

# COUNTER TRAFFICKING HANDBOOK



Funded by  
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International Organization for Migration

# COUNTER TRAFFICKING HANDBOOK

‘Enhancing Cooperation Measures to Effectively Combat Trafficking  
in Persons through Capacity Building and Technical Assistance in  
Azerbaijan – Phase IV’



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International Organization for Migration

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## ABBREVIATIONS

APOV	Abuse of Position of Vulnerability
ASEAN	Association of Southeast Asian Nations
CIS	Commonwealth of Independent States
CJE	Code of Judicial Ethics
CoE	Council of Europe
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
FI	Financial Investigation
GRETA	Group of Experts on Action against Trafficking in Human Beings
ICAT	Inter-Agency Coordination Group against Trafficking in Persons
ICJ	International Court of Justice
ICTY	International Court of the Former Yugoslavia
ILO	International Labour Organisation
IOM	International Organisation for Migration
ILP	Intelligence Led Policing
JIT	Joint Investigation Team
MLA	Mutual Legal Assistance
NAP	National Action Plan
NGO	Non-Governmental Organisation
NRM	National Referral Mechanism
ODIHR	Office for Democratic Institutions and Human Rights
PTSD	Post Traumatic Stress Disorder
SOM	Smuggling of Migrants
SOP	Standard Operating Procedures
TIP	Trafficking in Persons
UAE	United Arab Emirates
UK	United Kingdom
UN	United Nations
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNTOC	United Nations Transnational Crime Convention
US	United States

## INTRODUCTION

Trafficking in persons is a complex phenomenon brought about by inter-related economic, social, cultural, political and personal factors. These stem primarily from vulnerability to poverty, lack of democratic cultures, gender inequality and violence against women, conflict and post-conflict situations, lack of social integration, lack of opportunities and employment, lack of access to education, child labour and discrimination.

The offence involves the recruitment, transportation, transfer, harbouring or receipt of persons, by force, coercion, abduction, fraud, deception, or abuse of power or a position of vulnerability, with the aim of exploiting them. Those trafficked are exploited into prostitution, forced labour, for the removal of their organs, or into other emerging forms of trafficking including organised begging, benefit fraud, domestic servitude and forced marriage.

Trafficking in persons is a crime that affects almost on all States in every region, of the world. It is both national and transnational. Between, 2010 and 2012, victims with 152 different citizenships were identified in 124 countries across the globe.<sup>1</sup> Trafficking has also an impact at individual level and can affect the health and wellbeing of victims. It leads to corruption, weakens the rule of law and endangers national security.

According to the United Nations, trafficking is estimated to have a global criminal worth of \$32 billion. The relatively low risks of trafficking and substantial profits have, in some cases, induced criminals to become involved as an alternative to other, riskier criminal pursuits.<sup>2</sup> The United Nations Office on Drugs and Crime (UNODC) claim that over 140,000 victims at any one time were trapped in trafficking situations across Europe in 2010. There is no sign of the overall number of victims decreasing, with up to 70,000 additional victims exploited each year. In 2012 the International Labour Organisation (ILO) <sup>3</sup> estimated “20.9 million people were victims of forced labour globally, trapped in jobs into which they were coerced or deceived and which they could not leave. Of these, 18.7 million (90per cent were exploited in the private economy. A total of 4.5 million (22 per cent were victims of forced sexual exploitation and 14.2 million (68 per cent) were victims of forced labour exploitation in economic activities, such as agriculture, construction, domestic work or manufacturing”.

The United Nations Children’s Fund (UNICEF) estimates that 1.2 million children are the victims of child trafficking in any one year. The proportion of children among detected victims is increasing: with one in three victims is a child. Two out of every three children trafficked are girls.<sup>4</sup> The ILO estimates that 40 to 50 per cent of those in forced labour are under the age of 18.

The human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims. Placing the victim at the centre of the response to trafficking means considering, at each and every stage, what the impact of the law, policy, practice or measure may have on persons who have been trafficked or who are vulnerable to being trafficked. Trafficked persons must not be subjected to discriminatory treatment. All measures must be applied without discrimination, particularly with respect to gender, ethnicity, social status,

<sup>1</sup> UNODC 2014 *Global Report on Trafficking in Persons* p7.

<sup>2</sup> Available from <https://www.unodc.org/unodc/en/human-trafficking/faqs.html>

<sup>3</sup> Available from <http://www.ilo.org/global/topics/forced-labour/lang--en/index.htm>

<sup>4</sup> UNODC 2014 *Global Report on Trafficking in Persons* p11.

immigration status and/or whether the trafficked person has been trafficked previously or has participated in the sex industry or illicit activities.<sup>5</sup>

Anti-trafficking measures should not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked.<sup>6</sup> Human rights based approach to action against trafficking in persons requires States to set up a comprehensive framework for the protection of trafficked persons as victims of a serious human rights violation and the effective investigation and prosecution of traffickers.

The National Coordinator reported before the Parliament in 2016 that 63 victims of trafficking (VoTs) were identified during 2015. Out of them 38 VoTs were exploited in Turkey, 8 in UAE, 3 in Russia. Among them 14 were exploited in Azerbaijan, out of which 7 were foreigners.<sup>7</sup>

The development of this handbook was carried out within the Project “Enhancing Cooperation Measures to Effectively Combat Trafficking in Persons through Capacity Building and Technical Assistance in Azerbaijan – Phase IV” which seeks to assist the Government of Azerbaijan’s efforts to combat trafficking in persons and consequently, transnational organised crime and to improve protection mechanisms to provide victims and potential victims of trafficking with appropriate assistance services.

The objective of this handbook is to strengthen national efforts to combat trafficking in persons by providing counter-trafficking training materials for judges, prosecutors and candidate judges which will be used by trainers and subsequently by the trainees in the framework of the formal education programme of the Justice Academy.

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<sup>5</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p27.

<sup>6</sup> UNODC *International Framework for Action To Implement the Trafficking in Persons Protocol* 2009 p8. Available from [https://www.unodc.org/documents/human-trafficking/Framework\\_for\\_Action\\_TIP.pdf](https://www.unodc.org/documents/human-trafficking/Framework_for_Action_TIP.pdf)

<sup>7</sup> <http://www.meclis.gov.az/?/az/stenogram/413>

## 1. International Framework – Legal Instruments

This chapter explains the importance of the international legal framework in trafficking in persons (TIP) and how the definition of trafficking in persons derives from International law.<sup>8</sup> It looks at the influence of international legal instruments including the United Nations Convention (UNTOC) against Transnational Organized Crime<sup>9</sup> and the Protocols thereto, the Council of Europe Convention on Action against Trafficking in Human Beings (CoE Convention)<sup>10</sup> and the decisions of the European Courts of Human Rights (ECtHR), to which the Republic of Azerbaijan is a signatory.

International and regional law provides the international standards that should be adhered to, legally, within the Republic of Azerbaijan. These standards should be used to develop national law and policy. Trafficking in persons can be a transnational crime and therefore an international response is required and equally importantly, at national level, it is necessary to understand the relevance and impact of international law. International law is also the foundation of international cooperation.<sup>11</sup> International commitments and legal obligations also originate from the Organisation for Security and Co-operation in Europe (OSCE) and the Commonwealth of Independent States (CIS). Member States should adhere to these commitments.

The OSCE is committed to playing an active role in addressing trafficking in persons which cuts across all three dimensions of its work. Since adopting its first Ministerial Council decision specifically addressing trafficking in persons in 2000, the OSCE has made combating trafficking in persons a priority. In 2003, the OSCE Ministerial Council endorsed the OSCE Action Plan to Combat Trafficking in Human Beings and established the position of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings.<sup>12</sup> The OSCE Action Plan is the key document providing the approach and framework for the anti-trafficking efforts of the OSCE participating States.

### 1.1 International Law on Trafficking in Persons

International law on trafficking in persons derives from the UNTOC and supplementary protocols. States that are Party to the UNTOC are Party to the UN Trafficking Protocol. These should be interpreted together and are supported by an array of international legal instruments, some focussing on the suppression of crime and others on human rights.<sup>13</sup> The UN Trafficking Protocol is a criminal matters protocol and an instrument designed to encourage international co-operation in fighting the crime of trafficking in persons.

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<sup>8</sup> International law originates from a number of sources including international conventions, treaties and agreements which when signed and ratified by States binds those States to the content as they become a party to the conventions and treaties.

<sup>9</sup> Available from <https://www.unodc.org/documents/treaties/UNTOC/Publications/TOC%20Convention/TOCebook-e.pdf>

<sup>10</sup> Available from <https://www.conventions.coe.int/Treaty/EN/Treaties/Html/197.htm>

<sup>11</sup> See Chapter 7. International Cooperation.

<sup>12</sup> OSCE *Factsheet on Preventing and Combating Trafficking in Human Beings in the OSCE Region* 23 November 2010. Available from <https://www.osce.org/›Resources>.

<sup>13</sup> ICAT 2012 Inter-Agency Coordination Group against Trafficking in Persons. *The International Legal Frameworks concerning Trafficking in Persons* p2.

One of the principle objectives of international law is the protection of human rights. Over the past decade a general agreement has emerged within the international community that trafficking itself is a serious violation of human rights. The United Nations General Assembly, the Human Rights Council and many international human rights mechanisms have repeatedly affirmed that trafficking violates and impairs fundamental human rights. International conventions that have been enacted relating to human rights and forced labour need to be considered when applying the law in relation to trafficking in persons.

ILO has a mandate to develop international labour standards and promote their ratification and implementation.<sup>14</sup> The European Court of Human Rights (ECtHR), acknowledging the reliance of the European Convention's drafters on the ILO Forced Labour Convention, has used the ILO instrument as a guide.<sup>15</sup> Similarly, the United Nations Human Rights Committee, the treaty body that monitors implementation of the International Covenant on Civil and Political Rights, has noted that the ILO definitions are relevant in elucidating the meaning of the terms forced and compulsory labour.<sup>16</sup> The Republic of Azerbaijan is a signatory to and has acceded to a number of ILO Conventions.<sup>17</sup>

## 1.2 European Law

The primary legal instrument of the Council of Europe (CoE) is the European Convention on Human Rights<sup>18</sup> (ECHR) which is overseen by the ECtHR. Council of Europe Member States are bound by the ECHR and its interpretations by the ECtHR<sup>19</sup>.

The CoE Convention contains provisions for adapting the criminal legislation of a State for two purposes, protecting victims of trafficking and assisting prosecution of the traffickers. Authorities can prosecute offences established in the Convention without the necessity of a complaint from the victim. Also, if a national of a State commits an offence abroad there is an obligation to prosecute if the conduct involved is an offence under the law of the country where the offence took place or the offence took place outside any country's territorial jurisdiction.<sup>20</sup>

## 1.3 Courts

The decisions of international courts can have binding authority on those States that are subject to their jurisdiction. A State may be reliant on international co-operation, which if not forthcoming may adversely affect a criminal prosecution or the protection of a victim. In such cases it can seek redress from international courts to uphold the cooperation.

### *International Court of Justice*

The International Court of Justice (ICJ) is the principal judicial organ of the United Nations (UN). It was established in June 1945 by the Charter of the United Nations and began work in April 1946. The Court's role is to settle, in accordance with international law, legal disputes submitted to it by States

<sup>14</sup> ILO 2009 *Forced Labour and Human Trafficking Casebook of Court Decisions* p1.

<sup>15</sup> Van der Musselle v. Belgium, Application No. 8919/80, at para. 32.

<sup>16</sup> ILO 2009 *Forced Labour and Human Trafficking Casebook of Court Decisions* p9.

<sup>17</sup> See Annex 2.

<sup>18</sup> Available from [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>19</sup> The Republic of Azerbaijan is a Member State of the CoE.

<sup>20</sup> Handbook for parliamentarians The Council of Europe Convention on Action against Trafficking in Human Beings. Available from <https://www.coe.int/trafficking>

and to give advisory opinions on legal questions referred to it by authorized United Nations organs and specialised agencies.<sup>21</sup>

The ICJ has been used to enforce Mutual Legal Assistance where one State refused to execute an international letter rogatory in violation of the Convention on Mutual assistance in Criminal Matters.<sup>22</sup>

### *The European Court of Human Rights*

The ECtHR was established by the European Convention on Human Rights in 1959. It rules on individual or State applications alleging violations of the civil and political rights set out in the ECHR. The ECHR is adopted within the context of the CoE. The Republic of Azerbaijan, as a Member State, is a contracting party to the Convention.

National courts must take into account any judgement, decision or declaration or advisory opinion of the ECtHR when determining any question that arises in relation to all articles of the ECHR. Judgments finding violations are binding on the States concerned and they are obliged to execute them. The CoE Committee of Ministers monitors the execution of judgments, particularly to ensure payment of the amounts awarded by the Court to the applicants in compensation for the damage they have sustained.<sup>23</sup>

In 2001, Azerbaijan became the 43<sup>rd</sup> country to join the Council of Europe. Since April 2002, Azerbaijan has been a party to the Convention for the Protection of Human Rights and Fundamental Freedoms, as well as to ten of its additional Protocols.

## 1.4 Jurisprudence

Examples of application of jurisprudence in different cases.

### *Prosecutor v Kunarac, Kovac and Vukovic*<sup>24</sup>

From April 1992 to February 1993, the area of Foca, Serbia was the scene of an armed conflict. Non-Serb civilians, Muslim civilians and women in particular, were killed raped or otherwise mistreated as a direct consequence of that armed conflict. On 22 February 2001, the Trial Chamber found K, K and V guilty of crimes against humanity on the counts of enslavement, rape and torture as well as violations of the laws and customs of war on the counts of rape and torture.<sup>25</sup>

The International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that the traditional concept of “slavery” has evolved to encompass various contemporary forms of slavery, based on the exercise of any or all of the powers attaching to the right of ownership. They observed that the definition may be broader than the ‘traditional and sometimes apparently distinct definitions of either slavery, the slave trade and servitude or forced or compulsory labour found in other areas of international law’.<sup>26</sup>

<sup>21</sup> Available from <https://www.icj-cij.org/court>

<sup>22</sup> Djibouti v. France.

<sup>23</sup> Available from <https://www.echr.coe.int/>

<sup>24</sup> Cases No IT-96-23 (22 February 2001) and IT-96-23/1-T(12 June 2002) (Appeals Chamber)

<sup>25</sup> Available from <https://www.icty.org>Press>>Pre-2008> Archives.

<sup>26</sup> Drew, S. 2009 *Human Trafficking – Human Rights* 2009 p36.

*Van der Musselle v. Belgium*<sup>27</sup>

A Belgium lawyer argued that providing an uncompensated pro bono service as part of his training was a violation of Article 4 of the ECHR. The Court rejected the claim but analysed each element of a forced labour violation.

The court took the definition under ILO Convention No.29 concerning “Forced or Compulsory Labour” which defined forced labour as “all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. The Court held that this definition was a starting point for the interpretation of Article 4 of the ECHR.

Notwithstanding actual consent, forced or compulsory labour may exist where a considerable and unreasonable imbalance exists between the aim pursued and obligations undertaken by the worker in order to achieve that aim. This definition echoes the definition of debt bondage and courts should be willing to look beyond actual subjective consent to the objective terms and conditions of work.<sup>28</sup>

*Siliadin v France*<sup>29</sup>

The Applicant was a fifteen year old girl who was brought from Togo to France by means of deceit for purposes of labour exploitation. It was the ECtHR’s first judgment under the CoE Convention, and on trafficking in persons generally, within the context of Article 4 of the ECHR. The Court concluded that the applicant, a minor at the relevant time, had been subjected to forced labour and was held in servitude within the meaning of Article 4 of the CoE Convention.

The Court unequivocally stated that, “it necessarily follows from this provision [Article 4] that States have positive obligations, in the same way as under Article 3 ECHR for example, to adopt criminal-law provisions which penalise the practices referred to in Article 4 and to apply them in practice”.

*Rantsev v Cyprus and Russia*<sup>30</sup>

This case involved a Russian national, Ms Rantseva, who entered Cyprus on an artiste visa (widely known to be used by human traffickers to bring women into the country for purposes of forced prostitution in nightclubs). She escaped from the club where she was working, but her “employers” found her and brought her to a police station in order to have her deported for violating the terms of her visa. After spending several hours at the police station, the police, not intending to deport her, contacted the alleged traffickers to come and pick her up, which they did. Several hours later Ms Rantseva was found dead on the pavement outside the apartment building of one of the men concerned.

The applicant (Ms Rantseva’s father) complained, principally, about the failure to investigate the allegations of trafficking in persons and his daughter’s death, as well as the failure of the Cypriot authorities to protect his daughter.<sup>31</sup>

The Court found, unanimously, that trafficking in persons, although not explicitly mentioned in the ECHR, fell within the scope of Article 4 (prohibition of slavery, servitude and forced labour).The

<sup>27</sup> ECHR Application no. 8919/90.

<sup>28</sup> Drew, S. 2009 *Human Trafficking – Human Rights* p151.

<sup>29</sup> ECHR Application no. 73316/01.

<sup>30</sup> Application No. 25965/04.

<sup>31</sup> Available from [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/rantsev-v-cyprus-and-russia-application-no-2596504\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/rantsev-v-cyprus-and-russia-application-no-2596504_en)

Court also took a much more thorough look at the whole issue of trafficking and clarified the obligations of States in this respect.

In its judgment, the Court found violations of Article 2, a violation by Cyprus of the procedural obligation to carry out an effective investigation; Article 4, in three respects; a violation by Cyprus of the procedural obligation to put in place an appropriate legislative and administrative framework; a violation by Cyprus of the positive obligation to take protective measures; a violation by Cyprus and Russia of the procedural obligation to investigate human trafficking; and Article 5(1), a violation by Cyprus arising out of Ms Rantseva's detention in the police station until the alleged traffickers came to get her and her subsequent detention in the apartment before her death.

This is an extremely important case for individuals who have been trafficked for the purposes of exploitation, but who have escaped from their traffickers before actually being forced into exploitation, which can be categorised as slavery, servitude or forced or compulsory labour. Having found that trafficking in persons itself comes within the scope of ECHR article 4, the Court makes specific mention of the positive obligations of States, under ECHR article 4, to have in place adequate protection measures for victims of trafficking and for potential victims.<sup>32</sup>

*The Court in Rantsev found that the CoE States have three positive obligations towards victims of trafficking of trafficking:*<sup>33</sup>

- To have in place a legislative and administrative framework designed to punish human traffickers;
- To protect individuals who have been or are at risk of becoming victims of trafficking ; and
- To investigate acts of trafficking in persons and, where possible, prosecute the traffickers.

#### **C.N. v UK**<sup>34</sup>

This case is about a woman who was held in domestic servitude and it is the fourth judgment in which the Court found a violation of the prohibition of slavery, forced labour and servitude (Article 4 ECHR). The applicant was from Uganda and she travelled to the United Kingdom (UK) to escape from sexual and physical violence. A relative helped her to get to the UK, but once there, he took away her passport and traveling documents. The applicant worked for an elderly couple, on-call day and night with just one afternoon per month off. Her wages were paid to her relative who kept them and gave the applicant very little of her wages.

The Court held that Article 4 of the ECHR entails a procedural duty on the part of the States to investigate "where there is a credible suspicion that an individual's rights under that Article have been violated" (paragraph 69). That the legislative provisions in force in the United Kingdom at the relevant time were inadequate to afford practical and effective protection against treatment falling within the scope of Article 4 of the Convention.

The Court noted that domestic servitude is a specific offence, distinct from trafficking and exploitation. It involves a complex set of dynamics, involving both overt and subtler forms of coercion, to force compliance. A thorough investigation into complaints of such conduct therefore

<sup>32</sup> Chaudary, S. Weiss, A. 2011 *ECHR and EU Protection for Victims of Trafficking in the UK* ed. Chandron, P Human Trafficking Handbook recognising Trafficking and Modern-Day Slavery in the UK p233.

<sup>33</sup> *Ibid.* p234.

<sup>34</sup> Application no. 4239.08.

requires an understanding of the many subtle ways an individual can fall under the control of another.

## 1.5 Soft Law

In the context of international law soft law refers to rules that are neither strictly binding in nature nor completely lacking in legal significance. These are guidelines, policy declarations or codes of conduct that set standards of conduct, but they are not directly enforceable.<sup>35</sup>

Soft law instruments can help to contribute to the development of new legal norms and standards by providing experience of opinion, juris and even State practice in the context of emerging customary norm.<sup>36</sup> Soft law includes resolutions and reports of international human rights mechanisms such as treaty bodies and special procedures and non-treaty agreements between countries regarding issues such as the repatriation and reintegration of trafficked persons.

### *Selected examples of soft law instruments*

Recommended Principles and Guidelines on Human Rights and Human Trafficking (Trafficking Principles and Guidelines) 2002.

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

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

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

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

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

Whilst the sources of soft law do not directly impose obligations on States or confer rights on individuals or groups, they can form part of the international legal framework by assisting in the identification of particular legal trends or by contributing to the development of customary international law in relation to a particular aspect of trafficking in persons. Determining the weight of soft, treaty-based norms is, at least in the area of trafficking, a fairly straightforward process. In the majority of cases, such provisions are not completely devoid of legal substance and it will generally be possible to determine the required behaviour objectively. In the case of the major instruments, and the UNTOC, such a determination can be made with reference to an extensive body of interpretive material that includes travaux préparatoires, legislative guides and commentaries.<sup>37</sup>

<sup>35</sup> Available from <http://definitions.uslegal.com/s/soft-law/>

<sup>36</sup> United Nations Human Rights Office of the High Commissioner for Human Rights 2010 *Recommended Principles and Guidelines on Human Rights and Human Trafficking* p25.

<sup>37</sup> United Nations Human Rights Office of the High Commissioner for Human Rights 2010 *Recommended Principles and Guidelines on Human Rights and Human Trafficking* p28.

## 1.6 Children

Children are amongst the most vulnerable in society and any child who is identified as a potential victim of trafficking in persons should be provided with protection. Even though there is no agreed definition of “vulnerability”, the existing legal and policy framework, as well as relevant literature, identifies children as one of the most vulnerable groups to victimisation. It should be stressed that vulnerability of children is not a static concept, as it fluctuates according to factors that could potentially impact the trafficking victimisation.

A lack of knowledge that impedes comprehensive understanding of the interplay between different vulnerability factors and the cumulative and the inter-sectional effects thereof renders children the most vulnerable in our society. The international legal and policy framework for addressing trafficking in human beings has identified children as inherently vulnerable to trafficking in persons.

### *International legal instruments relating to Children*

In the international legal framework for the protection of children, including the instruments that address trafficking in persons directly or indirectly the principle of the best interests of the child occupies a central position (see Annex 5).

Article 3 of the UN Convention on the Rights of the Child states.

*“The best interests of the child are a primary consideration in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies.”*

*The UN Convention on the Rights of the Child is guided by key principles;*

Article 2 - Non-discrimination;

Article 6 - The right to life;

Articles 9 and 10 refer to family reunification.

Article 12 - Listening to the child (a child’s right to be heard);

An Optional Protocol to the UN Convention –the “Optional Protocol on the sale of children, child prostitution and child pornography” draws special attention to the criminalisation of serious violations of children’s rights.<sup>38</sup> The term “trafficking” is only mentioned in the preamble to the Protocol, however the Protocol states in Article 3 that:

*“1. Each State Party shall ensure that, as a minimum, the following acts and activities are fully covered under its criminal or penal law, whether such offences are committed domestically or transnationally or on an individual or organized basis:*

*(a) In the context of sale of children as defined in article 2:*

*(i) Offering, delivering or accepting, by whatever means, a child for the purpose of:*

*a. Sexual exploitation of the child;*

*b. Transfer of organs of the child for profit;*

*c. Engagement of the child in forced labour;*

<sup>38</sup> ILO 2012 *Tackling Child labour from commitment to action* p4.

*(ii) Improperly inducing consent, as an intermediary, for the adoption of a child in violation of applicable international legal instruments on adoption;*

*(b) Offering, obtaining, procuring or providing a child for child prostitution, as defined in article 2;*

*(c) Producing, distributing, disseminating, importing, exporting, offering, selling or possessing for the above purposes child pornography as defined in article 2.*

ILO Convention No 182 “Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour” calls for the elimination in addition to the prohibition of the worst forms of child labour.

Article 1 of the Convention requires:

*“Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”*

The CoE Convention specifically provides minimum standards for the protection of victims. Chapter III sets out the “Measures to protect and promote the rights of victims, guaranteeing gender equality” and these measures include all children.

Article 3 of the CoE Convention states that “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.”*

The EU Directive 2011/36/EU<sup>39</sup> states that “Children are more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings”. In the application of this Directive, the child’s best interests must be a primary consideration, in accordance with the Charter of Fundamental Rights of the European Union and the 1989 United Nations Convention on the Rights of the Child”. Of note this Directive, further, introduces a presumption of childhood.

