take on the role of first filter. In order to guarantee the confidentiality of the citizen, the independence of the mediation service needs to be guaranteed.

- *Optimisation of the culture of the organisation*

As far as the cultural organisation is concerned, one should first of all encourage, within the organisation, the intention to be open. One has to admit that corruption can occur within every organisation and that it has to be thwarted via a whole series of measures. This point constitutes an essential pillar to the anti-corruption project.

The organisation of the external and internal information concerning corruption and the treatment of these files give to a large extend an answer to the need of transparency. It is in the interest of the organisation to inform citizens and organisations other than workers as much as possible of the recorded misdeeds.

One of the key instruments of anti-corruption projects can be located at the management level as such. The organisation is supposed to pursue its development and to verify that every worker participates to the realisation of a common objective. It is essential that the management feel that it is responsible for everything that is going on within its sphere of competences and that the organisation can easily designate it as responsible (management accountability). The leaders must indeed implement a clear policy regarding the appropriate behaviour and set an example.

It is also important that (morally) distressed persons benefit from a discrete accompaniment within the organisation. At the same time, state employees could receive positive incentives such as a material reward. The absence of recognition on the field often leads to frustrated and deceived state employees that initially were motivated.

- *The elaboration of lines of conduct*

Besides the formal rules regarding the function and competence processes and dispositions, it is important to get down to the elaboration of lines of conduct that establish clearly and in a simple way the rules of an upright behaviour and specify the meaning of the legal dispositions that determine this theme.

Lines of conduct can overcome the problem of discrepancy between the law and its specific application in practice and generate the required clarity. These lines will only have a positive effect when their elaboration implies an open discussion with those who are obliged to abide by these rules.

These lines constitute an indication concerning the behaviour that a public servant should adopt both within the context of its relations with its colleagues as with the population. The agreements on the extra's and the donations could for instance be part of the lines of conduct.

## **Repressive strategies**

### *The macro level: Criminal law and a repressive fight against corruption*

An important part played by criminal law is to ensure that corruption is detected, pursued and punished. Criminal law is the ultimate remedy, even though it is a precious instrument in the context of the establishment of norms and their upholding. Moreover, criminal law functions also repressively.

In order to improve the quality of inquiries in the corruption field, a service within the police could especially be in charge of it. Anyway, it is appropriate to verify that the repressive anti-corruption service collaborates optimally with the different services of internal control as well as with the services that in one way or another are linked to the anti-corruption project.

### *The meso level: the formal control within the organisation*

Besides the implementation of a social control system thanks to preventive strategies, the presence of a normal control system within the organisation seems necessary. Internal horizontal control systems based upon the distribution of tasks between colleagues as well as a vertical internal control carried out by the services or functions ensuring the surveillance are thus necessary.

In this last case, however, the internal and external control services play an important role.

These services must be provided with power, must be familiarised with the organisation, show independency and have the necessary means and inquiry competences.

Internal contact points can turn out to be very useful at that level, as they allow to manage internal intolerable situations without necessarily reporting it to the superiors. It may even be envisaged to offer a certain form of protection to the persons involved in corruption yet disposed to reveal information about corrupt practices (whistle blowing).

Finally, the importance of disciplinary measures must be underlined. An administrative and disciplinary reaction to corruption offers indeed more possibilities than a strictly criminal law approach, as the criminal incriminations must not necessarily be proved. Within that context, disciplinary measures complete criminal law. It is important to react rapidly and carefully to eventual situations of abuse. The elaboration of an efficient disciplinary policy cannot be done in an isolated way. It has to be incorporated in an integrated anti-corruption project. The disciplinary measures often get stuck because of a lack of general vision concerning corruption and concrete measures at the organisation level.

## Glossary of abbreviations

BD	Brussels Declaration
CRC	Convention on the Rights of the Child
EU	European Union
EC	European Commission
ECHR	European Court of Human Rights
FD	Framework Decision
ICCPR	International Covenant on Civil and Political Rights
IGO	Inter-Governmental Organisation
ICCPR	International Covenant on Civil and Political Rights
ILO	International Labour Organisation
IO	International Organisation
IGO	Inter-Governmental Organisation
NRM	National Referral Mechanism
NGO	Non-Governmental Organisation
OSCE	Organisation for Security and Co-operation in Europe
SIS	Schengen Information System
THB	Trafficking in Human Beings
TrafProt	UN Protocol to Prevent, Suppress and Punish Trafficking in persons, especially Women and Children
UN	United Nations
UNODC	United Nations Office on Drugs and Crime
UNDP	United Nations Development Programme
UNHCHR	United Nations High Commissioner for Human Rights