#### *Defined Elements of Child trafficking*

- A child is a person under the age of 18 years;
- Recruitment, transportation, transfer, harbouring or receipt, whether by force or not, by a third person or group;

<sup>39</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims

- The third person or group organises the recruitment and/or these other acts for exploitative purposes;
- Movement may not be a constituent element for trafficking in so far as law enforcement and prosecution is concerned. However, an element of movement within a country or across borders is needed – even if minimal – In order to distinguish trafficking from other forms of slavery and slave like practices enumerated in Article 3 (a) of ILO Convention No. 182, and to ensure that victims of trafficking separated from their families do receive the assistance they need;
- Exploitation includes:
  - a) all forms of slavery or practices similar to slavery, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict (Convention No. 182, Art. 3(a));
  - b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances (Convention No. 182, Art. 3(b));
  - 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 (Convention No. 182, Art. 3(c));
  - 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 (Convention No. 182, Art. 3(d) and Convention No. 138, Art 3);
  - e) work done by children below the minimum age for admission to employment (Convention No. 138, Art. 2 & 7).
- Threat or use of force or other forms of coercion, abduction, fraud or deception, or the abuse of power or a position of vulnerability at any point of the recruitment and movement do not need to be present in case of children (unlike for adults), but are nevertheless strong indications of child trafficking;

*ILO 2010 Child Trafficking – Essential p1.*

Available from <https://www.ilo.org/ipecinfo/product/download.do?type=document>

## 2. International framework – Phenomenon of Trafficking in Persons

This chapter looks at the root causes of trafficking in persons. It provides the definition of trafficking in persons at international level and describes the component elements and the process of trafficking in persons. It identifies the different forms of trafficking in persons and the types of exploitation and explains why it is both a national and transnational crime.

The chapter also provides the definition of smuggling of migrants (SOM) and its component elements and explains the difference between trafficking in persons and SOM.

Trafficking in persons is, in its modern form, a phenomenon that is inextricably linked to, and shaped by, the dynamics of contemporary global migration.<sup>40</sup> Severely restrictive immigration policies are more likely to fuel organised, irregular migration than stop it. The tightening of immigration laws and policies in many destination States has led to a decrease in legal opportunities for international migration, creating an environment that is very conducive to migrant smuggling.<sup>41</sup> Research has demonstrated that a response that emphasises restricting immigration can increase migrants' vulnerability and facilitate abuse.<sup>42</sup>

### 2.1 Root Causes

Trafficking in persons is a highly profitable crime that is based on the principles of supply and demand and which exploits a series of “push and pull” factors in the countries of origin and destination. There is a continuous supply of victims within the States of origin and a constant and growing demand for the services of the victims in the States of destination. These two factors are exploited by organised criminals.

The supply of victims can result from global root factors which can be economic opportunity, conflict, violence (including domestic violence), gender, culture, age and other factors. The root causes are varied and often differ from one State to another, many of the factors are specific to individual trafficking patterns and to the States in which they occur. There are, however, many factors that tend to be common to trafficking in persons in general or found in a wide range of different regions.

Cultural factors can include family or peer pressure, a patriarchal family structure, gender discrimination, social discrimination, States or regions where women are the sole providers and cultural practices. The devaluation of women and girls in society makes them disproportionately vulnerable to trafficking.<sup>43</sup> Economic factors include, economic transition which can cause unequal distribution of wealth in a State and poverty, employment opportunities and the desire to improve living standards. Political factors can include governmental policies, lack of adequate legislation, conflict, civil unrest and instability.

Potential victims are made vulnerable by these “push factors” (circumstances within their States of origin that push people to leave their homes). Traffickers often exploit this vulnerability. There is no

<sup>40</sup> Bosco, F. et al. 2009 *Human Trafficking Patterns* ed. Freisendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* pp57-58.

<sup>41</sup> Danzinger, R. et al 2009 *Human Trafficking & Managed Migration* ed. Freisendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p261.

<sup>42</sup> Dwyer, P. et al 2011 *Forced labour and UK immigration policy: status matters?*

<sup>43</sup> UNODC 2006 *Toolkit to Combat Trafficking in Persons* Chapter 9 p455.  
<https://www.unodc.org/documents/human-trafficking/HT-toolkit-en.pdf>.

agreed definition of “vulnerability” and there is a lack of knowledge that impedes comprehensive understanding of the interplay between different vulnerability factors and cumulative and the intersectional effects.

Trafficking in persons is a market driven criminal industry with a consumer willingness to pay specific price for goods and services. The consumer’s failure to either recognise or ignoring trafficking in persons can result in the markets they use being targeted by the traffickers. There is a demand for sexual services that may be unlawful, unavailable or illegal.

Usually, demand for labour exploitation comes from unscrupulous employers, but it may also come from brokers or agents, or from a trafficking network involving several actors at different points along the trafficking process<sup>44</sup>.

“Pull factors” can include the prospect of employment, higher salaries, improved living standards, financial reward, or a belief of a better life. A desire to earn more money is the common denominator in most people’s decision to migrate. Nearly 80 per cent of male victims of trafficking assisted by IOM Ukraine cited a desire to improve their living conditions as their main reason for migrating.<sup>45</sup>

For the criminals involved, trafficking in persons for the purpose of exploiting their labour is ultimately a business. It thrives because the perceived rewards involved outweigh the perceived risks. Effective criminal justice responses affect demand by increasing the costs to traffickers through measures including imprisonment and asset confiscation.

There are a number of challenges to an effective response to trafficking in persons. In the first instance, many cases are simply not identified. A lack of clear identification mechanisms and guidelines is often compounded by limited incentives for victims to come forward, both in terms of benefits in the legal process, and services and protection available to them.<sup>46</sup>

Article 6 of the CoE Convention– Measures to discourage the demand states

*“To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures”*

### 2.1.1 Children

UNICEF warn against generalising about the causes of trafficking in persons, stating that each country has specific factors or combinations of multiple factors that are unique. However there are a number of factors that can contribute to the vulnerability of children and make them susceptible to human trafficking. These can include legislation that can discriminate against children, poor education, the search for a better life, cultural and religious factors including a belief in spirit possession. There are also external factors such as conflict and natural disasters which create circumstances of vulnerability. Children can also be groomed by the traffickers.

Children from minority ethnic groups seem to be particularly vulnerable to traffickers, as social discrimination and marginalisation hinder their access to education, health and employment.

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<sup>44</sup> ICAT 2014 *Preventing Trafficking in Persons by addressing Demand*.

<sup>45</sup> USAID 2010 *Trafficking of Adult Men in Europe and Eurasia Region* p12.

<sup>46</sup> ICAT 2014 *Preventing Trafficking in Persons by addressing Demand*.

Cultural factors such as the acceptance of child labour, young marriage age and nomadic lifestyle, seem to contribute to child vulnerability.<sup>47</sup>

### 2.1.2 Gender

Trafficking in persons, as recognised by international legal instruments, policy and international agencies including the OSCE is a gendered phenomenon. The cycle of trafficking in human beings in its entirety is highly gendered i.e. from the gender dimensions of demand creating supply and the root causes that make victims vulnerable, to the gendered policy and institutional responses for addressing trafficking in human beings, including prevention policies.

Article 5 (3) of the CoE Convention states:

*“Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2”.*

A UNIFEM<sup>48</sup> concept paper states that “trafficking, especially in women and in children, is consequently an important concern on the agenda of governments and non-governmental actors worldwide. However significant inroads into the problem do not appear to have been made. This is partly attributable to conceptual ambivalences, perspectival biases and the need for more strategic thinking in formulating and operationalizing plans, policies, laws and programmes to address the issue”.

The concept paper also states that the “dominant discourse and interventions on trafficking are not normally gender-responsive, though focused primarily on women and girls. Many such initiatives recognize differences and inequalities between men and women as natural and unchangeable, reinforcing discriminatory gender stereotypes. They tend to ban or restrict women’s actions and choices, control or morally reform women, often while intending to protect them. All of this disempowers women. A gender sensitive rights-based approach would address unsafe and discriminatory contexts, and equip women to deal with potential exploitation”.

Vulnerability to trafficking and to different forms of exploitation is shaped by gender. While women and girls tend to be trafficked for sexual exploitation, domestic work or the care sector, men and boys tend to be victims of forced labour, in particular in agriculture, construction, mining, or forestry or on fishing fleets. In addition, the short and long term consequences on trafficked women and men might differ, depending on the form of trafficking and gender.

The 2015 Eurostat Report<sup>49</sup> states that, “Both female and male victims can be trafficked for many exploitative purposes. Of all the female victims registered, the overwhelming majority were trafficked for the purpose of sexual exploitation (85%). Among registered male victims, 64% were trafficked for labour exploitation. A distinct gender split can also be seen within the different types of exploitation. Registered victims of sexual exploitation are predominantly female (95%) whereas the majority of registered victims of labour exploitation are male (71%). For other forms of

<sup>47</sup> BM.I. 2006 *Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking* p27.

<sup>48</sup> UNIFEM *Gender Equality, Human Rights and Trafficking: A Framework for Analysis and Action* p2.

<sup>49</sup> Eurostat Report on trafficking in human beings 2015 edition p11. Available from [https://ec.europa.eu/anti-trafficking/publications/trafficking-human-beings-eurostat-2015-edition\\_en](https://ec.europa.eu/anti-trafficking/publications/trafficking-human-beings-eurostat-2015-edition_en)

exploitation such as forced begging, selling of children, etc., female victims represent 52% and males 38% of registered victims, with 10% of unknown gender.”

The EU Strategy towards the Eradication of Trafficking in Human Beings (2012–2016) recognises that trafficking in persons takes many different forms, and evolves with changing socioeconomic circumstances and that it targets women and men, girls and boys in vulnerable positions. One of the key priorities of the strategy is “Stepping up the prevention of trafficking in human beings” which states “Prevention needs to be stepped up in the light of the root causes which make people vulnerable to trafficking and addressing these causes should be a key aspect of prevention in the EU and in third countries”.

The EU Directive 2011/36/EU highlights the “push and pull” factors may be different for women and men depending on the sectors concerned, such as trafficking in persons into the sex industry or for labour exploitation in, for example, construction work, the agricultural sector or domestic servitude”. It further recognises gender as one of the factors contributing to vulnerability.

The OSCE Action Plan to Combat Trafficking in Human Beings<sup>50</sup>, in section IV, 3.3, recommended that the economic and social policies aimed at addressing the root causes of trafficking in persons should, “Take appropriate measures to eliminate discrimination against women in the field of employment in order to ensure, on a basis of gender equality, the right to equal pay for equal work and the right to equality in employment opportunities”.

This was reinforced by the “Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later”<sup>51</sup> which recommended in section III “Prevention of all forms of trafficking” that national level authorities take further measures to eliminate discrimination against women in the field of employment and to ensure equal opportunity for men and women for economic participation and equal access to social protection, thereby decreasing their vulnerability to trafficking in persons”.

## 2.2 Definition of Trafficking in Persons

The first internationally recognised definition of trafficking in persons appears in Article 3 of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children (2000) (UN Trafficking Protocol). It defines trafficking in persons as:

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

<sup>50</sup> OSCE Decision No. 557 *OSCE Action Plan To Combat Trafficking In Human Beings* p8.

<sup>51</sup> “Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later” that was adopted by the Permanent Council in its Decision PC.DEC/1107 and endorsed by the Kyiv Ministerial Council in its Decision MC.DEC/07/13 on 6 December 2013.

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

*(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.*

*(d) “Child” shall mean any person less than eighteen years of age”.*

The definition of trafficking in persons in the CoE Convention expressly included both national and transnational trafficking and that trafficking in persons could be linked or not with organised crime. The EU Directive 2011/36/EU included begging and criminal activities as forms of exploitation.

There have been criticisms on the international definition of trafficking in persons, and it has been stated that it is complex, lacks clarity of meaning and has no common definitions of recruitment, deception, coercion or exploitation. These definitions have been left to individual States to define within their national legislation. However, the complexity of the definition has brought problems when it has been adopted word for word in national legislation and passed to law enforcement officials as an operational definition of a crime they are supposed to detect or prevent.<sup>52</sup>

Article 5 of the UN Trafficking Protocol states:

*“1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally”.*

All State parties to the UN Trafficking Protocol are obliged by Article 5 to criminalise trafficking, either as a single criminal offence or a combination of offences that cover, at a minimum, the full range of conduct covered by the definition.<sup>53</sup> It is important that all States develop a national legislative framework that provides a comprehensive response to trafficking in persons. Article 18 of the CoE Convention reinforces this and states “Each State Party shall adopt such legislation as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally”.

The basic obligation to establish criminal offences is directly linked to the definition of “trafficking in persons”. This definition is therefore central to any legislation seeking to implement the Protocol.<sup>54</sup>

The definition of trafficking in persons consists is made up of three constituent elements, and each of the elements must be present to breach the UN Trafficking Protocol.

These constituent elements are:

*(a) The action of: the recruitment, transportation, transfer, harbouring, or receipt of persons. [action – what is done]*

*(b) By means of: the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or giving or receiving of payments or benefits to a person in control of the victim. [means – how it is done]*

<sup>52</sup> Dottridge, M. 2007 *Collateral Damage The Impact of Anti-Trafficking Measures on Human Right around the World* p4.

<sup>53</sup> UNODC 2004 *Legislative Guides for the Implementation of the UNTOC and the Protocols thereto* p267.

<sup>54</sup> *Ibid.* p268.

*(c) The purpose of exploitation: which includes at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude and the removal of organs. [purpose – why it is done]*

The UN Trafficking Protocol definition may appear to define trafficking in persons as a simple crime. However when studied more closely human trafficking often involves a complex process with multiple actors.<sup>55</sup> The first component of the definition, the “action” element, is one part, and in the case of trafficking in children, the only part, of the definition that will constitute the actus reus of trafficking. This element can be fulfilled by a variety of activities including, but not limited, to the undefined practices of recruitment, transportation, transfer, harbouring or receipt of persons.

The final element of the definition, “for the purpose of exploitation” introduces a mens rea requirement into the definition. Trafficking in persons will occur if the implicated individual or entity intended that the action (which in the case of trafficking in adults must have occurred or been made possible through one of the stipulated means) would lead to exploitation. Trafficking is thereby a crime of specific or special intent (*dolus specialis*).<sup>56</sup>

### 2.2.1 Definition of Trafficking in Persons for Children

An internationally recognised definition of trafficking in persons is important to enable the identification and protection of ‘child’ victims and to ensure that traffickers are prosecuted. The UN Trafficking Protocol has provided an internationally recognised definition and Article 3 defines trafficking in persons. According to the Protocol, the consent of the child, or the means to achieve such consent, is irrelevant as long as the overall objective of the operation is the exploitation of the child.<sup>57</sup>

Article 3 states:

“(c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered “trafficking in persons” even if this does not involve any of the means set forth in subparagraph (a) of this article.

(d) “Child” shall mean any person less than eighteen years of age”.

### 2.2.2 Elements

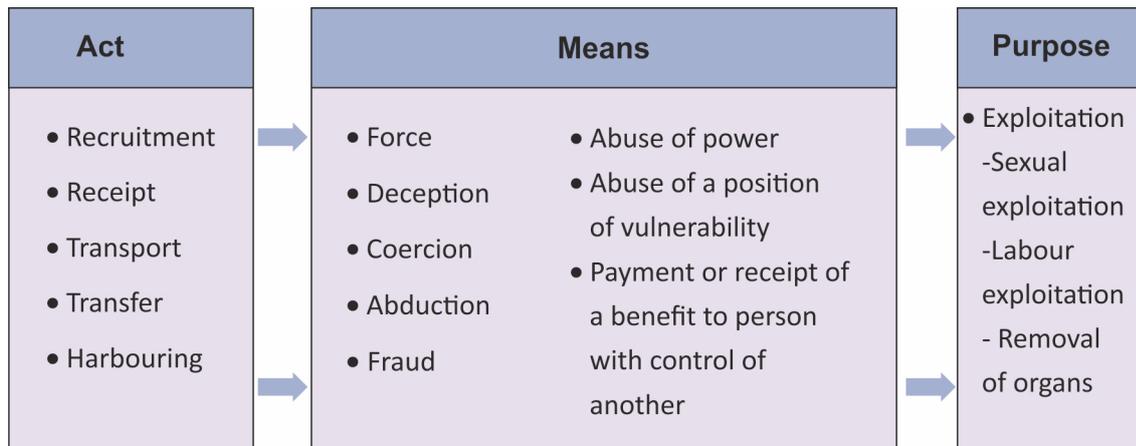
The obligation is to criminalise trafficking in persons as a combination of constituent elements and not the elements themselves. Thus, any conduct that combines any listed action and means and is carried out for any of the listed purposes must be criminalised as trafficking.<sup>58</sup> The crime of trafficking in persons can be a continuing offence, and it can take place over a period of time and involve not only multiple actors. In addition to being consecutive, the elements of human trafficking can be concurrent with one another or can overlap.

<sup>55</sup> IOM Ireland 2010 *Human trafficking is a modern form of slavery* p7.

<sup>56</sup> UNODC 2013 Issue Paper *Abuse of position of vulnerability and other “means” within the definition of trafficking in persons* p16.

<sup>57</sup> BM.I. 2006 *Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking* p19.

<sup>58</sup> UNODC 2004 *Legislative Guides for the Implementation of the UNTOC and the Protocols thereto* p268.

*Human Trafficking (IOM).*

An important aspect of this definition is an understanding of trafficking in persons as a process comprising a number of interrelated actions rather than a single act at a given point in time. Once initial control is secured, victims are generally moved to a place where there is a market for their services, often where they lack language skills and other basic knowledge that would enable them to seek help. While these actions can all take place within one States borders, they can also take place across borders with the recruitment taking place in one State and the act of receiving the victim and the exploitation occurring in another. Whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.<sup>59</sup>

The elements of trafficking in persons are as follows:

*The first stage* is the action or recruitment by which a person is targeted by the trafficker as a potential victim. The recruitment of the victim into the trafficking process will involve the use of one of the means as outlined above unless the victim is a child and the means do not apply.

*The second stage* is the movement of the potential victim. The movement can be within or across borders and the border may be crossed legally or illegally.

*The final stage;* is the exploitation of the victim.

In international legal instruments the offence of trafficking in persons is constituted once a trafficker recruits a potential victim with the intention to exploit. That exploitation can take place either across a border or within the borders of a State and the recruitment can also take place either outside or within the borders of a State.

*DEU020 - Federal Court [Bundesgerichtshof] Germany*

Sentence Date: 2008-03-26 (reference: case identifier no. 2060 Js 14765/07 - 3 Kls)

The Koblenz Regional Court, at first Instance, on 9 May 2007 found the defendant guilty of attempted trafficking in persons for the purpose of sexual exploitation under section 232 para. 3, 4 no. 2 of the German Penal Code (StGB). The Court clarified that to fulfil the requirements of the

<sup>59</sup> As noted in the guidelines on international protection issued by the office of the United Nations High Commission for Refugees (UNHCR).

crime of trafficking for the purpose of sexual exploitation, it is sufficient for someone to have gained physical control of another person to force her to engage in prostitution. It is not necessary for the victim to have already begun or continued engage in prostitution.

The first instance judged this element of the offence wrongly and sentenced the defendant just for attempted trafficking for the purpose of sexual exploitation. However trafficking in persons is a conduct crime, and not a crime of result. Therefore the desired result, the actual exploitation, need not take place in order to consider the crime has been consummated, as long as the acts have been committed through the required means, with the purpose of exploiting the victim or victims.

UNODC Human Trafficking Case Law Database: BGH StR 90/08: Legal Database provided by German Institute for Human Rights

### 2.2.3 Means

The means are the methods used by the perpetrators to recruit potential victims. The means listed in the UN Trafficking Protocol have been accepted as a distinct and important part of the international legal definition of trafficking in persons. They have survived intact in all the major treaties adopted after the UN Trafficking Protocol that incorporate a definition of trafficking in persons, as well as in policy documents and interpretative texts.<sup>60</sup>

The means of human trafficking are defined as follows:

*Force*; which refers to the threat or use of force or other forms of coercion. This threat can be either on or against the victim or a member of their family.

*The UNODC Model Law against Trafficking in Persons defines coercion as:*

*5 (1) (e) "Coercion" shall mean use of force or threat thereof, and some forms of non-violent or psychological use of force or threat thereof, including but not limited to:*

*(i) Threats of harm or physical restraint of any person;*

*(ii) Any scheme, plan or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint*

*against any person;*

*(iii) Abuse or any threat linked to the legal status of a person;*

*(iv) Psychological pressure;*

[https://www.unodc.org/.../UNODC\\_Model\\_Law\\_on\\_Trafficking\\_in\\_Persons.pdf](https://www.unodc.org/.../UNODC_Model_Law_on_Trafficking_in_Persons.pdf).

Coercion is understood as the use or threat of the use of force, including some forms of non-violent or psychological force.<sup>61</sup> However, courts are struggling with the issue of indirect forms of coercion, "They ask if the coercion at issue is psychological, is it too subjective to be quantified... and can a

<sup>60</sup> UNODC 2013 *Issue Paper Abuse of position of vulnerability and other "means" within the definition of trafficking in persons* p2.

<sup>61</sup> OSCE 2013 *Resource Police Training Guide: Trafficking in Human Beings* p41.

worker be bound by ‘mental detention’ instead of ‘physical walls and chains’.<sup>62</sup> Courts in a number of States have considered the definition of coercion and have concluded that it does not just mean physical violence. They have incorporated a term similar to that of “serious harm” as stated in the case of *United States v Bradley* (below), into their national law.

*United States v Bradley, 390 F.3d 145 (1st Cir. 2004)*

The defendants were convicted of forced labour and related crimes based on their abusive treatment of several Jamaican seasonal workers whom they recruited in Jamaica and then kept in the United States by threats and other means. Each defendant was sentenced to a prison term of 70 months-the minimum provided for under the governing provisions of the Sentencing Guidelines.

The term "serious harm" includes both physical and non-physical types of harm. Therefore, a threat of serious harm includes any threats; includes threats of any consequences, whether physical or non-physical, that are sufficient under all of the surrounding circumstances to compel or coerce a reasonable person in the same situation to provide or to continue providing labour or services.

In interpreting the new statute, the conference report said "serious harm" was intended to encompass not only physical violence, but also more subtle psychological methods of coercion; "such as where traffickers threaten harm to third persons, restrain their victims without physical violence or injury, or threaten dire consequences by means other than overt violence."

The defendants appealed and the appellate court found: “Thus, in an appropriate case we think that the court in instructing the jury would be required to draw a line between improper threats or coercion and permissible warnings of adverse but legitimate consequences”.

<https://caselaw.findlaw.com/us-1st-circuit/1423766.html#sthash.i7JLjhQ1.dpuf>

The ILO operational indicators of trafficking in human beings<sup>63</sup> consist of four operational indicators for adult and child victims of trafficking for labour or sexual exploitation. The indicators are relevant to a several dimensions of trafficking, including deception and coercion and provide guidance on how they can be interpreted. They are operational indicators that should be used by prosecutors and judges within the criminal justice system to identify potential victims of trafficking and to provide guidance.

### **ILO Operational indicators of adults for sexual exploitation**

#### **Indicators Of Deceptive Recruitment**

##### **Strong Indicator**

- Deceived about the nature of the job or location.

##### **Medium Indicators**

- Deceived about conditions of prostitution;
- Deceived about content or legality of work contract;
- Deceived about family reunification;

<sup>62</sup> ILO 2009 *Forced Labour and Human Trafficking: Casebook of Court Decisions* p5.

<sup>63</sup> Available from <https://www.ilo.org/forcedlabour>

- Deceived about housing and living conditions;
- Deceived about legal documentation or obtaining legal migration status;
- Deceived about travel and recruitment conditions;
- Deceived about wages/earnings;
- Deceived through promises of marriage or adoption.

**Weak Indicator**

- Deceived about access to education opportunities.

**Indicators of Coercive Recruitment**

**Strong Indicators**

- Abduction, forced marriage, forced adoption or selling of victim;
- Debt bondage;
- Threats of violence against victim;
- Violence on victims.

**Medium Indicators**

- Confiscation of documents;
- Isolation, confinement or surveillance;
- Threat of denunciation to authorities;
- Threats to inform family, community or public;
- Violence on family (threats or effective) ;
- Withholding of money.

**Indicators of Coercion at Destination**

**Strong Indicators**

- Confiscation of documents;
- Debt bondage;
- Forced tasks or clients;
- Isolation, confinement or surveillance;
- Threats of violence against victim;
- Violence on victims.

**Medium Indicators**

- Forced into illicit/criminal activities;
- Forced to act against peers;

- Forced to lie to authorities, family, etc.;
- Threat of denunciation to authorities;
- Threat to impose even worse working conditions;
- Threats to inform family, community or public;
- Under strong influence;
- Violence on family (threats or effective) ;
- Withholding of wages;

<https://www.ilo.org/forcedlabour>

Psychological coercion can refer to a victim's relationships with other people, threats of rejection from or disapproval of a peer group or family, anger or displeasure from a person considered to be a boyfriend or partner or blackmail. The difficulty in defining psychological coercion can make psychological abuse and coercion easier to conceal with many people having difficulty understanding how psychological means can be used to manipulate other people.<sup>64</sup> These include cases where victims are taken abroad by their husbands/boyfriends and are then sold to traffickers for exploitation.<sup>65</sup>

In the Netherlands the 'lover boy' phenomenon has been an issue for more than fifteen years. The 'lover boy' phenomenon is the grooming of young, vulnerable girls by men who befriend them, become their 'boyfriends' and then coerce them into prostitution. The victim is recruited by a form of psychological coercion with false promises of free housing and well-paid jobs, or grooming abroad with promise of a better life and marriage. Many of the victims are minors.<sup>66</sup>

#### *The SNEEP Case - Aimelo District Court, the Netherlands*

Sentenced date: 11/07/2008

In this case there were six defendants, all guilty of trafficking in women with respect to one or more women. Five defendants in addition were found guilty of participation in and/or leading a criminal organisation. 'A characteristic feature of the organisation was its ruthless and violent conduct. The case file [was] bursting with violence and intimidations. The five defendants [had] 'no respect at all for the physical and mental integrity and right of self-determination of these women'. Sentences varied from eight months to seven years and six months. Compensation of victims' claims for damages was partially awarded, with advance payments of up to EUR 50,000.

In the case the Defence argued in favour of acquittal with respect to trafficking in persons on the indictment. It was generally argued, in summary, that:

- the women involved were already engaged in prostitution when they came into contact with the Defendant;
- they had always engaged in prostitution of their own free will;
- insofar as the women shared their earnings with the Defendant or made payments to him, this

<sup>64</sup> Hopper, E. Hildalgo, J.2006 *Invisible Chains; Psychological Coercion of Human Trafficking Victims* pp 185-209 Intercultural Human Rights Law Review

<sup>65</sup> Finnegan, W. 2008 *The Countertraffickers* The New Yorker.

<sup>66</sup> Europol Knowledge Report 2011 *Trafficking in Human Beings in the European Union* p7.

was because they had an emotional relationship with him.

In response to these defence arguments, the Court took Article 250a (old) of the Criminal Code into consideration. This covered are coercing into prostitution (by violence or other act or by threat of violence or other act), or inducing into prostitution (by misuse of authority arising from the actual state of affairs or misrepresentation). The means of coercion listed in Article 273f of the Criminal Code include: coercion, violence or other act, the threat of violence or other act, misrepresentation and misuse of authority arising from the actual state of affairs or abuse of a vulnerable position.

As accompanying important factors, the legislator envisaged the following, among other things: not having access to one's own financial means, not having access to a passport, not having a valid visa and debts involving such a repayment obligation that the person in question is forced to continue to engage in prostitution. Possible consent on the part of the victim to his or her exploitation is not determinative. Moreover, there can be no question of voluntariness if the commercial sex worker has no, or only a reduced, possibility of making a conscious choice with regard to the continuation or discontinuation of his or her relationship with the exploiter. The fact that the relationship was initially entered into on a voluntary basis and/or that the person had previously been engaged in prostitution is itself no indication of voluntariness.

*EU Anti-trafficking website: Legislation and case law. <https://www.ec.europa.eu/dgs/home-affairs/>*

Economic coercion is where a victim is forced to pay excessive amounts of money, has significant salary deductions, or is not paid at all. It can include debt bondage in which a person is kept in bondage by making it impossible for him or her to pay off actual or imagined debts<sup>67</sup>. Debt bondage can be difficult to associate with cases of trafficking in persons and it is possible that debt bondage cases will not be recognised as grave crimes. Such cases do not always involve violence or deprivation of freedom of movement and can relate to salaries either not being paid or being paid with significant deductions.

Following research undertaken in the Delphi research project to determine the ILO operational indicators the following indicators may point to coercion at the recruitment stage and when the potential victim reaches their destination.

### **ILO Operational Indicators of adults for labour exploitation**

#### **Indicators of Coercive Recruitment**

##### **Strong Indicator**

- Violence on victims.

##### **Medium Indicators**

- Abduction, forced marriage, forced adoption or selling of victims;
- Confiscation of documents;
- Debt bondage;

<sup>67</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p8.

- Isolation, confinement or surveillance;
- Threat of denunciation to authorities;
- Threats of violence against victim;
- Threats to inform family, community or public;
- Violence on family (threats or effective) ;
- Withholding of money.

### **Indicators Of Coercion At Destination**

#### **Strong Indicators**

- Confiscation of documents;
- Debt bondage;
- Isolation, confinement or surveillance;
- Violence on victims.

#### **Medium Indicators**

- Forced into illicit/criminal activities;
- Forced tasks or clients;
- Forced to act against peers;
- Forced to lie to authorities, family, etc. ;
- Threat of denunciation to authorities;
- Threat to impose even worse working conditions;
- Threats of violence against victim;
- Under strong influence;
- Violence on family (threats or effective) ;
- Withholding of wages.

#### **Weak Indicator**

- Threats to inform family, community or public.

<https://www.ilo.org/forcedlabour>

Debt bondage has been defined as a “status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as a security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited or defined”.<sup>68</sup>

<sup>68</sup> UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 1956, Article 1(a)

*What is Debt Bondage?*

Victims of trafficking are often subjected to debt bondage. A trafficker may assist the victim in arranging travel, finding employment and accommodation and then require him or her to “work off” the debt owed for the services provided.

Typically, the individual is tricked into accepting terms which are exploitive in nature, as the combination of unlawfully low wages and unlawfully high interest rates create a situation of increasing debt that make it virtually impossible to ever earn back the amount purportedly owed to the trafficker.

Trafficked individuals are prevented from escaping their situation through debt bondage as well as retention of travel documents, violence and threats of violence against themselves or their families.

Even if the victims sense that debt-bondage is unjust, it is difficult for them to find help. Language, social, and physical barriers often keep them from obtaining assistance.

Victims of forced exploitation are most frequently found in labour intensive and/or under-regulated industries, such as:

- Agriculture
- Domestic work
- Construction, mining, quarrying and brick kilns
- Manufacturing, processing and packaging
- Prostitution and sexual exploitation

These industries tend to be characterised by ‘3D’ work – dangerous, difficult and dirty – and are often similar in their nature. They typically involve low pay and low skill levels.

All Party Group on Human Trafficking (UK).

<https://www.allpartygrouphumantrafficking.org/the-issues/debt-bondage>.

*Abduction* is the act of leading someone away by force or fraudulent persuasion. When used in relation to child abduction, this term means the removal or retention of a child in breach of custody rights. There is no specific definition of abduction in relation to trafficking in persons.

*Fraud*; the definition of fraud includes acts of deception which is understood as misleading a person by words or conduct about the nature of work or services to be provided (i.e. promises of legitimate work, the conditions of work, the extent to which the person will be free to leave his or her place of residence, or other circumstances involving exploitation of the person.<sup>69</sup>

### **ILO Operational Indicators of trafficking of adults for labour exploitation**

#### **Indicators of Deceptive Recruitment**

##### **Strong Indicator**

- Deceived about the nature of the job, location or employer.

<sup>69</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p8.

**Medium Indicators**

- Deceived about conditions of work;
- Deceived about content or legality of work contract;
- Deceived about family reunification;
- Deceived about housing and living conditions;
- Deceived about legal documentation or obtaining legal migration status;
- Deceived about travel and recruitment conditions;
- Deceived about wages/earnings;
- Deceived through promises of marriage or adoption.

**Weak Indicator**

- Deceived about access to education opportunities.

<https://www.ilo.org/forcedlabour>

The UNODC Model Law against Trafficking in Persons defines deception thus:

*5 (1) (f) "Deception" shall mean any conduct that is intended to deceive a person;*

*or*

*"Deception" shall mean any deception by words or by conduct [as to fact or as to law], [as to]:*

*(i) The nature of work or services to be provided;*

*(ii) The conditions of work;*

*(iii) The extent to which the person will be free to leave his or her place of residence; or*

*(iv) Other circumstances involving exploitation of the person.*

Deception includes giving false or inaccurate or misleading information i.e. when recruiting workers into forced labour or the offer of a false job for the purpose of sexual exploitation. IOM data in the Europe and Eurasia Region concerning the trafficking of adult men suggests that they are often recruited through personal contacts or referred by a personal contact to a recruitment agency. Advertisements in newspapers were the second most common method of recruitment. Male victims of trafficking often have to pay a fee to an intermediary for their job placement and the arrangement of transport. As noted in other studies, women trafficked into commercial sex work often do not pay the intermediaries a fee and the services they receive from the intermediaries are held as a debt against them.<sup>70</sup>

***"Terra Promessa"***

In 2005, Polish citizens started to call for help and support to return to their homeland from the Polish honorary consul in Bari. They stated that they had come to work in Italy, in the region of Apulia. They were promised good labour conditions and salaries but they were forced to work beyond their powers for no money or symbolic payment and they lived in conditions which were

<sup>70</sup> USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* pp 13-14.

below minimal, social standards.

They were recruited through deception and an attractive work offer. There was a close connection between the recruitment cell in Poland and the one that was organising the work in Apulia. The recruiters offered attractive and well-paid jobs through national and local newspapers and internet advertisements and by direct links with the future victims.

The police forces of both countries liberated 113 victims of trafficking in persons who were being kept as “slaves” at the labour camps in the region of Apulia and being forced to work on farms in the area. 600 cases of trafficking were investigated and 27 perpetrators from Italy and Poland were arrested.

*Presentation by Polish Police – Warsaw 2006*

*Abuse of power or of a position of vulnerability* is understood to refer to any situation in which the person involved has no real acceptable alternative but to submit to the abuse involved.<sup>71</sup> The drafting history of the UN Trafficking Protocol confirms that “abuse of a position of vulnerability (APOV)” is to be understood as referring to “any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved”.<sup>72</sup>

The UNODC Guidance Note on ‘APOV’<sup>73</sup> states that an APOV occurs when an individual’s personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim’s situation. In determining whether the victim’s belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account.

The position of vulnerability is any situation in which the person involved had no real acceptable alternative but to submit to the abuse involved. The existence of vulnerability is best assessed on a case-by-case basis, taking into consideration the personal, situational or circumstantial situation of the alleged victim. Personal vulnerability for instance, may relate to a person’s physical or mental disability. Situational vulnerability may relate to a person being irregularly in a foreign country in which he or she is socially or linguistically isolated. Circumstantial vulnerability may relate to a person’s unemployment or economic destitution. Such vulnerabilities can be pre-existing and can also be created by the trafficker.<sup>74</sup>

<sup>71</sup> UNODC 2004 *Legislative Guides for the Implementation of the UNTOC and Protocols thereto* p269.

<sup>72</sup> UNODC 2012 *Issue Paper on Abuse of a Position of Vulnerability and Other Means within the Definition of Trafficking in Persons* p3.

<sup>73</sup> UNODC 2012 *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol*. (The aim of the Guidance Note is to assist criminal justice practitioners in understanding and applying ‘abuse of a position of vulnerability’ (APOV) as a means of trafficking in persons. The Guidance Note draws on the UNODC Issue Paper on the same subject, and practitioners are encouraged to consult that document for further information, including insight into national law and practice.)

<sup>74</sup> *Ibid.* p3.

**ILO Operational Indicators of trafficking of adults for sexual exploitation****Indicators of Recruitment By Abuse of Vulnerability****Medium Indicators**

- Abuse of difficult family situation;
- Abuse of illegal status;
- Abuse of lack of education (language);
- Abuse of lack of information;
- Control of exploiters;
- Economic reasons;
- False information about law, attitude of authorities;
- False information about successful migration;
- Family situation;
- Personal situation;
- Psychological and emotional dependency;
- Relationship with authorities/legal status.

**Weak Indicators**

- Abuse of cultural/religious beliefs;
- General context;
- Difficulties in the past;
- Difficulty to organise the travel.

**Indicators of Abuse of Vulnerability at Destination****Medium Indicators**

- Dependency on exploiters;
- Difficulty to live in an unknown area;
- Economic reasons;
- Family situation;
- Relationship with authorities/legal status.

**Weak Indicators**

- Difficulties in the past;
- Personal characteristics;

<https://www.ilo.org/forcedlabour>

Prosecutors will need to prove the “existence” and “abuse” of that vulnerability with credible evidence, the mere existence of proven vulnerability is not sufficient. The UN Trafficking Protocol definition establishes a clear link between the ‘act’ and the ‘means’. Accordingly, where APOV is being alleged as the ‘means’, an offender should be shown to have abused the victim’s vulnerability in order to recruit, transport, transfer, harbour, or receive that person.<sup>75</sup>

#### *The Public Prosecution Service v. The Accused*

No. 07.976405-06, District Court of Zwolle (29 April 2008).

Indian workers, resident in the State illegally, were employed by a tofu factory. They incurred substantial debts to finance the trip from India, they did not speak Dutch, and they did not have any identity documents. They worked long hours and were not paid overtime. They had no health insurance, and taxes and social service contributions were not paid for them.

The issue before the Court was whether the defendants had violated the Criminal Code and committed offences of trafficking in persons. The Court in making its decision considered the charge as comprising two elements: (1) the means used; and (2) the exploitation. In considering the means it identified the issue as whether the defendants had abused the vulnerability of the workers as there was no evidence of deception or coercion.

The Court noted the workers were vulnerable by reason of their illegal presence in the Netherlands, and the facts that they did not speak Dutch and they had no identity papers. The Court also stated that to find the defendants had abused the worker’s vulnerability they had to have acted intentionally. This presupposes a certain degree of initiative and action by the perpetrator whereby they deliberately abuse the weaker or more vulnerable position of the victims.

The Court found that there was abuse of the vulnerability of the victims, but there was no exploitation.

ILO Forced Labour and Human Trafficking Casebook of Court Decisions pp65-66.

*Payment or receipt of a benefit to person with control of another* is a situation whereby the trafficker has given another person payment, of some kind, for the use of the victim e.g. a trafficker may pay an impoverished parent for their child or a smuggler may sell a person to a trafficker<sup>76</sup>. There is no specific definition of payment or receipt of a benefit to a person with control of another in relation to human trafficking.

### 2.2.4 Consent

The UNODC Issue Paper on ‘The Role of Consent’<sup>77</sup> states: “The lack of consent to a situation of exploitation is considered integral to the understanding of trafficking and, through the operation of the means element, has been accepted as a distinct and important part of the definition of trafficking in persons”.

Article 3 (b) of the UN Trafficking Protocol states:

<sup>75</sup> UNODC 2012 *Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol* p3.

<sup>76</sup> Human Trafficking Information and Resources for Emergency Healthcare Providers. Available from <https://www.humantraffickinged.com>

<sup>77</sup> UNODC 2014 Issue Paper *The Role of ‘Consent’ in the Trafficking in Persons Protocol* p6.

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

The apparent consent of a victim to be controlled and exploited is irrelevant when one or more of the means set out above is used to obtain that consent. Victims may initially give consent to a trafficker but this will be negated if the trafficker used any of the means to obtain it. A trafficked person cannot consent to being trafficked and any consent given is not applicable if the victim was not in a position to give it freely.

*R v Roci and Ismailaj [2006] 2 Cr.App.R.(S.) 15. (UK)*

Trafficking in persons into the United Kingdom for the purpose of sexual exploitation the appellants arranged immigration from Lithuania of adult women willing to engage in commercial sex work. While the women came to the country willingly, they were then coerced to work in unpleasant circumstances and ways contrary to their wishes and to pay over most of their earnings.

The judge accepted that the women had come to the United Kingdom for the purposes of prostitution and had not been corrupted in any way. They had been coerced by reason of the conditions in which they were required to work. There had been a high degree of planning and organisation and there was some evidence of threats against and restriction of the women's liberties and the confiscation of their passports.

The sentence on the appellant who was concerned in all these matters was reduced from eleven years to nine years' imprisonment.

<https://www.legislationline.org/documents/action/popup/id/7040>.

Article 3 (c) of the UN Trafficking Protocol states:

*“The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose “trafficking in persons” even if this does not involve any of the means set forth in paragraph (a) of this article of exploitation shall be considered “.*

Children under 18 cannot consent to exploitation and any child recruited, transported or transferred for the purposes of exploitation is considered a potential victim of trafficking, whether or not they are forced or deceived. This is because it is not considered possible for children to give informed consent and therefore consent is not relevant.

## 2.3 Exploitation

The purpose of trafficking in persons is the exploitation of the victim and it is an essential element of the trafficking offence. The act of trafficking in persons is constituted before any exploitation occurs it is the trafficker's purpose of exploitation not the actual exploitation that completes the third element of the crime of trafficking in persons e.g. the trafficker's intent to exploit.

Exploitation is not defined in the UN Trafficking Protocol and the onus is on each State to provide a definition.

Article 3 (a) of the Palermo Protocol states that:

*“Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery practices similar to slavery, servitude or the removal of organs.”*

Article 2 of the EU Directive 2011/36/EU adopted a broader concept of what should be considered trafficking in persons and included additional forms of exploitation. These were ‘forced begging’ which should be understood as a form of forced labour and the ‘exploitation of criminal activities’ which should be understood as the exploitation of a person to commit, inter alia, pick pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain.

As highlighted in the UNODC Issue Paper on the Concept of ‘Exploitation’<sup>78</sup> “exploitation is not well or uniformly understood” and “certain forms of exploitation raise particular practical and evidentiary challenges”. This can result in problems, that, in defining exploitation and incorporating it into national legislation. It can also make it difficult to understand or identify victims in exploitative situations and recognise different forms of exploitation.

### 2.3.1 Forms of exploitation

Exploitation is the source of profits in trafficking in persons cases, and therefore, the key motivation for traffickers to carry out their crime. The exploitation may take on a range of forms, but the principle that the more productive effort traffickers can extract from the victims, the larger the financial incentive to carry out the trafficking crime.<sup>79</sup>

The absence of a definition of exploitation within the UN Trafficking Protocol or international legal instruments means that it has been left to each individual State to stipulate the forms of exploitation. States are permitted to expand that list by either adding new concepts or by interpreting undefined concepts in a way that captures certain conduct relevant in a given country or cultural context.<sup>80</sup>

Trafficking in persons relates not only to trafficking for the purposes of sexual exploitation but also to numerous other forms of exploitation. There is an increasing awareness of the different and emerging forms of exploitation that constitute trafficking. Recent studies indicate that labour exploitation is becoming a huge problem with poorly skilled people who go abroad to work.<sup>81</sup> In addition to newly emerging and changing forms of exploitation, the traffickers responsible for the exploitation, continually change and evolve their modus operandi. Therefore, understanding how the traffickers commit the offence of trafficking can be as important as understanding the different forms of exploitation.

#### ***Forced labour (servitude)***

The awareness and identification of cases of forced labour exploitation is increasing globally and the number of prosecutions is limited. It is increasingly viewed not only as a human rights concern that imposes obligations on States, but also as a norm of criminal law, both domestic and international.

<sup>78</sup> UNODC 2015 *Issue Paper on the Concept of ‘Exploitation’ in Trafficking in Persons Protocol*.

<sup>79</sup> UNODC 2014 *Global Report on Trafficking in Persons* p33.

<sup>80</sup> UNODC 2015 *Issue Paper on the Concept of ‘Exploitation’ in Trafficking in Persons Protocol* p7.

<sup>81</sup> OSCE 2013 *Resource Police Training Guide: Trafficking in Human Beings* p58.

Individuals are criminally liable for imposing forced labour, and States may have positive obligations to prosecute such crimes.<sup>82</sup>

One of the main problems is that cases are not recognised or identified as a criminal justice issue and are dealt with as labour violations in administrative courts. The mildest forms of labour exploitation, such as the violation of safety regulations, exceeding the fixed duration of the working day and detention of wages are violations of labour legislation by employers. For these violations the employer is liable under labour and administrative law. When, in addition to these violations, the employer himself/herself or through other people is using illegal means to engage and retain employees in situations of exploitation, then the situation can be classified as forced labour and/or trafficking in persons for forced labour exploitation: this is subject to a criminal prosecution.<sup>83</sup>

### *Definition of forced labour (servitude)*

There is no definition of forced labour within the UN Trafficking Protocol, and Article 4 of the Human Rights Convention does not define forced or compulsory labour. The definition provided by the ILO Forced Labour Convention, 1930, (No. 29), which was acknowledged in the decision in *Van der Musselle v. Belgium*<sup>84</sup>, appears to be the basis for the definition in the CoE Convention.

Article 2 paragraph 1 ILO Forced Labour Convention 1930 (No 29) 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”*

According to the ILO, menace of the penalty does not always mean that the trafficker or exploiter applies some form of direct punishment to obtain the victim’s work. Subtle forms of menace exist, sometimes of a psychological nature, or it may take the form of a loss of rights or privileges. The ILO guidance is very significant as in many cases trafficking for forced labour does not involve harsh physical violence, but rather psychological abuse, control and manipulation.<sup>85</sup>

The ILO Global Estimate of Forced Labour<sup>86</sup> states: “Forced labour is thus not defined by the nature of the work being performed (which can be either legal or illegal under national law) but rather by the nature of the relationship between the person performing the work and the person exacting the work. While sometimes the means of coercion used by the exploiter(s) can be overt and observable (e.g. armed guards who prevent workers from leaving, or workers who are confined to locked premises), more often the coercion applied is more subtle and not immediately observable (e.g. confiscation of identity papers, or threats of denunciation to the authorities)”.

Whilst there is no direct guidance on the definition of labour exploitation the ILO has identified several elements which can singularly or collectively indicate labour exploitation.

#### *Three main elements*

(i) some form of work or service must be provided by the individual concerned.

<sup>82</sup> ILO 2009 *Forced Labour and Human Trafficking Casebook of Court Decision* p7.

<sup>83</sup> La Strada 2011 *Trafficking in Persons for Forced Labour Exploitation in the Republic of Moldova* Executive Summary.

<sup>84</sup> ECHR Application no. 8919/90.

<sup>85</sup> Skrivankova, K. 2011 *Forced Labour: Understanding and Identifying Labour Exploitation* ed. Chandron, P. Human Trafficking Handbook Recognising Trafficking and Modern-Day Slavery in the UK LexisNexis p50.

<sup>86</sup> ILO Global Estimate of Forced Labour 2012 *Results and methodology* p19.

(ii) work is performed under threat of penalty, which can take various forms, whether physical, psychological, financial or other.

(iii) the work is taken involuntarily, meaning that the person either become engaged in the activity against their free will or, once engaged, finds that he or she (convention says himself) cannot leave the job with a reasonable period of notice, and without forgoing payment or other entitlements.

States within the EU have adopted various approaches to dealing with the lack of clarity as to what constitutes exploitation. Some States, such as the Netherlands, have left it to the discretion of their courts to interpret what such an act entails (with the risk that the concept of trafficking in persons may be interpreted too broadly and the severity of the crime eroded), while others, like Belgium, have focussed on the concept of a violation of human dignity as the fundamental aspect of exploitation.<sup>87</sup>

*Uzbekistan v Turchinov - Miribad District Court, Uzbekistan*

UNODC No.: UZB001: Sentence Date: 2012-12-17

In the Spring of 2012, the defendant T, together with other individuals, organised the recruitment and transportation through deception of four individuals to the town of Chernayevka, in Kazakhstan to work as construction workers. Upon arrival, they were handed over to an individual by the name of H who took the four individuals to the construction site. The owner of the site took away their passports, did not pay them any salary, and exploited them using the threat of the use of force. This continued until July 2012.

In June 2012, another victim that was recruited by defendant T arrived at the site and fell under the same scheme. For his part of the work, defendant T received 560,000 Tenge. Furthermore, T continued this practice also in May

2012, sending another 3 victims to the above-mentioned site using the same organized criminal group, and received for this 1200 USD.

Taking into account the witness testimonies of four victims, as well as the gathering of evidence and defendant T's guilty plea, the Court concluded that defendant T was guilty under Art. 135, Part 3 (g) of the Criminal Code of the Republic of Uzbekistan, of trafficking in persons for recruitment to forced labour through deception, transport, transfer, the keeping of individuals outside the country's borders against their will, the confiscation of documents against their will, and participation in an organised criminal group.

*UNODC Human Trafficking Case Law Database*

Due to the absence of a clear definition of labour exploitation it is difficult to distinguish between exploitation in terms of violation of labour rights and extreme exploitation amounting to forced labour. In a number of States it has been problematic to prove the component elements of the process of trafficking in persons. Whilst it has been possible to prove the element of exploitation it has not always been possible to show that the person exploiting was responsible for the other elements in the trafficking process namely, the act or means of recruitment.

<sup>87</sup> Skrivankova, K. 2011 Forced Labour: *Understanding and Identifying Labour Exploitation* ed. Chandron, P. Human Trafficking Handbook Recognising Trafficking and Modern-Day Slavery in the UK LexisNexis p54.

England and Wales has introduced legislation that creates the offence of “holding another person in slavery or servitude or requiring them to perform forced or compulsory labour” (see below). Whilst the legislation may not overcome some of the definitional problems its purpose is to criminalise the exploitation element alone.

#### Section 71 Coroners and Justice Act 2009 (England & Wales)

##### *Slavery, servitude and forced or compulsory labour*

*(1) A person (D) commits an offence if—*

*(a) D holds another person in slavery or servitude and the circumstances are such that D knows or ought to know that the person is so held, or*

*(b) D requires another person to perform forced or compulsory labour and the circumstances are such that D knows or ought to know that the person is being required to perform such labour.*

*(2) In subsection (1) the references to holding a person in slavery or servitude or requiring a person to perform forced or compulsory labour are to be construed in accordance with Article 4 of the Human Rights Convention (which prohibits a person from being held in slavery or servitude or being required to perform forced or compulsory labour).*

*(3) A person guilty of an offence under this section is liable—*

*(a) on summary conviction, to imprisonment for a term not exceeding the relevant period or a fine not exceeding the statutory maximum, or both;*

*(b) on conviction on indictment, to imprisonment for a term not exceeding 14 years or a fine, or both.*

#### **Domestic servitude**

Persons who are trafficked for domestic servitude are often migrants, and predominantly women, who enter a State to work within a private household and to undertake a range of activities that can include housekeeping and childcare, and can extend to other activities. The trafficked persons usually live within the private household, their documents are often confiscated and they are often isolated and dependent on the trafficker.

Domestic servitude is an invisible form of exploitation which can be difficult to detect. Trafficking for domestic servitude covers a range of situations, all of which share certain features: subjugation and the obligation to provide work for a private individual, low or no salary, with no days off, psychological and/or physical violence, limited or restricted freedom of movement and the impossibility of a private life.<sup>88</sup>

ILO Convention 189 Decent work for domestic workers, 2011 (which came into force on 5 September 2013) sets out the basic rights and protections for domestic workers. Article 2 (b) states:

*“Each Member shall, in relation to domestic workers, take the measures set out in this Convention to respect, promote and realize the fundamental principles and rights at work, namely: [...] (b) the elimination of all forms of forced or compulsory labour;”*

<sup>88</sup> OSCE 2010 *Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude* p11.

*Siliadin v France*<sup>89</sup>

A 15-year-old girl was brought to France from Togo by 'Mrs D', who paid for her journey but then confiscated her passport. It was agreed that the girl would work for Mrs D until she had paid back her air fare, but after a few months she was 'lent' to 'Mr and Mrs B', who forced her to work for 15 hours a day, seven days a week with no pay, no holidays, no identity documents and without her immigration status being authorised. The girl wore second-hand clothes and did not have her own room.

The authorities intervened once they were alerted to the situation. However, at the time, slavery and servitude were not specifically criminalised in France. The European Court of Human Rights held that the girl had been held in servitude and that France had breached its positive obligations to prohibit slavery and forced labour, because French law had not afforded the girl specific and effective protection.

**Sexual exploitation**

Sexual exploitation predominantly affects women and children with victims being held and exploited in slavery-like conditions. Trafficked individuals suffer extreme violations of their human rights, including the right to liberty, the right to dignity and security of person, the right not to be held in slavery or involuntary servitude, the right to be free from cruel and inhumane treatment, the right to be free from violence and the right to health. Sexual exploitation can include prostitution in bars, massage parlours, escort services, private houses, brothels, and hostess clubs; pornography; and forced marriage.<sup>90</sup>

The UN Trafficking Protocol states: "Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation". However, the obligation to define sexual exploitation in national legislation is the responsibility of the State. There is no definition of either "exploitation of the prostitution of others" or "other forms of sexual exploitation" in international legal instruments or national law. Any definition is reliant on the States interpretation and policy towards "sexual exploitation" and "prostitution".

**ILO operational indicators of trafficking of adults for sexual exploitation.****Indicators Of Exploitation****Medium Indicators**

- Bad living conditions;
- Excessive working days or hours;
- Hazardous work;
- Low or no salary;
- No respect of labour laws or contract signed;
- No social protection (contract, social insurance, etc.);

<sup>89</sup> ECHR Application no. 73316/01.

<sup>90</sup> IOM (Ireland) 2010 *Counter-Trafficking Training Manual* p9.

- Very bad working conditions;
- Wage manipulation.

<https://www.ilo.org/forcedlabour>

There is no unique method by which persons are recruited to become victims of trafficking in persons, and the ways in which victims are coerced into exploitative conditions differ between States of origin. Prosecutors and judges should be aware of the different methods of recruitment of victims for sexual exploitation, especially emerging forms of recruitment.

Four main systems of exploitation of trafficked women have been identified by the IOM in Italy.

- The Albanian model: uses coercion and violence.
- The Nigerian model: debt bondage (assisting victims to travel abroad by paying cost of transportation, passport and visa acquisition).
- The Eastern European model: highly organised and highly mobile, defined contract period.
- The Latin American model: semi-voluntary and part time.

### Slavery

Slavery is defined in the Slavery Convention of 1926 as:

*“The status or condition of a person over whom any or all of the powers attaching to the rights of ownership are exercised”.*

This definition is also used in Article 5(1)(t) of the UNODC Model Law against Trafficking in Persons. This is the existing international legal definition of slavery. While it dates back to the early part of the twentieth century, its continuing validity has been affirmed through both treaty and case law.<sup>91</sup>

In *Prosecutor v. Kunarac, Kovac and Vukovic*<sup>92</sup> the ICT concluded that the traditional concept of ‘slavery’ had evolved to encompass various contemporary forms of slavery. The term is still relevant today both in relation to understanding the context of trafficking in persons and in relation to new and emerging forms of trafficking.

### Practices similar to slavery

Article 1 of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery (1956) states that each of the States Parties to this Convention shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment of the following institutions and practices,

*“(a) Debt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined;*

<sup>91</sup> UNODC 2015 *Issue Paper on the Concept of ‘Exploitation’ in the Trafficking in Persons Protocol* p6.

<sup>92</sup> Case No. IT-96-23 (22 February 2001) and Case No. IT-96-23/1-T (12 June 2002) (Appeals Chamber).

*(b) Serfdom, that is to say, the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status;*

*(c) Any institution or practice whereby:*

*(i) A woman, without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or*

*(ii) The husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or*

*(iii) A woman on the death of her husband is liable to be inherited by another person;*

*(d) Any institution or practice whereby a child or young person under the age of 18 years, is delivered by either or both of his natural parents or by his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour”.*

Practices similar to slavery are not subject to a clear international legal definition. However there is a general understanding in law as to the substantive scope and content and there are agreed international legal understandings as to the practices that fall within ‘practices similar to slavery’. The term ‘practices similar to slavery’ encompasses debt bondage, sale of children for exploitation, serfdom, and servile forms of marriage, all of which have been defined in international law.<sup>93</sup> These are consistent with the specific prohibitions in the Supplementary Convention on the Abolition of Slavery.

### **Removal of organs**

The EU Directive 2011/36/EU states that the trafficking in human beings for the purpose of the removal of organs constitutes a serious violation of human dignity and physical integrity. While there have been an increasing number of prosecutions and investigations into trafficking for the removal of organs, there is still a lack of awareness of the scale of the problem and also an understanding of the nature of the exploitation.

Article 3(a) of the UN Trafficking Protocol defines the ‘*removal of organs*’ as a form of exploitation that can be a purpose of trafficking in persons. Article 4(a) of the CoE Convention also includes the ‘*removal of organs*’ as a form of exploitation.

It is difficult to prove that cases of trafficking for the removal of organs falls within the trafficking in persons definition. There are issues of consent and it can be argued that the donors have consented to the removal of their organs, and that consent is genuine, and may have received payment for it. If victims are not fully informed about all the circumstances and the impact of the process it can be said that they have either been coerced or they are in a position of vulnerability. Whilst most States have incorporated trafficking for the removal of organs into their national laws on trafficking in persons prosecutions are still limited.

The Council of Europe Convention on Human Rights and Biomedicine, and the 2002 additional protocol thereto on transplantation of organs, prohibits financial gain from the sale of human body

<sup>93</sup> UNODC 2015 *Issue Paper on the Concept of ‘Exploitation’ in the Trafficking in Persons Protocol* p9.

parts as well as “organ and tissue” trafficking.<sup>94</sup> When the removal of human organs is linked to the crime of trafficking in human beings, it can be very difficult to prove the absence of valid consent or the existence of economic gain. By establishing trafficking in human organs as a criminal offence, the Council of Europe Convention against Trafficking in Human Organs of 2014<sup>95</sup> which prohibits the removal of human organs when done without the free, informed and specific consent of the living or deceased donor or when the donor or a third party has been offered or received a financial gain, will allow States to combat this type of illegal behaviour as a separate crime.

Trafficking for the removal of organs occurs in states across the globe. It can involve local recruiters who initially advertise for donors (potential victims) after which the number of donors usually increases. The traffickers are often international brokers who move between States where networks are active. Recipients can pay \$100,000 - \$160,000 whilst the donor is only paid \$2,500 - \$10,000. Organ, supply shortages, coupled with the facts that it is not a criminal offence in all States and that significant profits can be made makes the offence attractive to traffickers. Children can also be trafficked for the purpose of organ removal, however, to date there is no direct evidence that children have been identified as victims.

#### *Medicus Clinic – Pristina, Kosovo*

An EU-led court in Kosovo found five people guilty in connection with a human organ-trafficking ring. The five were accused of carrying out dozens of illegal transplants at the Medicus Clinic. The trade was discovered when a Turkish man collapsed after having one of his kidneys removed at the clinic. The case was tried by Eulex, the European Union's law and order mission that was set up in Kosovo to handle sensitive cases.

The special court heard that the Medicus Clinic recruited poor people from across Eastern Europe and Central Asia, promising them EUR 15,000 for their organs. Donors came from Moldova, Kazakhstan, Russia and Turkey and lived in "extreme poverty or acute financial distress", the indictment said "They were alone, did not speak the local language, were uncertain of what they were doing and had no one to protect their interests," Organ recipients were alleged to have been mainly from Israel and to have paid between EUR 80,000 and 100,000 each to receive transplants.

Prosecutors alleged that at least 30 illegal kidney removals and transplants were carried out at the Medicus clinic in 2008.

The clinic's director, urologist Lutfi Dervishi was sentenced to eight years in prison for organised crime and human trafficking. His son, Arban, was sentenced to seven years and three months, while three other defendants received between one and three years' imprisonment.

<http://www.bbc.co.uk/news/world-europe-22343589>.

#### **Begging**

There is no reference to ‘begging’ in either the UN Trafficking Protocol or the CoE Convention. However, Article 2 the EU Directive 2011/36/EU includes ‘begging’ as a form of exploitation and states that “within the context of this Directive, forced begging should be understood as a form of

<sup>94</sup> The Council of Europe Convention against Trafficking in Human Organs was adopted by the Committee of Ministers of the Council of Europe on 9 July 2014. (The Convention prohibits the removal of human organs when done without the free, informed and specific consent of the living or deceased donor or when the donor or a third party has been offered or received a financial gain).

<sup>95</sup> Ibid.

forced labour or services as defined in the 1930 ILO Convention No. 29 concerning Forced or Compulsory Labour. Therefore, the exploitation of begging, including the use of as trafficked dependant person for begging, falls within the scope of the definition of trafficking in human beings only when all the elements of forced labour or services occur”.

The victims of ‘begging’ are predominantly children who are often trained to beg. They are exploited by both criminal networks and their own families. Children have been sold for EUR 20,000 and they can make over EUR 100,000 profits a year. Begging is one of the emerging threats prevalent within EU States.<sup>96</sup> Within the Commonwealth of Independent States children have been trafficked from orphanages and sold to traffickers, the elderly and infirm have been forced to beg, and there are instances when victims have been maimed to earn more profits.<sup>97</sup>

#### *Tribunal Correctionnel de Nivelles - Begging conviction.*

Belgium Criminal Court of Nivelles. Sentence date: 25 January 2013.

Purpose of exploitation: Forced begging. A Hungarian person residing in Slovakia had allegedly deceived some people in order to exploit them for begging. These people were highly impaired and in such a poor social or health condition that they had no alternative but to tolerate this person’s bad intentions.

The trafficker often initially pretended to be a relative of the above people to take them away from the places where they lived. They were then forced to live together in the perpetrator’s flat (or even sleep four in a car) and beg within supermarket parking yards in Belgium. They were left there on wheelchairs with placards soliciting for money. The perpetrator subsequently extorted this, along with all the social allowances the impaired people received in Slovakia.

A sentence of six years detention and EUR 30,000 fine have been imposed on the trafficker.

EU anti-trafficking policy website: [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/tribunal-correctionnel-de-nivelles-begging-conviction\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/tribunal-correctionnel-de-nivelles-begging-conviction_en)

#### *Forced or servile marriage*

Forced or servile marriage is not directly referenced within any international legal instrument. However, the factors that determine whether a forced marriage is trafficking in persons include the use of force, fraud and coercion (economic and/or sexual) as well as potential abuse of a position of vulnerability. The exploitation that victims are recruited into can be slavery, servitude, domestic servitude and/or sexual exploitation.

Forced marriage is a practice with deep historical roots in which at least one of the parties is married against his/her will and without his/her consent.<sup>98</sup> Forced marriage can be as result of cultural practices, with victims being subject to peer pressure and abuse of a position of vulnerability. Victims are often unaware of final outcome and as a result of the forced marriage are exploited by recipient families as domestic workers and sex slaves. There are limited prosecutions because victims may often be related and/or too vulnerable to provide evidence, and because forced marriage is not seen as a crime in many States.

<sup>96</sup> Europol Organised Crime Threat Assessment (OCTA) 2011.

<sup>97</sup> OSCE 2013 *Resource Police Training Guide: Trafficking in Human Beings* p84.

<sup>98</sup> Basco, F. et al. 2009 *Human Trafficking Patterns* ed. Friesendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p50.

### *Illegal adoption*

In a number of States “Illegal Adoption” is a form of exploitation. The illegal adoption of children as a form of trafficking in persons has become a highly profitable activity for organised criminal groups, private child adoption firms and state officials around the world. It is driven partly by the demand for international adoption, particularly in Europe and the US.<sup>99</sup>

In paragraph 94 of the CoE Convention Explanatory Report it “*where an illegal adoption amounts to a practice similar to slavery as defined in Article 1(d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to slavery, it [falls within the Convention’s scope]*”

Illegal adoption can occur not only transnationally, but internally as well. Through various means, such as abduction and the falsification of adoption permits, criminals take advantage of shortcomings in legislation, law enforcement, birth registration and social welfare systems.<sup>100</sup> Parents can be paid to sell their babies or young child, children from orphanages can be illegally adopted and documents relating to the birth or adoption are falsified. In some States intermediaries who appear to be acting legally, such as lawyers and notaries, charge such exorbitant fees that they are profit from trafficking. They should themselves be considered as accomplices.<sup>101</sup>

### **2.3.2 Exploitation of Children**

Child trafficking begins when the act of trafficking occurs. In some cases, the child may approach a ‘recruiter’ to find out how to move to find work or in the hope of being able to leave the place where they are for opportunities elsewhere. Recruiters may be the person who actually employs the child, or an intermediary, both are part of a chain of people involved in the trafficking.

The act of trafficking happens in many different ways. Children may be under pressure from their families to find work to help support the family. Often there is a relationship of trust involved with the trafficker. Children especially girls, may be approached by members of their own communities. They are at risk of being lured by men who show an interest in them and promise them love, a good job, or even marriage.

As with the trafficking of adults, the wider socio-economic situation of child victims can also make them more vulnerable to traffickers. Children are particularly vulnerable due to their lack of experience, dependence and trust of adults, notably relatives and people in positions of authority. They have fewer possibilities of escape exploitative situations.<sup>102</sup>

Child victims of trafficking are subject to different forms of exploitation. They may be forced to work in sweatshops, on construction sites, in houses as domestic servants, on the streets as child beggars, in wars as child soldiers, on farms, in traveling sales crews or in restaurants and hotels. Some are forced to work in brothels and strip clubs or for escort and massage services.<sup>103</sup>

The trafficking in children, internally in countries, across national borders, and across continents. It is closely interlinked with the demand for cheap malleable and docile labour in sectors and among

<sup>99</sup> Basco, F. et al. 2009 *Human Trafficking Patterns* ed. Friesendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p54.

<sup>100</sup> Ibid.

<sup>101</sup> Dottridge, M. 2004 *Kids as Commodities. Child trafficking and what to do about it* Terres des Hommes.

<sup>102</sup> BM.I. 2006 *Resource Book for Law Enforcement Officers on Good Practices in Combating Child Trafficking* p27.

<sup>103</sup> UNICEF Available from <https://www.unicefusa.org/mission/protect/trafficking>

employers where the working conditions and the treatment grossly violates the human rights of the children.

Children can be exploited within the same forms of trafficking as adults. However, there are specific forms of exploitation that children are specifically recruited and for which there is increased demand. These can include child pornography, sex tourism, forced marriage, illegal adoption and criminal activities including pick-pocketing and begging.

#### *Roma father case: Country - Italy*

Court: Supreme Court of Cassation, V Criminal Section: Sentence date: 6 October 2010.

Purpose of exploitation: Criminal activities by minors.

A Roma father who "sold" his underage daughter to people who forced her to steal was charged with enslavement. He "sold" his underage daughter for EUR 200,000 to a family who forced her to steal goods in apartments. The story that led to the arrest of appellant was brought to light through wiretaps which clearly showed that the child had been "trained" to steal. She was also threatened so that, if caught red-handed, she would not tell the police about her trafficking situation or she had been sold to "steal" as she had been compelled to do by her parents since her childhood.

With this judgment the Supreme Judges endorsed the decision made by the Tribunal of Freedom not to release her father, who had tried to pass off the sum of money that ended up in his pockets as a bride-price. This excuse did not pass the scrutiny of the judges of the Courthouse [in Rome]. The amount paid by the head of the family who had received the child was just the price established for selling a minor who was "regarded as something that could be a subject of trade." Hence the serious charge of enslavement was made.

EU Anti-trafficking website. Available from [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/roma-father-case\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/roma-father-case_en)

#### *Tackling forced criminality by families*

In 2011, local officials from municipalities across the Netherlands requested the support of the Ministry of Security and Justice to deal with a high number and diversity of problems they were witnessing with families within Roma communities. These included housing issues, high incidence of early arranged marriages, truancy and poor health and pre-natal care. Of significant concern were the high levels of anti-social behaviour and criminality undertaken by these families: children were becoming involved in criminal activities such as shoplifting and pickpocketing from a young age. These criminal exploits were generating large profits for the family which could, in some cases, be then channelled abroad.

RACE 2015 *Trafficking for Forced Criminal Activities and Begging in Europe 2015* p58.

## 2.4 Internal Trafficking

Article 2 of the CoE Convention confirmed that trafficking in persons applied to both national and transnational trafficking, whether or not related to organised crime.

*"This convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected to organised crime".*

Internal trafficking is increasing and it is occurring within all States. The number of children trafficked is also growing. The UNODC Global Report 2014 states that victims of trafficking who are below 18 years old accounts for more than 30 per cent of the victims detected during 2010-2012.

Internal trafficking can require less preparation and organisation, and there is no need for travel documents and costly flight tickets. However, it is an area of trafficking in persons that has been ignored, either through lack of awareness or the belief that trafficking was transnational only, and it is important that these cases are properly identified and prosecuted. The scale of internal trafficking has been underestimated and it is increasing and the lack of recognition is depriving victims of the protection and assistance they are entitled to.

## 2.5 Smuggling of Migrants

The two main routes of smuggling of migrants to Europe and North America generate nearly \$7 billion a year to the smuggling networks, according to the estimate released by the UNODC.

The International Organization for Migration (IOM) have stated that “Since 2000, at least 40,000 migrants have died in their search for a better life. The smuggling of migrants is a growing global crime that exposes thousands of migrants to unacceptable risks and challenges the integrity of international borders. Many migrants who lack the means to reach their State destinations legally fall prey to criminal groups specialising in people smuggling”.<sup>104</sup>

The criminal activities of people smugglers undermine the capacity of States to safeguard their own sovereignty and combat crime and corruption both internally and across their borders. Where authorities of countries of origin, transit and destination do not effectively cooperate in their efforts to prevent smuggling of migrants, smugglers may simply take advantage of weak prosecution responses in some of these countries to forge new routes through which to commit their crimes.<sup>105</sup>

### 2.5.1 Definition of Smuggling of Migrants

Article 3 of the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Organised Crime (2000) (SOM Protocol) states:

*“Smuggling of migrants means 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.”*

Article 2 of the SOM Protocol states that the purpose of the protocol is to:

*“prevent and combat the smuggling of migrants, as well as to promote cooperation among State Parties to that end, whilst protecting the rights of smuggled migrants”.*

Article 5. Criminal liability of migrant’s states:

*“Migrants shall not become liable to criminal prosecution under the Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol”.*

<sup>104</sup> IOM Immigration and Border Management Programmes People Smuggling. Available from <https://www.iom.int/.../10-IOM-IBM-FACT-SHEET-People-smuggling.pdf>

<sup>105</sup> UNODC 2011 *International Framework for Action to Implement the Smuggling of Migrants Protocol* p3.

The SOM Protocol sets out to promote cooperation to target criminal smugglers and protect those they smuggle.<sup>106</sup> It is important that States respect the rights of victims and do not summarily deport them.

Article 16. Protection and Assistance measures states:

*“1. In implementing this Protocol, each State Party shall take, consistent with its obligations under international law, all appropriate measures, including legislation if necessary, to preserve and protect the rights of persons who have been the object of conduct set forth in article 6 of this Protocol as accorded under applicable international law, in particular the right to life and the right not to be subjected to torture or other cruel, inhuman or degrading treatment or punishment.*

*2. Each State Party shall take appropriate measures to afford migrants appropriate protection against violence that may be inflicted upon them, whether by individuals or groups, by reason of being the object of conduct set forth in article 6 of this Protocol.*

*3. Each State Party shall afford appropriate assistance to migrants whose lives or safety are endangered by reason of being the object of conduct set forth in article 6 of this Protocol.*

*4. In applying the provisions of this article, States Parties shall take into account the special needs of women and children.*

*5. In the case of the detention of a person who has been the object of conduct set forth in article 6 of this Protocol, each State Party shall comply with its obligations under the Vienna Convention on Consular Relations, where applicable, including that of informing the person concerned without delay about the provisions concerning notification to and communication with consular officers”.*

## 2.5.2 What is Smuggling of Migrants?

The combination of the following three elements constitutes SOM:

- Either the procurement of illegal entry or the illegal residence of a person
- for financial or other material gain
- across a border into another Country

Article 6 of the Smuggling Protocol both requires the criminalisation of such conduct and requires States to criminalise the conduct of *“enabling a person to remain in a State where the person is not a legal resident or citizen without complying with requirements for legally remaining by illegal means”* in order to obtain a financial or other material benefit.<sup>107</sup>

<sup>106</sup> UNODC 2011 *International Framework for Action to Implement the Smuggling of Migrants Protocol* p4.

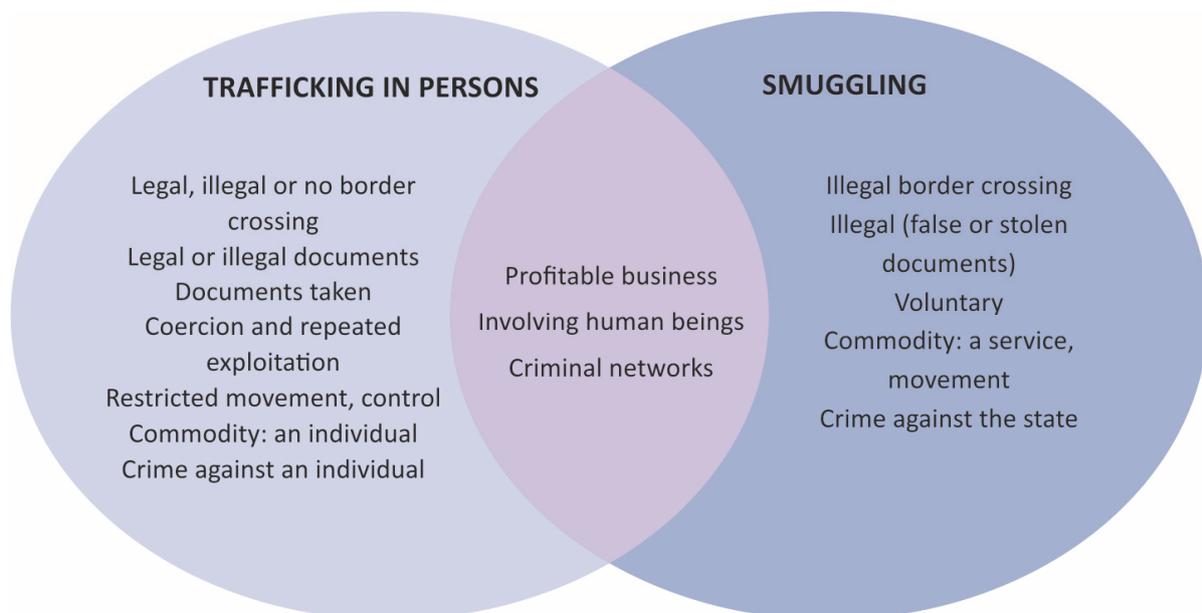
<sup>107</sup> UNODC 2011 *International Framework for Action to Implement the Smuggling of Migrants Protocol* p7.

### 2.5.3 The Differences between Trafficking in Persons and Smuggling of Migrants

The phenomenon of SOM is often misunderstood and assumed to be the same as trafficking in persons. A distinction must be made between the two terms which are often used interchangeably. There is also an obligation to assist victims who have been smuggled and who are entitled to rights and protections under Article 16 of the Smuggling Protocol.

Trafficking in persons and SOM have similar “push factors” which can include poverty, low education, no employment, gender issues, conflict and other causes that make people want to leave their place of origin. Criminal networks, organised criminal groups and individual criminals will traffic or smuggle these people in order to make a profit. The profits in trafficking in persons are made when the victim is ultimately exploited. However, the profits in SOM are made by the payments received for transporting people illegally across State borders to the States of destination.

Whilst there are similar elements to both trafficking in persons and SOM there are a number of distinct differences:



IOM

SOM is a crime against the State and a breach of immigration laws. It can only be transnational as the objective is to facilitate an illegal border crossing to gain entry to another State. Smugglers will provide false or stolen documents, if required, as the smuggled person cannot cross the border legally with their own documentation. Trafficking in persons is a crime against the person because it is a violation of the victim’s human rights and a criminal offence is being perpetrated against the victim. Trafficking in persons is both transnational and national, and victims are moved legally or illegally using either the victim’s documents or false documents.

People who are smuggled can enter into a commercial agreement with the smuggler voluntarily and consent to the undertaking, even if they are placed in danger or suffering degrading conditions. They will have freedom of movement and are able to leave the smuggling situation if they choose to do so. Victims of trafficking in person do not consent to being trafficked and cannot agree to the

exploitation. They are a commodities obtained by the trafficker which are bought and sold without their agreement and with no freedom of movement.

#### *Iraqi-Kurdish SOM Case*

In December 2012 the criminal court in Leuven, Belgium convicted the defendants. During the period November 2008 to February 2009 an Iraqi-Kurdish people smuggling organisation used private cars and trains to smuggle Iraqi-Kurdish persons from their own region on at least 16 occasions. They were transported, via Greece and Italy, to Belgium where they requested asylum or were taken to Norway and/or Sweden. The persons were well treated and during the journey the smugglers used other smuggling networks. The cost of the transport from Italy to Belgium was EUR 1,300-1,500 per person and payments were made through the hawala banking system or cash.

*Centre for Equal Opportunities and Opposition to Racism Trafficking in and Smuggling of Human Beings Annual Report 2012 p73.*

The difficulty in distinguishing between trafficking in persons and SOM means that victims of trafficking may be mistaken for irregular migrants, mistreated by authorities and deported without proper assistance. This often leads to further victimisation and allows the traffickers to remain unpunished.<sup>108</sup>

Article 16 of the SOM Protocol sets out protection and assistance measures that each State party should undertake to be consistent with international law. Smuggled migrants may have different protection and assistance needs than trafficked persons. However, State parties are obliged to protect the rights of migrants. Protection means safeguarding people from harm, without discrimination, and ensuring that migrants are treated to internationally recognised standards.<sup>109</sup>

<sup>108</sup> Batsyukova, S. 2012 *Human Trafficking and Human Smuggling: Similar Nature, Different Concepts in Studies of Changing Societies*. Comparative and Interdisciplinary Focus Vol 1(1) p40.

<sup>109</sup> UNODC 2014 *Standard Operating Procedures Manual for Law Enforcement Personnel of the Central Asia countries on the cases relating to human trafficking and smuggling of migrants* p75.

## 3. International Framework - Victims' Rights and Assistance

This chapter provides a definition of a victim of trafficking and the rights and protections that victims are afforded by international legal instruments. It states why victim identification is important and how early identification is a prerequisite of victims to access assistance and protection.

Victims of trafficking in persons are entitled, as a minimum, to have their human rights respected and to be given protection and safety. According to the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, safeguarding the human rights of trafficked persons should be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.<sup>110</sup>

### 3.1 Definitions of victims

Definitions of victims of trafficking in persons are stipulated in international legal instruments and national law. However, there is no defined or agreed profile of a victim of trafficking in persons. This is because there is no stereotypical image of a victim and victims have no common characteristics. There are however stereotypical images of victims that lead to misidentification and failure to protect and assist those who do not fit the prevailing stereotypes. The profile of a victim can be influenced by the form of exploitation and can depend on their vulnerable characteristics.

#### 3.1.1 Victims of crime

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (29 November 1985) states that victims are:

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

*A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term “victim” also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimisation.*

*The provisions contained herein shall be applicable to all, without distinction of any kind, such as race, colour, sex, age, language, religion, nationality, political or other opinion, cultural beliefs or practices, property, birth or family status, ethnic or social origin, and disability”.*

Article 3 of the CoE Convention Non-discrimination principle states:

<sup>110</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p25.

*“ The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”.*

### 3.1.2 Victim of trafficking in persons

Article 4(e) COE defines a victim as follows:

*“any natural person who is subject to trafficking in human beings as defined by this article”*

The UN Trafficking Protocol does not define a victim of trafficking in persons however. However, it does set out in articles 6-8 the protections that should be given to victims.

## 3.2 Victim identification

The identification of potential victims of trafficking in persons is important to ensure that victims receive the protection they are entitled to and that investigations and prosecutions are undertaken. All sectors within a State including prosecutors, judges, law enforcement and border agencies should be able to identify potential victims of trafficking. There are numerous types of trafficking in persons, and new and emerging forms of exploitation. Therefore the identification of potential victims requires knowledge not only of the trafficking process but of the differences between trafficking in persons and smuggling of migrants. It can be time-consuming because of the complexity of the crime and the networks of individuals involved.

States need to ensure that there is an effective system for proactive identification of victims of trafficking in persons, irrespective of their nationality and immigration status. Victims of trafficking do not always identify themselves. Therefore, the onus is on the authorities of the State, who should consider working with specialised NGOs who could contribute to the identification process.<sup>111</sup> This would enable States to identify victims of internal trafficking, begging and forced labour in the fields.

A human rights approach requires early identification of and assistance to victims of trafficking. Because trafficking in persons is such a complex phenomenon, the process of making the final identification of victims can be prolonged. This means that initial identification of presumed victims is crucial. Failure to identify victims at an early stage can lead to them receiving inadequate protection and their being violated. This in turn may impede effective prosecution of the crime.<sup>112</sup>

In many destination States victims of trafficking of trafficking may be mistaken for irregular migrants and summarily deported or put in detention facilities without being properly identified. The nature of the assistance and protection needed by the other categories of persons seeking assistance is likely to be different to that required by victims of trafficking of trafficking. Victims of trafficking are likely to have immediate and acute physical, sexual and psychological health needs that are not

<sup>111</sup> GRETA 2014 *Report concerning the implementation of the CoE Convention against Trafficking in Human Beings in Azerbaijan* p32.

<sup>112</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims A Community Policing Approach* p26.

normally present in cases involving smuggling or other irregular migrants. They are victims of serious crimes, and particular security arrangements and procedures are necessary since the agency personnel assisting them could themselves be exposed to particular risks.

The process of identification aims at making a determination of whether or not an individual is potentially a trafficked person according to the definitions of trafficking in persons established in international legal instruments.<sup>113</sup> It is essential for victims to be identified so that they can be removed from the situation of exploitation, their immediate physical and psychological needs addressed and the appropriate protection measures implemented.

Clause 16 of the United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) states that those people who are likely to be in contact with victims of trafficking should receive adequate training to assist them to identify and respond sensitively to their needs.

Article 10 of the CoE Convention “Identification of the victims” states:

*“1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.*

*2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2”.*

### 3.2.1 Identification process

Identifying a victim of trafficking is a process which takes time. If a person is believed to be a potential victim of trafficking, who may have been recovered from a situation of exploitation, then initial investigations should be undertaken to ascertain and address any hygiene needs which may relate to clothing, health or other issues. Non-specialised law enforcement officers should then make a preliminary identification of the person. They can make an assessment, without undertaking an interview, using a range of indicators to determine if the person is a potential victim of trafficking.

Potential victims of trafficking should then be referred to specialised law enforcement units, if they consent and in accord with their rights to ‘recovery and reflection’, to determine if a crime of trafficking in persons has been committed. A potential victim may be unwilling or unable (e.g. for reasons of trauma) to submit to interview.<sup>114</sup> Additionally, it is important to screen potential victims

<sup>113</sup> IOM 2006 *Counter-Trafficking Training Modules Victim Identification & Interview Techniques* p15.

<sup>114</sup> IOM 2006 *Counter-Trafficking Training Modules Victim Identification & Interview Techniques* p16.

of trafficking to ensure they are in fact victims of trafficking and not smuggled or other irregular migrants, or other individuals in an abusive or vulnerable situation who may be in need of assistance or protection.<sup>115</sup> This process should consider the circumstances surrounding each case before asking the potential victim specific trafficking related questions.<sup>116</sup>

#### *Preliminary Identification.*

1. Initial referral: the potential victim is referred or self-refers to a body responsible for initial referral: the responsible body will vary depending on the States legislation and policies.
2. Access to basic needs and information: providing basic information to potential victims and enquiring about their urgent needs responding to concerns expressed and/or emergency needs.
3. Early risk assessment: reviewing possible risks and securing the immediate safety of the potential victim.
4. Language and interpretation: ensuring communication in a language the potential victim understands.
5. Recovery and reflection period: providing potential victims with time and resources to ensure that they can make sound decisions about next steps.

OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p47.

### 3.3 Indicators of Trafficking in Persons

Indicators are a quantitative and qualitative benchmark that provides a simple and reliable basis for assessing achievement, change or performance.<sup>117</sup> They reveal the symptoms of a situation, and are a flexible instrument to be used on a case-by-case basis. It is not required that all or only one of the indicators is satisfied: what is important is that the indicators highlight a potential situation where a person may be a potential victim of trafficking in persons. Indicators then allow for further more detailed identification and the use of secondary indicators.

Indicators are divided into 'General Indicators' that apply to all forms of trafficking and 'Specific Indicators' for particular kinds of exploitation. Indicators are also divided into 'Objective Indicators', which are mainly found through observation, and 'Subjective Indicators', that are mainly revealed through interviews and investigation. It should be remembered that these are only indicators and none of them, in isolation or combination, mean that a person has definitely been trafficked. However, the presence of indicators should lead to further investigation.

In most of States only a small percentage of victims are formally identified and a significant number remain in the situation of exploitation. Trafficking for sexual exploitation is the major detected form of trafficking in persons in Europe and Central Asia.<sup>118</sup> This could be because of other forms of exploitation are not being identified, particularly migrant workers in a situation of forced labour, internal trafficking and child trafficking.

<sup>115</sup> UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p35.

<sup>116</sup> IOM 2006 *Counter-Trafficking Training Modules Victim Identification & Interview Techniques* p17.

<sup>117</sup> IOM 2006 *Counter-Trafficking Training Modules Victim Identification & Interview Techniques* p49.

<sup>118</sup> UNODC 2014 *Global Report on Trafficking in Persons* p35.

### 3.3.1 General indicators

These indicators relate to adult victims of trafficking in persons and provide a general indication that a person may be a potential victim. Further investigation and interviewing and the use of specific indicators may be necessary to establish if the person is a victim of trafficked. Those indicators that can be observed are 'objective indicators' whilst any indicator that you need to interview the potential victim to ascertain is a 'subjective indicator'.

#### *General Indicators of a victim of trafficking in persons.*

- Evidence that the person(s) is/are being controlled;
- Evidence of an inability to move or leave their work environment;
- Bruises or other signs of physical abuse;
- Fear or depression;
- Being unfamiliar with the local language;
- Recently brought into the country from another State e.g. Eastern Europe, Asia, Latin America, USA, Africa or India;
- Lack of a passport, immigration or other identification documentation;
- Living with employer;
- Poor living conditions;
- Multiple people in a cramped space;
- Inability to speak to individual alone;
- Answers appear to be scripted and rehearsed;
- Show fear or anxiety;
- Unpaid or paid very little;
- Be distrustful of authorities;
- Not know their work or home address;
- Having no access to their earnings;
- Have no access to medical care;
- Be under the perception that they are bonded by debt;
- Have limited or no social interaction;
- Have acted on the basis of false promises;
- Have limited contact with their families or with people outside of their immediate environment;
- Work excessively long hours over long periods;
- Not have any days off;
- Being threatened with being handed over to authorities;
- Being afraid of revealing their immigration status.

*UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p36.*

### 3.3.2 Specific indicators

These indicators are applicable when a potential victim is in a specific form of exploitation (Forms of exploitation are defined in sections 2.3.1, 2.3.2 and 3.3).

### *Sexual exploitation*

These indicators should be considered to ascertain if a potential victim has been engaged in sexual exploitation.

#### *Indicators of sexual exploitation.*

- Under 30 years of age, although the age may vary according to the location and the market;
- Move from one brothel to the next or work in various locations;
- Be escorted whenever they go to and return from work, shops etc.;
- Have tattoos or other marks indicating “ownership” by their exploiters;
- Work long hours or have few if any days off;
- Sleep where they work;
- Live or travel in a group, sometimes with other women who do not speak the same language;
- Have very few items of clothing;
- Have clothes that are mostly the kind typically worn for doing sex work;
- Only know how to say sex-related words in the local language or in the language of the client group;
- Have no cash of their own;
- Be unable to show an identity document;

*The following might also indicate that people have been trafficked for sexual exploitation;*

- There is evidence that suspected victims have had unprotected and/or violent sex;
- There is evidence that suspected victims cannot refuse unprotected and/or violent sex;
- There is evidence that a person has been bought and sold;
- There is evidence that groups of women are under the control of others;
- Advertisements are placed for brothels or similar places offering the services of women of a particular ethnicity or nationality;
- It is reported that sex workers provide services to a clientele of a particular ethnicity or nationality;
- It is reported by clients that sex workers do not smile or do not cooperate.

*UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p38.*

### *Forced labour*

These indicators should be considered to ascertain if a potential victim has been engaged in exploitation for forced labour. These should be applied in all situations including those that initially appear to be labour exploitation or contractual disputes involving regular or irregular migrant workers.

#### *Indicators of labour exploitation.*

- Live in groups in the same place where they work and leave those premises infrequently, if at all;
- Live in degraded, unsuitable places, such as in agricultural or industrial buildings;
- Not dressed adequately for the work they do: for example, they may lack protective equipment or warm clothing;

- Given only leftovers to eat;
- Have no access to their earnings;
- Have no labour contract;
- Work excessively long hours;
- Depend on their employer for a number of services, including work, transportation and accommodation;
- Have no choice of accommodation;
- Never leave the work premises without their employer;
- Unable to move freely;
- Subject to security measures designed to keep them on the work premises;
- Disciplined through fines;
- Subjected to insults, abuse, threats or violence;
- Lack basic training and professional licences;
- Notices have been posted in languages other than the local language, except for key notices on health and safety, for example;
- No health and safety notices;
- Employer or manager unable to show the documents required for employing workers from other countries;
- Employer or manager unable to show records of wages paid to workers;
- Health and safety equipment of poor quality or missing;
- Equipment designed or modified so it can be operated by children;
- Evidence that labour laws are being breached;
- Evidence that workers must pay for tools, food or accommodation or that those costs are being deducted from their wages.

UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p39.

### **Domestic Servitude**

It is probable that most victims of trafficking for domestic servitude are never identified or assisted. The lack of knowledge and understanding of domestic servitude limits the action of States and relevant professionals.<sup>119</sup>

#### *Indicators of domestic servitude.*

- Live with a family;
- Do not eat with the rest of the family;
- Have no private space;
- Sleep in a shared or inappropriate space;
- Reported missing by their employer even though they are still living in their employer's house;
- Never or rarely leave the house for social reasons;
- Never leave the house without their employer;
- Only given leftovers to eat;
- Subjected to insults, abuse, threats or violence.

<sup>119</sup> OSCE 2010 *Unprotected Work, Invisible Exploitation: Trafficking for the purpose of Domestic Servitude* p17.

UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p40.

### Begging

The UNODC Global Report 2014<sup>120</sup> states that the trafficking of children for forced begging is a significant problem in some locations. Begging is also increasing amongst adults.

#### Indicators of begging and petty crime

- Children, elderly persons or disabled migrants who tend to beg in public places and on public transport;
- Children carrying and/or selling illicit drugs;
- Physical impairments that appear to be the result of mutilation;
- Children of the same nationality or ethnicity move in large groups with only a few adults;
- Unaccompanied minors who have been “found” by an adult of the same nationality or ethnicity;
- Move in groups while travelling on public transport: for example, they may walk up and down the length of trains;
- Participate in the activities of organised criminal gangs;
- Belong to gangs composed of members of the same nationality or ethnicity;
- Part of large groups of children who have the same adult guardian;
- Punished if they do not collect or steal enough;
- Live with members of their gang;
- Travel with members of their gang to the country of destination;
- Live, as gang members, with adults who are not their parents;
- Move daily in large groups and over considerable distances;
- New forms of gang-related crime appear;
- Evidence that the group of suspected victims has moved, over a period of time, through a number of countries;
- Evidence that suspected victims have been involved in begging or in committing petty crimes in another country.

UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p40.

### 3.3.3 Indicators of exploitation

Indicators of exploitation are critical to recognise a situation of exploitation and to clarify the concept of exploitation. This is especially relevant to exploitation for forced labour where it can be difficult to differentiate between labour exploitation and forced labour. Therefore, the use of the indicators of trafficking in persons can help identify a situation of exploitation.<sup>121</sup>

<sup>120</sup> Available from [https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP\\_2014\\_full\\_report.pdf](https://www.unodc.org/documents/data-and-analysis/glotip/GLOTIP_2014_full_report.pdf)

<sup>121</sup> Trafficking in Human Beings Fifth Report of the Dutch National Rapporteur pp152-153.

*Polish cleaning women case: Country: the Netherlands*

Court: The Hague District Court: Sentencing date: 05 October 2007:

Purpose of exploitation: Forced labour or services.

In this case, the Defendant is accused of aiding and abetting human trafficking (charge no. 1) (Article 273f (1) (i) (iv) and (vi) of the Dutch Criminal Code). The Defendant recruited several Polish women to come and work as domestic staff in the Netherlands and arranged work for the women as cleaners.

The Explanatory Memorandum states that exploitation in the sense of this Article refers to modern types of slavery. The legislator has left further definition of the concept of exploitation to the courts. This Court is of the opinion that interpretation of the concept of exploitation should be modelled on the fifth report of the Dutch National Rapporteur on Trafficking in Persons, which contains a number of (non-exhaustive) indicators that could be a sign of exploitation. The Court is of the opinion that there are indications of misrepresentation, poor working conditions and multiple dependencies. Nonetheless, in the judgement of the Court, there is no question of a situation of excesses which would constitute an infringement of fundamental human rights.

EU Anti-trafficking website. [https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/polish-cleaning-women-case\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/polish-cleaning-women-case_en)

### 3.4 Identification of Child Trafficking

In identifying child victims, it may be necessary to coordinate efforts with relevant social work and child welfare authorities in order to meet the special needs of child victims, to repatriate them if conditions are safe, and to “ensure that the process takes place in a dignified manner, and is governed by a concern or what is in the best interests of the child”.<sup>122</sup>

#### 3.4.1 Indicators of child trafficking

*Indicators of a child victim of trafficking:*

- No access to their parents or guardians;
- Look intimidated and behave in a way that does not correspond with behaviour typical of children their age;
- No friends of their own age outside of work;
- No access to education;
- No time for playing;
- Live apart from other children and in substandard accommodations;
- Eat apart from other members of the “family”;
- Given only leftovers to eat;
- Engaged in work that is not suitable for children;
- Travel unaccompanied by adults;
- Travel in groups with persons who are not relatives;
- The presence of child-sized clothing typically worn for doing manual or sex work;

<sup>122</sup> UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p16.

- The presence of toys, beds and children’s clothing in inappropriate places such as brothels and factories;
- Claim made by an adult that he or she has “found” an unaccompanied child;
- Findings of unaccompanied children carrying telephone numbers for calling taxis;
- The discovery of cases involving illegal adoption.

UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p37.

### 3.5 Victim Assistance

Victim assistance should be available to potential victims of all forms of exploitation that result from being trafficked in accordance with the definition of a victim in Article 4(a) of the CoE Convention. A victim centred approach should be taken developing a relationship of trust with potential victims of trafficking, referring them to the appropriate services and providing information about their rights. Each potential victim should be provided with full information about their case, rights and possible next steps.<sup>123</sup>

Article 2 (b) of the UN Trafficking Protocol states that one of the purposes of the protocol is:

*“(b) To protect and assist the victims of such trafficking, with full respect for their human rights”.*

This is further supported by Article 6 of the UN Trafficking Protocol which sets out responsibilities for “Assistance to and protection of victims of trafficking in person”.

The importance of victim assistance is further reinforced by the CoE Convention and the EU Directive 2011/36/EU. Both these international legal instruments augment the commitment to combating trafficking in persons by providing mandatory provisions to protect the human rights of victims. These mandatory provisions apply to victims who have been trafficked transnationally and internally, within State borders.

Article 1 (b) of the CoE Convention sets out one of the key purposes of the Convention:

*“to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution”.*

Article 11 of the Directive defines “Assistance and support for victims of trafficking in human beings” and Article 12 of the Directive defines “Protection of victims of trafficking in persons in criminal investigation and proceedings”.

### 3.6 Victim Protection

Victims are entitled to have their human rights respected and they should be provided with protection, safety and individualised care with the right to self-determination. They should also be given full information, their full and informed consent should be obtained and they should not be discriminated against. Their right to confidentiality should be adhered to. The protection of victims is

<sup>123</sup> UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p16.

always a priority and prior to pursuing a criminal investigation, law enforcement officials must ensure that victims are removed from positions of vulnerability and secured in protective custody.<sup>124</sup>

Victims need protecting to safe guard their social, medical, physical, psychological and legal needs, and to assist and expedite their recovery. At all stages they should be empowered. Initially, victims' immediate hygiene needs should be attended to, including clothing, food and toiletries. They should be given emotional and physical support, if required, and be kept continually informed about their situation and what will happen to them.

In order to ensure the victim's needs are being met, a needs assessment should be conducted. This entails three levels of assessment beginning with an assessment of basic needs, followed by a needs assessment for assistance and services, and finally an assessment of needs associated with their victims needs to implement their rights.<sup>125</sup>

Victim protection should be provided as soon as a victim of trafficking is identified and irrespective of whether the victim assists in the criminal investigation and/or proceedings. However, those victims that do assist in the criminal investigation and/or proceedings should be provided with additional protection before, during and after any criminal proceedings.

In isolation Articles 2 and 6 of the UN Trafficking Protocol are not a strong protection tool. However, they are not stand alone articles, and should be read in conjunction with other international legal instruments. Under the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (1950) States have a responsibility under international law to protect and assist victims of trafficking.

The CoE Convention and the EU Directive 2011/36/EU have increased the obligation of States to protect victims. One of the key priorities of the EU Strategy (2012-2016) is *"Strengthening the identification, protection and assistance to victims, with a special emphasis on children"*.

### 3.7 Protection and Assistance of Children

Article 6 of the UN Trafficking Protocol "Assistance to and protection of victims of trafficking in persons" states:

*"4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, in particular the special needs of children, including appropriate, housing, care and education"*.

Child victims of trafficking in persons have very specific needs because of the nature of the crime committed against them. For example, the fact that they are removed from family and support networks greatly increases their suffering and means they are likely to feel particularly isolated. Support services should include psycho-social counselling, the appointment of a guardian, legal assistance (where needed), shelter/housing, life skills training, (re)training and education, and return and reintegration where this is in the best interests of the child.

<sup>124</sup> UNODC SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants 2014 p71.

<sup>125</sup> Ibid. P71.

Once the status of ‘trafficked person’ is clear in law, it is much more likely that children’s rights will be protected and the provision of appropriate support services will be on the political agenda. Identifying victims and referring them to appropriate services is primarily the responsibility of government services such as immigration officials, labour inspectors and police.<sup>126</sup>

Article 12 of the Directive 2011/36/EU “Protection of victims of trafficking in human beings in criminal investigation and proceedings” states:

*“3. Member States shall ensure that victims of trafficking in human beings receive appropriate protection on the basis of an individual risk assessment, inter alia, by having access to witness protection programmes or other similar measures, if appropriate and in accordance with the grounds defined by national law or procedures”.*

Child victims of trafficking in persons are entitled to special protection measures, both as victims and as children, in accordance with their specific rights and needs. The State should protect and assist children and ensure their safety.<sup>127</sup>

### 3.8 Referral Systems in Different Countries

One of the purposes of the CoE Convention is to prevent and combat trafficking in persons. This involves the identification and protection of victims and safeguarding their rights. Chapter 111 of the CoE Convention sets out the “*Measures to protect and promote the rights of victims, guaranteeing gender equality*”. Implicit within the CoE Convention there will be a process that begins with initial identification of a victim and provides protection and repatriation.

The Referral system is a framework for identifying victims of trafficking and ensuring they receive the appropriate protection and support. The OSCE defined the referral system as a co-operative framework to allow States to identify, protect and promote the human rights of trafficked persons in co-ordination with civil society.<sup>128</sup>

There are challenges for prosecutors in building and prosecuting trafficking in persons cases and also challenges in court proceedings to ensure the safety of victims. Protection measures can increase the number of victims who are willing to provide testimony and it can reduce the re-traumatisation of victims of trafficking. The successful prosecution of trafficking and forced labour requires effective witness testimony.

Once identified, potential victims of trafficking should be referred to victim support services. Referrals should be made with the victim’s informed consent, and based on their needs. Addressing victim’s needs requires co-operation between various anti-trafficking actors, such as law enforcement, social welfare services, NGOs, and so on. The UN Trafficking Protocol and the CoE Convention emphasis that assistance, protection and support should be provided by the State, but in close co-operation with NGOs and civil society.<sup>129</sup>

<sup>126</sup> ILO 2010 *Child Trafficking – Essentials* p4.

Available from <https://www.ilo.org/ipcinfo/product/download.do?type=document>

<sup>127</sup> UNICEF 2006 *Guideline on the Protection of Child Victims of Trafficking* p12.

<sup>128</sup> OSCE *National Referral Mechanisms Joining Efforts to Protect the Rights of Trafficked Persons A Practical Handbook* 2004.

<sup>129</sup> Copic, S. Simeunovic-Patic, B. *Victims of Human Trafficking* ed. Winterdyk, J. et al *Human Trafficking Exploring the International Nature, Concerns and Complexities* 2012 p275.

States are obliged to develop a referral system that incorporates in accord with Article 12 of the CoE Convention a 'Competent Authority'

*"1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:*

- a) standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;*
- b) access to emergency medical treatment;*
- c) translation and interpretation services, when appropriate;*
- d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;*
- e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;*
- f) access to education for children.*

*2. Each Party shall take due account of the victim's safety and protection needs.*

*3. In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.*

*4. Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.*

*5. Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.*

*6. Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.*

*7. For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care".*

Competent authorities are nominated groups of people who are trained and qualified to identify victims of trafficking and who should work with relevant support agencies. Competent authorities will make a judgement as to whether there are reasonable grounds to believe someone is a victim of trafficking in accordance with Article 12.2 of the CoE Convention. If this decision is affirmative a victim of trafficked should not be deported and will be entitled to a 'recovery and reflection period' as defined by Article 13 of the CoE Convention. Victims of trafficking will also be entitled to the measures contained in Article 12, paragraphs 1 and 2 (see above).

#### **Section 1 - Residence Permits, Protection Statuses And National Programmes Available To Victims Of Trafficking – Norway.**

*"(i) Reflection period of six months which cannot be renewed and does not form the basis for a permanent residence permit (Immigration Regulations, section 8-3)".*

#### **Conditions for the residence permits**

When granting a reflection period for six months (alternative (i) above), the responsible authority

should take into consideration whether facts pointing to trafficking exist, and whether the individual in question is prepared to accept help and follow up measures offered. The threshold is low to grant such a permit. If facts do not exist to indicate that the person is not a victim, the Norwegian Directorate of Immigration (UDI) usually grants a permit on the basis of facts provided by the foreign national, the lawyer, an assistance agency or a non-governmental organisation (NGO). There is no condition on cooperation with the police.

European Migration Network, *Identification of victims of trafficking in human beings in international protection and forced return procedures*, 2014

Victims of trafficking may be entitled to a 'residence permit' under Article 14 of the CoE Convention:

*"1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:*

- a) the competent authority considers that their stay is necessary owing to their personal situation;*
- b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings."*

A residence permit will allow a victim of trafficking to stay within the destination State for a minimum period of time and is renewable. States can impose criteria for the granting of a residence permit.

*Section 1 - Residence Permits, Protection Statuses And National Programmes Available To Victims Of Trafficking – Norway.*

*(ii) Limited residence permit for up to 12 months, with possible renewal if the specified requirements are still fulfilled, but which does not form the basis for a permanent residence permit (Immigration Regulations, section 8-3).*

In order to be granted a limited residence permit for up to 12 months (alternative (ii) above), the following cumulative criteria are utilised: whether the individual has broken all contacts with the trafficking environment, whether the individual has filed a police complaint against the traffickers, whether the police are investigating the case, and whether the police or prosecution consider the individual's presence in the country necessary for the investigation or for criminal proceedings. The police must verify the information given by the individual.

European Migration Network, *Identification of victims of trafficking in human beings in international protection and forced return procedures*, 2014

According to international standards, all victims of trafficking should have equal access to comprehensive assistance and protection schemes both in States of destination and States of origin upon their return. In order to meet a victim of trafficking's needs and individualise the treatment it is necessary to take into account the type of crime, the psychological characteristics of the victim and the factors in his/her social environment.<sup>130</sup> While acknowledging that victims of trafficking share

<sup>130</sup> Copic, S. Simeunovic-Patic, B. *Victims of Human Trafficking ed. Winterdyk, J. et al Human Trafficking Exploring the International Nature, Concerns and Complexities* 2012 p277.

some common experiences and circumstances, organisations should recognise and respect the individuality of victims and, to the extent possible, provide personalised care and assistance.<sup>131</sup>

### 3.9 Assistance for Children

The EU Directive 2011/36/EU states that assistance and support measures for child victims should focus on their physical and psycho-social recovery and on durable solutions. The Directive further places particular attention on unaccompanied child victims of trafficking in human beings, as they need specific assistance and support due to their situation of particular vulnerability. The Directive calls on Member States to ensure that specific assistance, support and protective measures are available to child victims.

#### 3.9.1 Appointment of a legal guardian

Article 10 of the CoE Convention “Identification of the victims” states, inter alia:

*“[...] 4. As soon as an unaccompanied child is identified as a victim, each Party shall:*

*“a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child [...]”.*

The concept of legal guardian is not defined in all States. However, whoever is appointed as guardian should act in the best interests of the child, and their interests should not conflict with the interests of the child. Article 29 of the CoE Convention states the guardians should be given specialised training, professional support and appropriate assistance in the performance of their responsibilities.<sup>132</sup>

Article 14 of EU Directive 2011/36/EU “Assistance and support to child victims”, states inter alia:

*“[...] 2. Member States shall appoint a guardian or a representative for a child victim of trafficking in human beings from the moment the child is identified by the authorities where, by national law, the holders of parental responsibility are, as a result of a conflict of interest between them and the child victim, precluded from ensuring the child’s best interest and/or from representing the child.”.*

Article 15 of EU Directive 2011/36/EU “Protection of child victims of trafficking in human beings in criminal investigations and proceedings” states:

*“2. Member States, shall, in accordance with the role of victims in the relevant justice system, ensure that child victims have access without delay to free legal counselling and to free legal representation, including for the purpose of claiming compensation, unless they have sufficient financial resources”.*

*An EU Strategy towards the eradication of trafficking in Human beings (2012)*

<sup>131</sup> IOM Handbook on Direct Assistance for Victims of Trafficking 2007 Preface X.

<sup>132</sup> UNICEF 2006 Guidelines on the Protection of Child Victims p16.

How is the particular situation of children addressed?

The Strategy, just like the Directive 2011/36/EU, recognises the importance of addressing trafficking in children who are particularly vulnerable to victimisation and re-trafficking, including during their adult lives. It proposes developing a best practice model for the role of the guardians and/or legal representation of the child victims and guidelines on child protection systems. The Strategy also calls on Member States to strengthen such child protection systems.

### 3.9.2 Referral Systems for Children in Different Countries

The procedures for the referral of victims of trafficking in persons apply to child victim of trafficking however, it is essential that the best interests of the child are the primary consideration. The State has the responsibility to provide protection and assistance to child victims of trafficking, and this protection should continue for those children who cannot return to their State of origin.

In accordance with Article 12 of the CoE Convention, the State should adopt legislative and other measures to provide victims with standards of living capable of ensuring their subsistence and this includes secure accommodation. Therefore the State has a responsibility to provide shelters for children who are victims of trafficking as well as psychological and material assistance. This protection is not only applicable to victims who have been trafficked into a State but also to those who have been internally trafficked within a State.

Article 10 of the CoE Convention “Identification of the victims” states:

*“1. Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.*

*3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.*

*4. As soon as an unaccompanied child is identified as a victim, each Party shall:*

*a) provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;*

*b) take the necessary steps to establish his/her identity and nationality;*

*c) make every effort to locate his/her family when this is in the best interests of the child.”*

### 3.10 Repatriation

Once rescued from the trafficking situation, victims may wish to be returned or resettled in their State of origin. This should be on a voluntary basis only. However, victims of trafficking are entitled

to be reintegrated in society in the long term and their medical, financial and legal issues resolved. They are entitled to an education, vocational training, income generation, employment and housing.

This is the third stage of protection of victims of trafficking and it can be a complex process of the victim's inclusion in the social environment and return them to normal life. Victims of trafficking should be provided with clear and sufficient information, but also assistance during their return.<sup>133</sup>

Article 8 of the UN Trafficking Protocol provides for the right to repatriation in international legal instruments:

*"1. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving State Party shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay."*

Article 16 of the CoE Convention "Repatriation and return of victims" confirms that right Article 16.5 states:

*"16.5. Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non-governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures".*

### 3.10.1 Repatriation of Children

Article 16 of the CoE Convention "Repatriation and return of victims" states:

*"7. Child victims shall not be returned to a State, if there is indication, following a risk and security assessment that such return would not be in the best interests of the child".*

### 3.11 Role of Non-Governmental Organisations

Within the anti-trafficking field, NGOs should fill the gaps in the response. Cooperation among all stakeholders is essential. NGOs need to cooperate with all actors in the anti-trafficking field and can offer their support to other actors. NGOs can support identification of victims of trafficking and provision of adequate support, including legal, psycho-social and basic support and safe referral and (re)integration of trafficked persons.

NGOs can also help trafficked persons in making their decision on cooperation with the authorities. Due to their direct social support services and direct contact with victims of trafficking, NGOs can win the trust of their beneficiaries. This often leads to them willing to testify and better witnesses in

<sup>133</sup> Copic, S. Simeunovic-Patic, B. *Victims of Human Trafficking* ed. Winterdyk, J. et al Human Trafficking Exploring the International Nature, Concerns and Complexities 2012 p278.

court.<sup>134</sup> The services NGOs can offer potential victims of trafficking include the provision of accommodation, health care, counselling, security, immigration advice and legal advice.

#### *La Strada International*<sup>135</sup>

The International La Strada Association is a leading European NGO-network working to ensure a world without trafficking by promoting respect for human rights. The network comprises eight independent member organisations that operate from a grass-roots level and implement activities for advocacy, prevention and social support for trafficked persons and at-risk groups in order to empower them to exercise their rights (There is no member organisation in Azerbaijan).

Available from <http://lastradainternational.org>

### 3.12 Confidentiality

All communications with victims of trafficking should remain confidential and any confidential data is handled securely. Agencies with responsibilities towards the victims of trafficking should ensure that they are fully informed as to the purpose of the collection of data about them and the uses to which it will be put, as well as to their own rights to access the data. They should also ensure that no personal data be released unless the victim gives written and fully informed consent authorising the release of personal data for specific purposes and uses.<sup>136</sup>

All communications, by telephone, postal service or in person, with victims of trafficking should be secure and confidential and ensure that details of the victims, including their name and location, are not disclosed. Systems should be put in place to ensure that victim privacy and confidentiality are adhered to.

#### *Suzanne M. Leone, Protecting Rape Victims' Identities: Balance Between the Right to Privacy and the First Amendment, 27 New Eng. L. Rev. 883, 909-10 (1993)*

A victim's right to control information about him or herself "constitutes a central part of the right to shape the 'self' that any individual presents to the world. It is breached most seriously when intimate facts about one's personal identity are made public against one's will . . . in defiance of one's most conscientious efforts to share those facts only with close relatives or friends." (quoting Laurence H. Tribe, *American Constitutional Law* § 12-14, at 650 (1st ed. 1978)); *Commonwealth ex rel. Platt v. Platt*, 404 A.2d 410, 429 (Pa. Super. Ct. 1979) "The essence of privacy is no more, and certainly no less, than the freedom of the individual to pick and choose for himself the time and circumstances under which, and most importantly, the extent to which, his attitudes, beliefs, and behaviour and opinions are to be shared with or withheld from others".

<https://law.lclark.edu/live/files/15549-protecting-victims-privacy-rights---the-use-of>

<sup>134</sup> Hoff, S. *Project on Combating and Preventing Trafficking in Human Beings in Azerbaijan The role of NGOs in combating human trafficking and supporting (presumed) trafficked person* 2011.

<sup>136</sup> IOM *Handbook on Direct Assistance for Victims of Trafficking* 2007 p8.

### 3.12.1 Child confidentiality

Article 16 of the UN Convention on the Rights of the Child “Right to privacy” states:

*“Every child has the right to privacy. The law should protect the child’s private, family and home life”.*

Article 11 of the CoE Convention “Protection of private life” states:

*“2. Each Party shall adopt measures to ensure, in particular, that the identity, or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child”.*

States should take all necessary measures to protect the privacy and identity of child victims to ensure their safety and security and that of the victim’s family.<sup>137</sup>

### 3.12.2 Data protection privacy

Article 11 of the CoE Convention “Protection of private life” states:

*“Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).”*

All agencies and institutions dealing with victims of trafficking should protect the privacy and identity of victims. A victim’s personal data should be stored and used in conformity with the conditions set out in the relevant international instruments. Confidentiality should be taken into account in police reports, especially when distributed to other stakeholders.<sup>138</sup>

## 3.13 Legal assistance

Victims of trafficking should have the right to legal services, including information about their rights, legal remedies and the options available to them. This legal assistance can be provided by independent lawyers from NGOs, civil society or the private sector. Legal assistance gives victims of trafficking access to justice, thereby ensuring that they are aware of their rights and understand them both linguistically and legally, and are able to provide additional information and to participate in proceedings.

Article 6.3 of the UN Trafficking Protocol “Protection of victims of trafficking in persons” states:

*“3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate*

<sup>137</sup> UNICEF 2006 *Guidelines on the Protection of Child Victims of Trafficking* p11.

<sup>138</sup> OSCE *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* 2011 p26.

*cases, in co-operation with non-governmental organisations, other relevant organisations and other elements of civil society, and, in particular, the provision of:*

*(b) Counselling and information, in particular as regards their legal rights, in a language that the victim of trafficking in persons understands.”*

Article 15 (2) of the CoE Convention establishes an obligation for State Parties to provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.

Article 12. 2 of EU Directive 2011/36/EU states:

*“Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling and, in accordance with the role of victims in the relevant judicial system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resource”.*

### **3.14 Provision of information**

States are obliged to provide victims with information and an opportunity to present their views and concerns. Legislators may consider provisions that ensure judges cannot deny information or exclude participation on any basis other than prejudice to the rights of the defence.<sup>139</sup>

Article 6.2 of the UN Trafficking Protocol “Protection of victims of trafficking in persons” states:

*“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:*

*(a) Information on relevant court and administrative proceedings;*

*(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence,”*

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<sup>139</sup> UNODC *Legislative Guides for the Implementation of the UNTOC and the Protocols thereto* 2004 p284.

## 4. International framework - best practices on addressing different aspects of trafficking in persons

This chapter will look at the impact of trafficking in persons on victims and their immediate, physical and psychological needs. It will explain the impact of gender and culture and how victims are controlled. It will also explain how victims should be interviewed.

Trafficking in persons is a hidden crime. Victims are usually unaware of their rights, do not understand the laws of the State and they are controlled by the traffickers.<sup>140</sup> Victims of trafficking may not seek assistance, they may not understand they are in a trafficked situation or may fear the authorities.

### 4.1 Control Methods

Through the differing exploitative forms of trafficking in persons the perpetrators of trafficking earn profits from their victims. However, they have to ensure that victims remain within those exploitative conditions. This is achieved through a variety of differing control methods which ensure that the trafficker has continuous control and the victim remains within the trafficked situation.

Control is exercised through many different, partly violent, mechanisms. Each mechanism may be used in isolation from the others, but in most cases, they will be implemented together so as to create a condition of actual or psychological imprisonment of the victim.<sup>141</sup> Control methods can be used at each separate element of the trafficking process, and different methods can conceivably be used.

While victims of trafficking are subject to many forms of coercive and violent control, it is also important to point out that victims of trafficking can also be controlled through the promise of benefits to come. For example, workers may be promised not only better wages in future, but legalisation of their stay in a State, help bringing their families or other such benefits. Victims can also be controlled through their lack of knowledge about their rights and the laws of the destination State. For example, many victims believe that their work permit is tied to their employer when it is not.<sup>142</sup>

Prosecutors and judges need to understand how victims are controlled to be able to recognise why they do not leave the exploitative situation or the perpetrators. This will also assist them to identify victims of trafficking and trafficking situations and understand the realities of the trafficking situation.

#### *Debt Bondage*

The victim is required to pay back debt accrued for being transported to the destination State or region. They will be required to work in an exploitative situation to pay back the debt, however, it can increase due to punitive interest charges, and charges for accommodation, food and transport. The victim may be sold on by the original trafficker and the debt can start again as a result of this re-

<sup>140</sup> OSCE *Trafficking in Human Beings: Identification of Potential and Presumed Victims A Community Policing Approach* 2011 p48.

<sup>141</sup> ICMPD 2006 *Anti-Trafficking Training Material for Judges and Prosecutors Background Reader in EU Member States and Accession and Candidate Countries* p32.

<sup>142</sup> USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* p16.

sale. The victim may have accepted debt at the outset but without the knowledge that, in reality, it could never be paid back.

### ***Isolation***

Isolation can be used deliberately to control victims, to ensure that they do not escape from the trafficking situation. Victims are kept away from others and not allowed to communicate with anybody. Victims may also be physically isolated in a location with no transport links.

Language is a significant barrier as many victims cannot speak the language of the State they have been trafficked into and the trafficker ensures they are given no opportunity to learn the language. They may be moved from location to location so they are unable to make any ties in a location. They may not be given a phone or any other communication tools. These methods of isolation make the victim more reliant on the traffickers.

### ***Use or Threat of Violence***

Violence can be used, in some cases excessively, to control victims, and ensure that they do not escape from the trafficking situation. Violence may also be used against a victim to foster belief in other victims that if they leave the trafficking situation they also will be subjected to violence.

Victims can be controlled by the threat of violence to themselves and/or members of their family. This is particularly effective when the victim either knows or believes that the trafficker know their family. Victims remain in the trafficking situation in the belief, genuine or otherwise, that their family will be harmed.

### ***Denunciation to Family***

The traffickers inform the victims that they will tell their families and/or communities that they are either working in prostitution or in a forced labour situation. This can be particularly effective in collectivist cultures when victims know they will either bring disrespect to or lose face with their family and/or communities. This control method can also be applicable when a victim comes from a religious background.

### ***Removal of Documents***

The confiscation or removal of the victim's documents by the trafficker make it almost impossible for them to leave the trafficking situation. This is usually done when the victim arrives at the destination. Without documents they have no official identity making it impossible to escape.

### ***Financial Extortion***

Finances are the primary method of exploitation and control. Exploitation may begin early in the migration process when potential migrants pay for visa services. Workers often pay for these and other services that are never received.

#### ***Case: workers from Bosnia and Herzegovina***

They workers were exploited in Azerbaijan as many of them had paid an extra \$250 to the recruiter for visas. They had to pay again for a tourist visa on arrival (\$40) and the vast majority were promised work visas that never materialised.

USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* p19.

These payments are the start of the exploitation as many studies reveal that the exploiters set up systems of forced dependencies in order to control workers. A common threat made against exploited migrants is that they will not be paid if they complain. The promise of pay is commonly cited as the reason for staying in abusive workplaces and fear of not being paid withheld wages is a commonly expressed concern.<sup>143</sup>

### **Non-payment of Wages**

Cases of trafficking of migrants forced labour are primarily dealt with by national authorities as cases of smuggling and violations of national immigration or labour law. This is a flawed approach, which puts victims in the position of criminals. It focuses on the wrong target and is an obstacle to effectively fighting traffickers and trafficking.<sup>144</sup>

Those exploiting victims do not pay wages, making the victims too impoverished to leave and afraid that if they do leave they will not receive any of the monies they are entitled to. Traffickers can also impose fines and administer financial punishments from wages by deductions for food, accommodation and transport. This ensures that the wages victims earn are so small they are unable to leave situations of exploitation.

ILO studies have revealed that 88.7 per cent of forced labour migrants had their wages withheld and in many cases wages were not paid at all or there were so many deductions for arbitrary fines fees that the final payment resulted in the workers hardly being paid. Whilst workers were unaware of this beforehand, it seems clear that employers had no intention of paying them the agreed wage, meaning the workers were deceived, meeting the conditions of the UN Trafficking Protocol.<sup>145</sup>

### **Loss of Freedom**

This entails denial or restriction of freedom of movement or detention of victims in premises in detention units. Freedom of movement was totally denied, or else allowed only when accompanied, for 92 per cent of trafficked men from Ukraine and men were guarded by armed guards and had to have written permits to leave the premises. The ILO country studies found that 92.1 per cent of forced labour migrants lacked freedom of movement.<sup>146</sup>

### **Denunciation to Authority**

Traffickers threaten the victims that they will inform the relevant authorities if they do not do as they are told, and that they will be arrested. The victims believe that the work they are doing is illegal or criminal, or that they are illegally in the country. The traffickers inform the victims that they can be arrested even when they are legally in a country or region or the work they are undertaking is legal for example working in prostitution in the Netherlands or working in a Schengen State this is allowed.

<sup>143</sup> USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* p19.

<sup>144</sup> Council of Europe Parliamentary Assembly. Report.Doc. 13086. 04 January 2013.

<sup>145</sup> USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* p19.

<sup>146</sup> USAID 2010 *Trafficking of Adult Men in the Europe and Eurasia Region* p18.

### *Induced Substance Addiction*

Victims are initially forced to take drugs or alcohol or both until they become addicted. The traffickers continue to supply the substance to the victims and, thereby, have control.

## **4.2 The Impact of Trafficking in Persons on Victims**

Trafficking in persons can have a physical and psychological impact on victims they may have been subjected to violence and substance misuse or become marginalised. Physical symptoms can include trauma and health symptoms including HIV/AIDS, sexually transmitted illnesses, physical injuries which may have been caused by violence, fatigue and weight loss. Violence can occur both prior to trafficking and whilst in the trafficking situation. It can include physical violence (assault and threats or injuries by weapons); sexual violence (being forced or intimidated into performing sexual acts against their will) as well as threats and loss of freedom and/or control.

The impact of this violence can result in a wide range of on-going health problems, from fatigue and weight loss to neurological symptoms, as well as potential mental health issues. It can also result in victims becoming withdrawn, further enhancing their isolation and potentially making them more dependent on the traffickers.

Victims of trafficking can suffer from adverse sexual and reproductive health complications, typically, as a result of sexual violence and coercion experienced during the trafficking situation. This can include the risk of acquiring a range of sexually transmitted illnesses and/or HIV through their engagement in commercial sex, sexual violence, experiences of coerced sex, and unsafe sex.<sup>147</sup>

Psychological symptoms can manifest themselves as mental health issues including depression, anxiety, hostility and post-traumatic stress disorder (PTSD) as well as the effects of emotional abuse. The impact of trauma can include dissociation and de-personalisation, an altered sense of time, memory impairment, acute indifference and apathy, the fragmentation of perception, feeling, consciousness and memory and flashbacks. The essence of trauma is that it overwhelms the victim's psychological and biological coping mechanisms. This occurs when internal and external resources are inadequate to cope with the external threat.<sup>148</sup>

Depressive symptoms can include, feeling very sad, worthless and a feeling of hopelessness about the future and no interest in things. The symptoms of hostility can include feeling annoyed or easily irritated, having temper outbursts and becoming easily upset. Victims of trafficking have also been diagnosed with PTSD, an anxiety disorder caused by very stressful, frightening or distressing events, which may be recurring.

#### **Post-traumatic stress disorder can manifest itself through:**

(i) re-experiencing traumatic events; which can comprise of recurrent thoughts or memories of terrifying events, recurring nightmares or sudden emotional or physical reactions when reminded of a hurtful or traumatic event.<sup>149</sup>

<sup>147</sup> Stolen Smiles: 2006 *The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* p15.

<sup>148</sup> UNODC *Anti-human trafficking manual for criminal justice practitioners Module 3* p2.

<sup>149</sup> Stolen Smiles: 2006 *The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* p20.

(ii) physical arousal; which can include feeling jumpy or being easily startled, having trouble sleeping, difficulty in concentrating and feeling irritable and outbursts of anger.

(iii) avoidance and numbing; which can include feeling that you do not have a future, feeling detached/withdrawn, unable to feel emotion or the inability to remember parts of the most traumatic or hurtful events.<sup>150</sup>

There can be several stages of recovery including hostility, loss of orientation, reconstruction and remembering prior to any social reintegration. Victims can adopt a number of survival strategies in response to systematic abuse, which is a dominant feature of a coercive relationship, and they can adapt their behaviour to reduce the abuse. The three key survival strategies are avoidance, identification with the trafficker (“Stockholm Syndrome”) and numbing.

#### *Consequences for criminal justice practitioners*

The behaviour of the victim could include:

- Hostility towards the investigator or prosecutor. The victim may have learned that anything jeopardising the dominance of the traffickers could lead to immediate violence. She/he may thus avoid any cooperation with law enforcement or judicial authorities;
- Failure to cooperate with the investigation or prosecution;
- Memory loss, lapses and, discrepancies, resulting in:
  - Changes in the account at different times
  - Inability to recall details
  - Ability to recall central details of a traumatic incident, but not peripheral details such as descriptions of clothing, rooms or vehicles
  - Blocking out events that were most life threatening (i.e, dissociation)
- Outbursts that appear to be irrational;
- Disorientation after leaving a situation of on-going trauma and control;
- Continuing anxiety despite apparently being “safe”;
- Needing more breaks, rest and sleep than might be expected;
- Reconstruction and remembering. For many victims, there is a period of re-construction as they process what has happened to them. Victims re-interpret events and try to come to terms with their experience, to possibly find an explanation for what has happened, or to evaluate the event.

*UNODC 2009 Anti-human trafficking manual for criminal justice practitioners Module 3 p10.*

The impact of the trafficking situation can diminish the victim’s emotional and intellectual capacity. This may impact on their ability to engage effectively with legal proceedings, rendering the victim unable to provide testimony or impacting on their credibility or reliability as a witness in legal proceedings. The trafficking can lead to impaired cognitive functioning among victims, affecting the

<sup>150</sup>Stolen Smiles: 2006 The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe p2.

extent to which they provide detailed evidence about the crime or how they make decisions about co-operating in a prosecution.<sup>151</sup>

### 4.2.1 Culture

It is important to try and understand the victim's own cultural framework. An essential dimension is whether a culture is individualistic or collectivist. Different cultures embody specific values and these values determine if a culture is individualistic or collectivist. In individualistic cultures, such as much of Western Europe, the focus is on the rights and independent actions of the individual and the loyalty of the person is to herself or himself first.

In collectivist cultures, which that stress interdependence and value the welfare and survival of the group above that of the individual, such as many in Africa, Asia, the Middle East, and some Eastern European countries personal development is not viewed in the same way. The group or family identity remains the focus, the individual is embedded in a collective identity and loyalty is to the group first. The shame of the individual is the shame of the family and group.

The meaning of the trauma is influenced significantly by how the victim's culture would view their experiences. Trafficked women fear being rejected and shunned by their families or community. Self-blame is not an uncommon immediate psychological response across cultures. In some cultures the woman's self-blame seems supported and reinforced by the culture.

## 4.3 The impact of Trafficking in Persons on Children

Child victims of trafficking are subjugated and physically abused by the traffickers, with the violence occurring at all stages of the trafficking process. They may have been subjected to sexual exploitation, have been isolated and separated from family, confined and subject to forced labour. They could have been deprived of an education, missed out on their childhood, and be malnourished and in need of medical care.

Child victims of trafficking may be suffering from trauma as a result of their experiences, as well as physical injuries. It is important that specialised care is provided for child victims to provide for their immediate and long-term physical and psychological needs.

## 4.4 Interviewing Victims

The interviewing of victims of trafficking is an essential part of the investigation and those conducting the interview should respect the rights, choices and autonomy of the victim. Interviewing victims of trafficking can be difficult because victims may deny involvement, and they may have impaired decision-making powers and difficulty in providing coherent and consistent account. This presents a risk of plausible invention and evidential contradiction. It is important that both the

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<sup>151</sup>Stolen Smiles: 2006 *The Physical and Psychological Health Consequences of Women and Adolescents Trafficked in Europe* p22.

interview management and the testimony are carefully managed. The objective of an interview is to obtain a truthful account of what has happened to the victim of trafficking.

Interviewing a person who has been trafficked raises a number of ethical questions and safety concerns. The interview should adopt the “Do No Harm” principle and interviewers should know the victim, not make any promises and respect the anonymity and confidentiality of the victim.<sup>152</sup> This principle is particularly significant in the context of trafficking given the risks associated. It is crucially important that no steps are taken that may make the situation more perilous for the victim of trafficking. Interviewers should listen to the victim, show respect and put the information obtained to good use.

Victims of trafficking have been exposed to risks and may still be at risk when being interviewed. The protection of victims should be one of the primary concerns of the interviewer and there are basic principles for the protection of the victim that should be followed.<sup>153</sup>

Interviews with victims of trafficking should be conducted by specially trained interviewers who have experience in dealing with trafficking in persons cases. It is essential that the interviewer understands the situation of the victims and how they are feeling and knows what the obstacles to victim cooperation are and why.

Interviewing victims of trafficking can be both challenging and difficult because they may be traumatised, confused, hostile and distrustful of those undertaking the interview. They may be in fear of the consequences of the interview, which could include reprisals against the victim or the victim’s family, by the traffickers. The victims may believe they will be deported, detained or prosecuted, or they may not tell the truth to protect others who could be suspects or victims.

#### *Additional skills for interviewing victim-witnesses*

- Questioning skills (particularly any evidence of appropriate questioning vulnerable victim-witnesses as opposed to ‘interrogation’ skills);
- Active listening skills;
- Observation skills: ability to recognise and respond to distress, anxiety, fear, and so on;
- Ability to develop a rapport with the victim, while remaining professional (e.g., showing empathy, acknowledging harm, being patient and so on etc.);
- Ability to adopt a non-judgmental, non-blaming attitude (e.g. prejudices against migrants, sex workers, women, men);
- Ability to reassure the victim that he/she has nothing to be ashamed of;
- Cultural competency: willingness and ability to become culturally prepared/competent to work with persons with different backgrounds;
- Psychological preparedness to deal with highly distressing crimes;
- Ability to strike a balance between maintaining professionalism and compassion in the tone and style of questioning;
- Ability to avoid complex and industry-specific jargon that is understood by the victim;
- Ability to avoid physical contact, however well intentioned.

*UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p64.*

<sup>152</sup> See Annex 6.

<sup>153</sup> Ibid.

### 4.4.1 Interview Planning

Prior to conducting any interview with a victim of trafficking it is essential to plan effectively and for the interviewer to be well prepared. All interviews should be assessed on a case-by-case basis and the interview methodology will be determined by the disposition of the victim of trafficking. There are good practice procedures that can be followed which can improve the chances of a victim answering questions and providing the information needed.

These procedures include:

*(i) The location of the interview:* the objective is to provide a safe environment and ensure the protection and safety of the victim of trafficking. The location should ensure privacy and, if possible, be a closed private space with no interruptions.

*(ii) Attendees at the interview:* the interviewers if possible should be the same gender as the victim. If the victim cannot understand what is being said or speaks a different language, an approved interpreter (not a member of the community or a friend who speaks the language), should attend if appropriate. A person should be there to provide support to the victim. This could be a NGO, legal representative or counsellor.

*(iii) Introduction:* the health, well-being and comfort of the victim should be ascertained. If necessary, medical attention or medication should be provided. The comfort needs of the victim should be addressed which may include the provision of food and/or drinks. The interviewers, and anyone else present, should introduce themselves and explain who they are, their position and why they are present at the interview.

*(iv) Explanation of the interview:* the victim should be informed of the purpose of the interview and why they are being interviewed, the format and how long it will take. The interviewer should explain the type of questions that will be asked and why and inform the victim that they can themselves ask questions. The victim should be informed that the interview is confidential and their consent to being interviewed should be obtained.

*(v) Respect:* it is important that the interview establishes a rapport with the victim and builds trust. The interviewer should be respectful to the victim at all times and not be judgemental. They should provide reassurance to the victim and inform them that they are not to blame.

### 4.4.2 Interviewing Child Victims

Whatever the offence, the judicial officials should consider the position of the child and what can be done, taking into account the role and powers of the judicial officials, to safeguard the child. The child will still be likely to be suffering from stress and worry at the thought of having to give evidence in court. It is unlikely to be possible to eliminate this altogether, but prosecutors should take such steps as are possible to reduce it to a minimum.

Interviews with adults are very different from those with children and should only be undertaken by law enforcement officers who are trained. The age, sex and cultural background of the child to be interviewed should always be kept in mind. These considerations will be of special importance when

determining the types of questions to ask, the way to ask them and who will conduct the interview.<sup>154</sup>

The child victim, or their parent or guardian, must give their informed consent prior to the interview, and the interview cannot commence without that consent. The child should, if possible, have a support person with them in the interview, and an interpreter if the child victim does not understand or speak the language. The interviewer and the interpreter should ideally be of the same gender as the child being interviewed, and both should be dressed in civilian clothing.

Article 15 of the Directive 2011/36/EU “Protection of child victims of trafficking in human beings in criminal investigations and proceedings” provides that:

*“15.1. Member States shall take the necessary measures to ensure that in criminal investigations and proceedings, in accordance with the role of victims in the relevant justice system, competent authorities appoint a representative for a child victim of trafficking in human beings where, by national law, the holders of parental responsibility are precluded from representing the child as a result of a conflict of interest between them and the child victim”.*

A multiplicity of interviews should be avoided and if possible, interviews should be arranged one at a time, taking time to involve all relevant authorities in the planning. Care should be taken to avoid intimidating the child and also to ensure the child is not subjected to repeated interviews and to re-live the abuse repeatedly. The language used in the interview should be simple, taking into account the age, and the apparent maturity and intellectual development of the child.<sup>155</sup>

Article 15 also provides that:

*“15.3. Without prejudice to the rights of the defence, Member States shall take the necessary measures to ensure that in criminal investigations and proceedings in respect of any of the offences referred to in Articles 2 and 3:*

*(a) interviews with the child victim take place without unjustified delay after the facts have been reported to the competent authorities;*

*(b) interviews with the child victim take place, where necessary, in premises designed or adapted for that purpose;*

*(c) interviews with the child victim are carried out, where necessary, by or through professionals trained for that purpose;*

*(d) the same persons, if possible and where appropriate, conduct all the interviews with the child victim;*

*(e) the number of interviews is as limited as possible and interviews are carried out only where strictly necessary for the purposes of criminal investigations and proceedings;*

*(f) the child victim may be accompanied by a representative or, where appropriate, an adult of the child’s choice, unless a reasoned decision has been made to the contrary in respect of that person”.*

<sup>154</sup>IOM 2006 Counter-Trafficking Training Modules Victim Identification & Interview Techniques p29.

<sup>155</sup>UNODC 2014 SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p16.

*Achieving Best Evidence in Criminal Proceedings: Guidance on interviewing victims and witnesses, and guidance on using special measures.*

ABE provides detailed recommended procedure for interviewing child witnesses. The Guidance covers practical issues around initial contact with the witness, consent, when the child can be further interviewed and issues to be considered for very young children, children with disabilities or children who are psychologically disturbed.

- Only staff trained in the special needs and rights of children should question potential victims. When possible and appropriate, children should be questioned by same sex staff.
- Create a space that is age appropriate, possibly including toys, books or games.
- Establish a rapport by talking about or doing things that are not related to the trafficking experience (discuss things the child is familiar with; play games)
- Keep the atmosphere simple and informal (do not assume an air of interrogation or press for responses). Consider sitting on the floor with a child while they play; communicate with children at eye level.
- Use appropriate and child-friendly language (pick-up terms the child uses).
- Explain things in a manner a child can easily comprehend (consider using visual aids). Questions should be adapted to the age and mental capacity of a child.
- Begin with open-ended questions, allowing a child to give their own account. Avoid leading questions e.g. "Did the person abuse you?" and use more open questions, e.g. "What did the person do?"
- Do not pursue and press for details when there are signs that a child has told all they know. Keep in mind that children may leave information out, or may give an answer they believe the interviewer wants to hear.
- Interviews should take place in the presence of a parent if possible. If this is not possible, a legal guardian such as a trained psychologist or social worker should be present.
- End the interview in a way that reassures the child that they have done well and that the interviewer will be available if they need to talk again.

*Ministry of Justice (UK) 2011 Achieving Best Evidence in Criminal Proceedings. Guidance on interviewing victims and witnesses, and guidance on using special measures.*

## 5. Trafficking in Persons Prosecutions

### 5.1 Role of Prosecutors and Judges

Prosecutors need to understand the complexity of trafficking in persons cases and to respect the human rights and the dignity of victims of trafficking. They are faced with the challenge of what charges to bring forward, in view of the complexity of the legislation, and explain the definitional problems inherent in human trafficking legislation to the courts. They have to build and bring a case to court, ensuring the case is effectively managed, that witnesses are protected and those witnesses who are suffering from physical or psychological problems are able to provide testimony.

The prosecutor should involve the victim throughout the process, providing information on their role in the criminal proceedings, and providing them with timely up-dates in respect of the case. The prosecutor should also provide as much compelling evidence as possible to establish the case, whether the witnesses have to attend court to give evidence in a common law system or have to provide evidence for a pre-trial deposition in a civil law system.

Judges have differing responsibilities dependent on the legal system. In a civil law State an inquisitorial system is applicable and judges actively investigate the case in front of them to determine the case facts. In common law States the adversarial system is used and the judge is generally there to ensure the proceedings are carried out in a fair and just manner according to the law acting as a referee or a partial arbiter between the concerned parties.

### 5.2 Investigations

There are significant complexities in investigating trafficking in persons cases, including various issues relating to victims who are often either unable or unwilling to cooperate. It is a changing environment that presents particular problems and new challenges making it necessary to adapt investigative approaches. All investigations need to be victim-centred with the human rights of the victim respected at all times. Victim protection should be a primary concern and no approach should be taken that could put a victim of trafficking at risk. Inadequate or limited victim protection and a victim's fear of limited or no security can affect their demeanour and influence if or how they give evidence in any subsequent prosecution.<sup>156</sup>

All investigations must be implemented in compliance with the legal requirements of the law of the State concerned.<sup>157</sup> They should be continually reviewed and risk assessments undertaken to consider if the outcomes at all stages of investigation and/or prosecution could have any possible adverse outcomes or risks for the victim. If a risk exists that threatens the security or safety of a victim, there is a legal duty of care to mitigate that risk by identifying and initiating the appropriate response.

<sup>156</sup>NGO ASTRA 2012 *Serbia Research into Court Trials*.

<sup>157</sup>UNODC SOP 2014 *Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p51.

### 5.2.1 Investigative Approaches

There are three recognised investigative approaches:

(i) *Reactive investigations*; a reactive response is required following the receipt of information, and after a risk assessment, that either an offence has been committed or there is a requirement to rescue a victim and an immediate response is required. These are “victim led” investigations as they can commence after a complaint from a victim.

There is a clear legal duty on States in these situations, especially if the potential victim is a child. Reactive investigations can include obtaining corroborative evidence, interviewing victims and suspects, obtaining statements, the analysis of materials recovered and preparing a case for trial.

(ii) *Proactive investigations*; the key to a successful proactive investigation is intelligence it can provide knowledge about traffickers that leads to the commencement of an investigation. The objective of the investigation is to rescue victims and/or to obtain evidence that will enable the arrest and prosecute those responsible for the trafficking.

The use of proactive tactics are the best method for investigating cases of trafficking in persons especially, trafficking for sexual exploitation. They are effective because they enable police investigators to focus on the perpetrators who are committing the offences of human trafficking. It is also predominantly a visible crime in that the victims, perpetrators and the location of the exploitation can be located.

The strategies and tactics used in the investigation may include specialist investigation techniques if they are the most effective method of concluding an investigation. It is important to ensure close co-operation between investigators, prosecutors and judges to ensure that all legal requirements have been complied with and the evidence obtained is admissible in court.

(iii) *Disruption*; aims to interrupt criminal activities and may be used when reactive and proactive investigations are either not possible or preferable. It is important tactic in circumstances where there may be insufficient evidence for an investigation and there is always the possibility of creating intelligence opportunities.

Prior to the commencement of any investigation, unless it is totally reactive, careful planning and prioritising is required and decisions should be made on what investigative approach should be deployed and why. It needs to be ascertained if intelligence has been obtained that can facilitate the commencement of a proactive investigation or should a disruptive approach be taken. Investigation approaches are not mutually exclusive and a combination of approaches maybe required. A reactive investigation may lead to a proactive investigation or vice versa.

#### *Circumstances conducive to disruptive investigations*

1. Where the level of risk to the victims demands an immediate response that precludes the proactive approach but may require an immediate intervention and disruption thereafter;
2. Where the proactive approach is not viable for operational reasons, such as where geographical and/or topographical features make surveillance on target premises impracticable, or where it is impossible to achieve undercover penetration of the network;
3. Where legislative, procedural or resource implications preclude the use of a proactive approach; and,
4. Where the disruptive approach provides a faster response to specific complaints from local

residents or other affected groups.

*UNODC SOP 2014 Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p55.*

## 5.2.2 Intelligence

Intelligence methodology is used to collect information and knowledge on the perpetrators of trafficking and also how they operate. Intelligence is described as information that has been collected, collated, analysed and evaluated. It provides the knowledge and understanding to identify and inform operational decisions and to select the best subjects for a pro-active investigation. Intelligence Led Policing can be defined as “a business model and managerial philosophy where data analysis and crime intelligence are pivotal to an objective, decision making framework that facilitates crime and problem reduction, disruption and prevention through both the strategic management and effective enforcement strategies that target serious and prolific offenders”.<sup>158</sup>

The most effective types of intelligence gathering that are most effective are strategic intelligence and tactical intelligence.

The objective of strategic intelligence is to conduct an overall intelligence assessment of the various strategic factors that underpin the existence of trafficking in persons.

*Tactical intelligence* affords immediate and timely support to ongoing investigations by identifying offenders and by providing advance information on their movements. It leads to specific action, including arrests, further investigations and prosecution.<sup>159</sup>

## 5.2.3 Specialist Investigative Techniques

Article 20 of the UN Transnational Organised Crime Convention (UNTOC) “Specialist investigative techniques” states that:

*“1. If permitted by the basic principles of its domestic legal system, each State Party shall, within its possibilities and under the conditions prescribed by its domestic law, take the necessary measures to allow for the appropriate use of controlled delivery and, where it deems appropriate, for the use of other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, by its competent authorities in its territory for the purpose of effectively combating organized crime.*

*2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.*

<sup>158</sup> Schrier, F. 2009 *Human Trafficking, Organized Crime & Intelligence* in Friesendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p220.

<sup>159</sup> UNODC 2014 *SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants* p56.

3. *In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.*

4. *Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods to continue intact or be removed or replaced in whole or in part”.*

Specialist investigative techniques are an important component of proactive investigations and are used to obtain good quality evidence that can be used to identify victims, perpetrators and their modus operandi, and the location of exploitation. Specialist investigative techniques must be implemented in strict compliance with the legislative, regulatory and procedural compliance of each State. They are intrusive and must only be undertaken when necessary and proportionate. They should only be carried out by trained law enforcement officers. They can be used individually or in a combination depending on the objective of the investigation.<sup>160</sup>

Article 27 (1) of the CoE Convention and Article 9 (1) of the EU Framework Document states that investigations and prosecutions should not be dependent upon the victim’s report or accusation and that criminal proceedings should continue even if the victim has withdrawn his or her statement. This places an onus on the use and development of investigative techniques that do not rely on victim evidence. Specialist investigative techniques can provide evidence which can be used, when corroborated, if a victim is unwilling or unable to give evidence to enable the case to continue. There is also an imperative to develop new investigation techniques or to use existing techniques in combination or in more innovative ways to gather evidence.

## 5.3 Investigative Good Practice

### 5.3.1 Financial Investigations

According to the UNODC global the annual profits from trafficking in persons are \$32 billion and the main motivation of all traffickers is to make substantial profits from their criminal enterprise as a result of the exploitation of victims. Therefore, it is essential that there should be effective financial investigations (FIs) to seize the illegally obtained assets of the traffickers through criminal and civil procedures. The evidence obtained during a FI can corroborate the evidence collected in criminal proceedings. The FI in trafficking in persons cases should, legislation permitting, commence at the same time that the criminal investigation commences.

An FI traces the funds that support and the profits that are derived from trafficking in persons and enables them to be seized, confiscated, forfeited, restrained or frozen as proceeds of crime. It can target the financial gains acquired by the traffickers and provide effective remedies to sequestering these gains through a number of differing solutions.

FIs use the same investigative methods and specialist techniques as criminal investigations to prove that the money was obtained illegally through the exploitation of victims. Once it can be established

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<sup>160</sup> See Annex 8.

that the assets that the perpetrators possess are a result of criminal activity an application can be made for the appropriate financial remedies.<sup>161</sup>

Article 6 of the UNTOC provides for the “Criminalisation of the laundering of proceeds of crime” and Article 8 of the UNTOC provides for “Measures to combat money-laundering”.

### 5.3.2 Joint Investigation Teams

A joint investigation team (JIT) is a team consisting of judges, prosecutors and law enforcement authorities, established for a fixed period and a specific purpose by way of a written agreement between the States involved, to carry out criminal investigations in one or more of the involved States. The possibility of setting up JITs between Member States is provided for in Article 13 of the 2000 Mutual Legal Assistance Convention (MLA Convention) and the EU Framework Decision on JITs.<sup>162</sup>

Article 19 of the UNTOC “Joint investigation” states:

*“State Parties shall consider concluding bilateral or multilateral agreements or arrangements, whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure the sovereignty of the State Party in whose territory such investigation is to take place is fully respected”.*

Article 13 of the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union of 29 May 2000 “Joint investigation teams” provided for:

*“1. By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement”.*

Article 1 of the Council Framework Decision of 13 June 2002 on joint investigation teams provides for “Joint Investigation Teams”:

*“1. By mutual agreement, the competent authorities of two or more Member States may set up a joint investigation team for a specific purpose and a limited period, which may be extended by mutual consent, to carry out criminal investigations in one or more of the Member States setting up the team. The composition of the team shall be set out in the agreement”.*

JITs can be set up between EU Member States and third States and between countries outside of the EU, provided that a legal basis for the creation of such JITs exists. The legal basis can take the form of an international legal instrument, a bilateral Agreement, a multilateral Agreement or national legislation (e.g. Article(s) of the Code of Criminal Procedure).<sup>163</sup> JITs will usually be considered when investigating more serious forms of criminality. However, when considering setting up a JIT, national

<sup>161</sup> See Annex 9.

<sup>162</sup> Eurojust Available from <https://www.eurojust.europa.eu/Practitioners/JITs/.../historical-background.aspx>

<sup>163</sup> Europol Available from <https://www.europol.europa.eu/sites/default/files/st15790-re01.en11.pdf>

legislation and operational guidelines should be checked to determine whether the creation of a JIT is subject to a seriousness threshold or any other qualifying criteria. JITs may also prove useful in the investigation of smaller cross-border cases. This is because a JIT can facilitate co-operation in a specific case and also prepare the groundwork for future JITs by building mutual trust and providing experience in cross-border co-operation.<sup>164</sup>

#### *Advantages of using a JIT*

1. Ability to share information directly between JIT members without the need for formal requests.
2. Ability to request investigative measures between team members directly, dispensing with the need for Letters Rogatory. This applies also to requests for coercive measures.
3. Ability for members to be present at house searches, interviews, etc. in all jurisdictions covered, helping to overcome language barriers in interviews, etc.
4. Ability to co-ordinate efforts on the spot, and for informal exchange of specialised knowledge.
5. Ability to build and promote mutual trust between practitioners from different jurisdictions and work environments.
6. A JIT provides the best platform to determine the optimal investigation and prosecution strategies.
7. Ability for Europol and Eurojust to be involved with direct support and assistance.
8. Ability to apply for available EU, Eurojust or Europol funding.
9. Participation in a JIT raises awareness of the management and improves delivery of international investigations.

*Council of the EU JIT Manual. Available from*

<https://www.europol.europa.eu/sites/default/files/st15790-re01.en11.pdf>

### 5.3.3 Cybercrime

Cybercrime is a fast growing area of crime with more and more criminals exploiting the speed, convenience and anonymity of the internet to commit a diverse range of criminal activities including trafficking in persons. The perceived anonymity and mass audience of online services increases both the discretion and profitability of these services, making it very hard to identify criminals using traditional police techniques.

The internet allows for private and encrypted exchange of data, through the use of networks, newsrooms and, chat-rooms. Social networks enable grooming. Recruitment of victims, advertising of their services and meetings between victims and clients are organised through dedicated websites. The internet facilitates production and distribution of abusive and sexual explicit material, including images of children, and materials promoting sex tourism and “sham” marriages. It is also used to arrange financial transactions and payments for those involved in the criminality of trafficking in persons.

<sup>164</sup> Council of the EU JIT Manual.

## 5.4 Corruption

Trafficking in persons could not occur, and certainly not in the scale it does, if it were not for the complicity and collusion of corrupt officials with criminal gangs.<sup>165</sup> Corruption can obstruct investigations, prosecutions and criminal and/or civil proceedings. Corrupt officials are either directly involved in the trafficking in persons process or enable the process to flourish through their omissions. They may sell investigative information or assist traffickers in evading prosecution.

Article 9 of the UNTOC “Measures against corruption” states:

*“1. In addition to the measures set forth in article 8 of this Convention each State Party shall, to the extent appropriate and consistent with its legal system, adopt, legislative, administrative or other effective measures to promote integrity and to prevent, detect and punish the corruption of public officials”.*

According to one OSCE report, “there is a very strong correlation between trafficking and corruption” and “the trafficking of persons...flourishes in part through the corruption of public officials”.<sup>166</sup> Traffickers often use corruption as a strategy to achieve their goals. There are many cases where police, customs and immigration officers have enabled traffickers to proceed with their illegal activities in return for benefits.<sup>167</sup>

Prosecutors and judges need to be aware of corruption and the possibility that law enforcement officers and public officials may be involved in corruption. Prosecutors should also be aware of international cooperation arrangements that have been signed to assist in fighting corruption, and any other bi-lateral inter-governmental or inter-agency treaty.<sup>168</sup>

### *Ways in which officials can be corruptly involved in trafficking in persons*

#### A. Direct ways

i. Running a trafficking operation.

ii. Consciously participating in a trafficking operation run by a criminal gang. Collusion may involve alerting the gang to forthcoming raids, turning a blind eye during border crossings, illegally providing relevant state paperwork such as visas, or helping traffickers regain control of victims who have escaped.

iii. Running activities that involve trafficking (for example, prostitution, forced labour, begging).

iv. Consciously participating in activities run by a criminal gang that involve trafficking (for example, prostitution, forced labour, begging). This may involve alerting the gang to forthcoming raids, or illegally providing relevant state paperwork such as work permits.

#### B. Indirect ways

<sup>165</sup> Holmes, L. 2009 *Human Trafficking & Corruption: Triple Victimisation?* ed. Friesendorf, C. Strategies Against Human Trafficking: The Role of the Security Sector p84.

<sup>166</sup> *Ibid.* p83.

<sup>167</sup> Arsokova, J. and Janssens, S. 2009 *Human Trafficking & Policing: Good & Bad Practices* ed. Friesendorf, C. Strategies Against Human Trafficking: The Role of the Security Sector p179.

<sup>168</sup> A departmental agreement on cooperation between the prosecutor general’s offices of CIS member states in fighting corruption was signed within the framework of the Commonwealth of Independent States on 25.04.2007 and entered into force immediately. It should be noted that Azerbaijan signed this document with a separate opinion.

- i. Using persons known to be or suspected of having been trafficked (for example, in prostitution, in domestic help).
- ii. Refusing to investigate allegations of trafficking.
- iii. Supportive involvement in passing legislation that is conducive to trafficking.
- iv. Supportive involvement in refusing to pass legislation designed to curb trafficking.

Holmes, L. 2009 *Human Trafficking & Corruption: Triple Victimisation?* ed. Friesendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p87.

## 5.5 Victim Protection during the Investigation and Prosecution

Victim protection and assistance is a primary consideration in all trafficking in persons cases. While judges and prosecutors are not tasked to provide welfare services, experience has proven that where the victim's psychological needs are met, their level of cooperation increases. They should familiarise themselves with the services available to victims of trafficking and should, at all stages of the investigation and prosecution consider the special needs of victims of trafficking.<sup>169</sup>

When a victim agrees to provide evidence in criminal proceedings they are entitled to protection from the inception of the proceedings and after they have concluded.

Article 12 of the Directive 2011/36/EU states:

*"1. Members States shall take the necessary measures to ensure assistance and support are provided to victims before, during and for an appropriate period after the conclusion of criminal proceedings in order to enable them to exercise their rights set out in Framework Directive 2001/220/JHA, and in this Directive".*

If witness protection measures are not used this could potentially lead to the re-traumatisation of trafficked persons and related decisions to withdraw their complaints against the perpetrators. Also, the successful prosecution of trafficking and forced labour requires effective witness testimony.

Article 28 of the CoE Convention *"Protection of victims, witnesses and collaborators with the judicial authorities"* states:

*"1. Each Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for*

*a. Victims [...]"*.

Article 18 of the Directive states:

*"It is necessary for victims of trafficking in human beings to be able to exercise their rights effectively. Therefore assistance and support should be available to them before, during and for an appropriate time after criminal proceedings".*

<sup>169</sup> IACAT & USAID *Manual on Law Enforcement and Prosecution of Trafficking in Persons Cases* p16.

### 5.5.1 Victim Protection Measures

Victim protection measures should be used during criminal investigation and proceedings to ensure that victim's human rights are protected, their safety is assured and re-traumatisation is prevented. It is also highly probable that any investigation will be more successful if a victim is afforded protection measures as they will be less likely to withdraw their complaint and more likely to provide effective witness testimony.

Effective protection measures can minimise any threats to victims and their families during the criminal investigation and proceedings, but especially during the court proceedings when both the victim and the perpetrator are in the court at the same time. There are a number of measures that can be taken to protect victims from both the perpetrator and members of his or her family.

#### *UNODC - Victim Assistance and Witness Protection*

States have a responsibility to respect the fundamental rights of victims, assist them in accordance with their special needs, and protect them from further harm.

All criminal justice systems have a duty to put in place procedures to provide measures to protect persons whose cooperation with the criminal justice system in an investigation or prosecution puts them, or persons closely associated with them, at risk of serious physical or emotional harm. Such measures may include:

- Assistance before and during trial to cope with the psychological and practical obstacles to testifying;
- Protective measures before, during and after hearing or trial for "at risk" witnesses.
- Court procedures to ensure the witness' safety while testifying; and
- A covert witness protection programme.

In accordance with Articles 24 and 25 of UNTOC, State parties shall take appropriate measures within their means to provide effective protection as well as assistance to victims and witnesses of crime. Such measures may include, *inter alia* establishing procedures to safeguard the physical integrity of people who give testimony in criminal proceedings from threats against their life and intimidation. Witnesses must be protected from threats, intimidation, corruption, or bodily injury and States are obliged to strengthen international cooperation in this regard.

[www.unodc.org/unodc/en/organized-crime/witness-protection.html](http://www.unodc.org/unodc/en/organized-crime/witness-protection.html)

The European Commission has made support to victims of crime a priority and is taking steps to ensure that their needs are met. It states that one of the greatest tests of the quality of our justice systems is how well we treat our victims. Appropriate treatment is a demonstration of our societies' solidarity with each individual victim and recognition that such treatment is essential.

Directive 2012/29/EU establishes minimum standards on the rights, support and protection of victims of crime and entered into force on 15 November 2012. This Directive includes the minimum standards that were established there on the rights to access information, support, protection and basic procedural rights in criminal proceedings, and contains more concrete and comprehensive rights for victims and clearer obligations for Member States. There are new rights and obligations including the following:

*“Protection of all victims is reinforced – The privacy of victims and their family members must be respected and contact with the offender avoided (all new court buildings must have separate waiting areas)”.*

Article 22, “Individual assessment of victims to identify specific protection needs”, states:

*“1. Member States shall ensure that victims receive a timely and individual assessment, in accordance with national procedures, to identify specific protection needs and to determine whether and to what extent they would benefit from special measures in the course of criminal proceedings, as provided for under Articles 23 and 24, due to their particular vulnerability to secondary and repeat victimisation, to intimidation and to retaliation.*

*2. The individual assessment shall, in particular, take into account:*

*(a) the personal characteristics of the victim;*

*(b) the type or nature of the crime; and (c) the circumstances of the crime.*

*3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organised crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered”.*

The following protection measures should be considered at the various stages the criminal proceedings. It is the responsibility of prosecutors and judges to ensure that victims receive protection on a continuous basis and that they are informed of the potential risks involved in providing testimony in court proceedings.

### **Pre-trial**

Once a victim has agreed to participate in an investigation and subsequent court proceedings it is essential to consider both their safety and how to effectively remove some of the fears of giving evidence. Victims who are not in protective custody or being sheltered in ‘safe housing’ under a Notional Referral Mechanism (NRM) may need other protection measures. These can include a direct telephone link or a panic button that is linked to a law enforcement agency.

Prior to going to court consideration should be given to the testimony options of the victim. In certain States, victims who are not nationals of that State, have been allowed to return to their home State. They have either given evidence by video or an officer from a law enforcement agency has travelled to the victim’s home State and taken their evidence either on a voluntary basis or by applying for mutual legal assistance.

Further testimony options include victims giving a video-recorded interview which can be admitted by the court as the witness's evidence. Victims of trafficking who are giving evidence in person in court proceedings can be taken for pre-court visits. This will enable the victim to view the court so they will know what to expect on the day of the trial. Victims can also be supported by NGOs before the court and during the court proceedings.

### **Trial**

Victims of trafficking can be given a number of options regarding how they give testimony. These can include giving evidence in court behind screens. To stop you either seeing or being seen by the defendant, victims who have returned to their home States are able to give evidence via video-link from that State.

Wherever possible, victims of trafficking should be given a separate waiting area and a seat in court away from the defendant's family. If there is no separate area, the court will make other arrangements to keep victims safe.

#### *Good Practice UK - Special measures*

Special Measures" are a series of provisions that help vulnerable and intimidated witnesses give their best evidence in court and help to relieve some of the stress associated with giving evidence.

The special measures available to vulnerable and intimidated witnesses, with the agreement of the court, include:

- screens (available for vulnerable and intimidated witnesses): screens may be made available to shield the witness from the defendant;
- live link (available for vulnerable and intimidated witnesses): a live link enables the witness to give evidence during the trial from outside the court through a televised link to the courtroom. The witness may be accommodated either within the court building or in a suitable location outside the court;
- evidence given in private, (available for some vulnerable and intimidated witnesses): exclusion from the court of members of the public and the press (except for one named person to represent the press) in cases involving sexual offences or intimidation by someone other than the accused;
- video-recorded interview, (available for vulnerable and intimidated witnesses): a video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief. For adult complainants in sexual offence trials in the Crown Court a video recorded interview will be automatically admissible upon application unless this would not be in the interests of justice or would not maximise the quality of the complainant's evidence.
- examination of the witness through an intermediary (available for vulnerable witnesses): an intermediary may be appointed by the court to assist the witness to give their evidence at court. They can also provide communication assistance in the investigation stage approval for admission of evidence so taken is then sought retrospectively. The intermediary is allowed to explain questions or answers so far as is necessary to enable them to be understood by the witness or the questioner but without changing the substance of the evidence;
- aids to communication, (available for vulnerable witnesses): aids to communication may be permitted to enable a witness to give best evidence whether through a communicator or interpreter, or through a communication aid or technique, provided that the communication can be independently verified and understood by the court.

*Crown Prosecution Service (UK). Available from*

[http://www.cps.gov.uk/publications/research/cps\\_research\\_on\\_special\\_measures.pdf](http://www.cps.gov.uk/publications/research/cps_research_on_special_measures.pdf)

### Post-trial

At the conclusion of court proceedings there are still on-going responsibilities towards victims and continued protection measures may still be required. Victims may still be at risk from members of the perpetrators family or the perpetrator if acquitted. The risk may continue until they are either reintegrated, which may include medical, financial and/or legal assistance or repatriated.

## 5.6 Protection of Child Victims

Under the new EU Commission Council Framework Directive 2012/29/EU children are always presumed vulnerable and particular attention will be paid to some categories of victims such as victims of terrorism, organised crime, human trafficking, gender-based violence. Child victims should be considered and treated as the full bearers of rights set out in this Directive and should be entitled to exercise these rights in a manner that takes into account their capacity to form their own views.

Victims of trafficking who co-operate in criminal proceedings need protection. Those who are particularly vulnerable need to be enabled to benefit from specific treatment best suited to their circumstances. In these circumstances child victims should be considered to be particularly vulnerable.<sup>170</sup>

Article 28 of the CoE Convention “Protection of victims, witnesses and collaborators with the judicial authorities” states:

*“3. A child victim shall be afforded special protection measures taking into account the best interests of the child”.*

Article 8 of the Optional Protocol on the sale of children, child prostitution and child pornography states that:

*“1. States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:*

- (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;*
- (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;*
- (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;*
- (d) Providing appropriate support services to child victims throughout the legal process;*
- (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;*
- (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*

<sup>170</sup> FRA 2009 *Child Trafficking in the European Union Challenges, perspectives and good practices* p73.

(g) *Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims*".

Child victims should have their privacy protected as a matter of primary importance. When they are giving evidence States need to ensure that they are able to give their evidence safely, and make efforts to reduce the secondary trauma that victims often face in the court room. Law enforcement authorities, prosecutors and judges should apply child friendly practices including interviews designed for children, modified court environments, hearings scheduled at a time appropriate to the age and maturity of the child and an on-call system so that the child only goes to court when necessary.<sup>171</sup>

*"Achieving Best Evidence (ABE) in Criminal Proceedings: Guidance for Vulnerable or Intimidated Witnesses"*.

Children are vulnerable witness and their evidence can be taken by video.

- video-recorded interview, (available for vulnerable and intimidated witnesses): a video-recorded interview with a vulnerable or intimidated witness before the trial may be admitted by the court as the witness's evidence-in-chief. For adult complainants in sexual offence trials in the Crown Court a video recorded interview will be automatically admissible upon application unless this would not be in the interests of justice or would not maximise the quality of the complainant's evidence.

Ministry of Justice (UK) 2011 *Achieving Best Evidence in Criminal Proceedings*. Guidance on interviewing victims and witnesses, and guidance on using special measures.

## 5.7 Witness Protection

Trafficking in persons is often controlled by international organised criminal networks and the potential level of risk to which victims of trafficking and service delivery personnel who interact with victims of trafficking are exposed must, therefore, be considered significant. Without overstating the degree of risk, the key to managing such situations lies in the careful assessment of the security risk involved in each case, and constant adherence to basic best practice security procedures.<sup>172</sup>

Witness protection is the means of providing protection measures for victims involved in the criminal investigation and proceedings who find themselves at risk of serious personal harm as a result of that involvement. Witness protection is generally directed to those victims who have provided crucial evidence and against whom there is a substantial threat.

### *Witness Protection Programmes*

In, 2005, a total of 851 requests were addressed via the Headquarters of the SECI Regional Centre in Romania (now called SELEC the Southeast European Law Enforcement Center), a total of 28 per cent of which concerned human trafficking and irregular migration. The SECI Centre had a unique witness protection programme. During 2004 -2005 eighteen trafficked persons from Moldova alone were assisted through the programme and travelled to Macedonia, Serbia and Montenegro in order to

<sup>171</sup> UNICEF 2006 *Guidelines on the Protection of Child Victims of Trafficking* p32.

<sup>172</sup> IOM 2007 *Handbook on Direct Assistance for Victims of Trafficking* p3.

testify.

During the travel to the countries where the trials were taking place the victims received special round-the-clock protection.

Arsovska, J. Janssens, S. 2009 *Human Trafficking & Policing: Good & Bad Practices* ed. Friesendof, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p193.

The openness of judicial proceedings is a fundamental principle enshrined in Article 6(1) of the European Convention on Human Rights (the right to a fair trial). This principle can sometimes act as a bar to successful prosecutions and victims may fear that if their identity is revealed to the perpetrator, his associates or the public generally then they or their friends and family will be at risk of serious harm.

## 5.8 Case Management

Case management is a framework which provides guidance on how cases can be managed most effectively and efficiently from pre-charge through to conclusion. It details the procedures and the roles and responsibilities of those responsible for the prosecution, the duties of the defence, and the expectations of the judiciary. The process generally begins from the point when a crime is reported to law enforcement agencies. Evidence is then gathered to establish what actually happened and who was involved, and testimony is taken from witnesses to support the evidence.

Case management comprises specialised processes or structures that ensure the efficient progression of cases through the judicial system and access to justice. Effective case management can help resolve many problems.

### *Important elements of a good case management system:*

- Cooperation among and between law enforcement agencies and other specialised services, such as victim service providers and case coordination mechanisms;
- Safety measures, to be developed in collaboration with all concerned actors;
- Uniform procedures and policies;
- Specialised calendars;
- Special deadlines and strict timelines should be spelled out among police, prosecutors, defence counsel and other actors involved in criminal proceedings;
- Training of staff;
- Law enforcement staff who may be potentially involved in human trafficking and migrant smuggling cases should receive specialized training;
- Gender-sensitivity;
- Consideration of the special needs of children.

*UNODC (2014) SOP Manual for Law Enforcement Personnel of the Central Asia countries on cases related to human trafficking and smuggling of migrants p83.*

Prosecutors and judges should undertake case management to ensure all cases are dealt with justly and the rights and welfare of those appearing before the courts are recognised and respected. Judges have a responsibility to set the rules for the active management of cases and prosecutors,

and other participants before the court should comply with the directions made by the court. The objective of case management is to ensure cases are dealt with expeditiously and fairly respect the interests of witnesses, victims and jurors, and keep them informed of the progress of the case.

*Case management - the duty of the court*

- (1) The court must further the overriding objective by actively managing the case.
- (2) Active case management includes–
  - a) the early identification of the real issues;
  - b) the early identification of the needs of witnesses;
  - c) achieving certainty as to what must be done, by whom, and when, in particular by the early setting of a timetable for the progress of the case;
  - d) monitoring the progress of the case and compliance with directions;
  - e) ensuring that evidence, whether disputed or not, is presented in the shortest and clearest way;
  - f) discouraging delay, dealing with as many aspects of the case as possible on the same occasion, and avoiding unnecessary hearings;
  - g) encouraging the participants to co-operate in the progression of the case; and
  - h) making use of technology.
- (3) The court must actively manage the case by giving any direction appropriate to the needs of that case as early as possible.

*Criminal Procedure Rules (England & Wales) 2014, as in force on 6 October 2014 (S.I. 2014/1610).*

Rules on-line at: <http://www.justice.gov.uk/courts/procedure-rules/criminal/rulesmenu>

## 5.9 Sentencing

Trafficking in persons is a serious violation of human rights and the CoE Convention requires parties to adopt sanctions that are “effective, proportionate and dissuasive”.<sup>173</sup> Prosecutors and judges need to understand the severity of trafficking cases and ensure that traffickers receive sentences that reflect the gravity of the offence. The Dutch Rapporteur has wondered whether courts were “sufficiently conscious of the nature and gravity of the offence”.<sup>174</sup>

Article 23 of the CoE Convention, “Sanctions and measures”, states:

*“1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition”.*

<sup>173</sup> Jernow, A.2009 *Human Trafficking, Prosecutors & Judges* ed. Friesendorf, C. Strategies Against Human Trafficking: The Role of the Security Sector. p350.

<sup>174</sup> Jernow, A.2009 *Human Trafficking, Prosecutors & Judges* ed. Friesendorf, C. Strategies Against Human Trafficking: The Role of the Security Sector. p351.

### 5.9.1 Sentencing Child Trafficking

Article 4 of the Directive 2011/36/EU “Penalties” states:

*“2. Member States shall take all necessary measures to ensure that the offence referred to in Article 2 is punishable by a maximum penalty of 10 years of imprisonment where that offence: (a) was committed against a victim who was particularly vulnerable, which in the context of this Directive, shall include at least child victims”.*

### 5.10 Victim Rights in criminal proceedings

Victims who agree to assist with an investigation or testify in criminal proceedings are entitled to be treated fairly, professionally, and with dignity and respect, be kept informed and given relevant information, apply for compensation or restitution and have information about them treated with privacy and confidentiality.

The needs and rights of victims of trafficking should be considered throughout the entire course of criminal proceedings. Prosecutors and judges have an obligation to ensure that measures to prevent and combat trafficking in persons do not have an adverse impact on the rights and dignity of victims of trafficking, even in cases which the victims do not become witnesses in criminal proceedings or do not provide sufficient evidence .

#### 5.10.1 Legal Counselling

The EU Directive 2011/36/EU “Protection of victims of trafficking in human beings in criminal investigation and proceedings” states:

*“2. Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling, and, in accordance with the role of victims in the relevant justice system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge”.*

#### 5.10.2 Confidentiality

Victims are entitled to confidentiality and privacy during criminal investigations and proceedings. This should include measures to ensure that victims are not named to their family and friends; and that any correspondence, from any agency, is not sent directly to an address that could lead to their identification. Victims of trafficking should not be named, whenever legally possible, within court proceedings or reports in the media. Also, again subject to legal considerations, what victims say in judicial proceedings should not be repeated.

Confidentiality is applicable during court proceedings, when the identity of trafficked persons should be protected. Any data or information about a victim of trafficking who is to testify should not be made available to any person, including the victim’s family, without the consent of the victim of trafficking. This also applies to all agencies involved within the National Referral Mechanism, which

should follow identified standards on regulation of private information and confidentiality in trafficking case to protect the identity of victims of trafficking.

Article 6 of the UN Trafficking Protocol states:

*“1. In appropriate cases, and to the extent possible under domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential”.*

Article 30 of the CoE Convention states:

*“In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party and, shall adopt such legislation or other measures as may be necessary to ensure in the course of judicial proceedings: a. the protection of victims’ private life and, where appropriate identity [...]”.*

The confidentiality and privacy of victims of trafficking should also be respected and adhered to during the course of the investigation and during and after any judicial or court proceedings. Further, the Government of Azerbaijan gives special attention to the issue of privacy protection and confidentiality. The Law of the Republic of Azerbaijan on Trafficking in Persons requires that only the decision of a prosecutor or a court can authorise the disclosure of personal data of a victim of trafficking. Disclosure of information about a victim who co-operates with law enforcement is subject to liability under the legislation of the Republic of Azerbaijan.

### 5.10.3 Data Protection Privacy

Article 11 of the CoE Convention “Protection of private life” states:

*“Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).”*

All agencies and institutions dealing with victims of trafficking should protect the privacy and identity of victims. Victim’s personal data should be stored and used in conformity with the conditions set out in the relevant international instruments. Confidentiality should be taken into account in police reports, especially when distributed to other stakeholders.<sup>175</sup>

### 5.10.4 Legal Assistance

Victims of trafficking should have the right to legal services including information about their rights, legal remedies and the options available to them. This legal assistance can be provided by independent lawyers from NGOs, civil society or the private sector. Legal assistance gives victims of trafficking access to justice to ensure that victims are aware of their rights and understand them

<sup>175</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims A Community Policing Approach* p26.

both linguistically and legally, and are able to provide additional information and to participate in proceedings.

Article 6.3 of the UN Trafficking Protocol “*Protection of victims of trafficking in persons*” states:

*“3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in co-operation with non-governmental organisations, other relevant organisations and other elements of civil society, and, in particular, the provision of: [...]*

*(b) Counselling and information, in particular as regards their legal rights, in a language that the victim of trafficking in persons understands.”*

Article 15. 2 of the CoE Convention establishes an obligation for State Parties to provide the right to legal assistance and to free legal aid for victims under the conditions provided by their internal law.

Article 12. 2 of the Directive states:

*“Member States shall ensure that victims of trafficking in human beings have access without delay to legal counselling and, in accordance with the role of victims in the relevant judicial system, to legal representation, including for the purpose of claiming compensation. Legal counselling and legal representation shall be free of charge where the victim does not have sufficient financial resource.”*

### 5.10.5 Provision of information

The obligation to provide victims with information and an opportunity to present their views and concerns is mandatory. However, legislators may consider provisions that ensure judges cannot deny information or exclude participation on any basis other than prejudice to the rights of the defence.<sup>176</sup>

Article 6.2 of the UN Trafficking Protocol “*Protection of victims of trafficking in persons*” states:

*“2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:*

*(a) Information on relevant court and administrative proceedings;*

*(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence”.*

## 5.11 The rights of child victims

Article 13 of the UN Convention on the Rights of the Child “*Freedom of expression*” states:

*“Every child must be free to say what they think and to seek and receive information of any kind as long as it is within the law”.*

<sup>176</sup> UNODC 2004 *Legislative Guidelines for the Implementation of the UNTOC and the Protocols thereto* p284.

Like adult victims of trafficking, children are entitled to be provided with accessible information regarding their rights, situation, protection measures, and the processes of family reunification and/or repatriation.<sup>177</sup>

## 5.12 Non-punishment of victims

Victims of trafficking in persons may be compelled to commit criminal offences as a result of their trafficking and exploitation. The principle of non-punishment of victims is affirmed in a number of international legal instruments. The UN Trafficking Protocol does not contain any explicit provision concerning the non-punishment of victims. However, the principle is explicit in the CoE Convention and the Directive. To comply with international standards States are obliged to provide a “non-punishment provision” in their national law.

Article 26 of the CoE Convention “*Non-punishment provision*” states:

*“Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.”*

The Directive states that victims of trafficking in human beings should, in accordance with the basic principles of the legal systems of the relevant Member States, be protected from prosecution or punishment for criminal activities such as the use of documents, or offences under legislation on prostitution or immigration, that they have been compelled to commit as a direct consequence of being subjected to trafficking.

Article 8 of the Directive, “*Non-prosecution or non-application of penalties to the victim*”, states:

*“Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.”*

Victims of trafficking may be forced to commit criminal offences that are directly linked to the fact that they are victims of trafficking. These offences can include using false identity documents, illegal border crossing, prostitution, theft, fraud and other offences. It can be a deliberate strategy of the traffickers to expose victims to the risk of criminalisation and to manipulate and exploit them for criminal activities.

The concept of non-punishment is that, despite committing an offence, the victim of trafficking has not really acted independently, either because of the level of control exercised by the traffickers or the methods used by them. The principle of non-punishment consists of the States guaranteeing that the victim of trafficking will not be punished for offences committed within the framework or as a result of the process of trafficking in persons.<sup>178</sup>

<sup>177</sup> UNICEF 2006 *Guidelines for Protection of Child Victims of Trafficking* p11.

<sup>178</sup> Centre for Equal Opportunities and Opposition to Racism 2012 *Trafficking in and Smuggling of Human Beings* p11.

*L, HVN, THN, T v. R Ce- Court Of Appeal (Criminal Division)*

21 JUNE 2013 (England &amp; Wales)

“In these appeals we are dealing with the problems raised by four otherwise unconnected cases in which three children and one adult who were trafficked by criminals for their own purposes have been prosecuted and convicted. Unfortunately the criminals who trafficked them have escaped justice.

It has not, however, and could not have been argued that if and when victims of trafficking participate or become involved in criminal activities, a trafficked individual should be given some kind of immunity from prosecution, just because he or she was or has been trafficked, nor for that reason alone, that a substantive defence to a criminal charge is available to a victim of trafficking.

What, however, is clearly established, and numerous different papers, reports and decided cases have demonstrated, is that when there is evidence that victims of trafficking have been involved in criminal activities, the investigation and the decision whether there should be a prosecution, and, if so, any subsequent proceedings require to be approached with the greatest sensitivity”.

Available from <https://www.judiciary.gov.uk/court/court-of-appeal/page/7/>

What is required in the context of the prosecutorial decision to proceed is a level of protection from prosecution or punishment for victims of trafficking who have been compelled to commit criminal offences. These arrangements should follow the “basic principles” within a legal system and that protection should be provided by the exercise of the “abuse of process” jurisdiction.

*OSCE Special Representative’s policy and legislative Recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking, April 2013.*

“[81] Victims of trafficking are victims of serious crimes and human rights violations. Under international law, States are obliged to ensure the protection of the rights of victims, including the right to be accurately identified as trafficked adults or children, and it is this identification that is the gateway to their protection. Not only is non-punishment a principle that respects and protects a victim’s rights, including the right to be free from detention and unfair proceedings, to be protected against re-victimization and re-traumatization and to be offered safety and assistance in recovery, respect for this legal principle also helps to fulfill the State’s obligations towards trafficked persons in line with the European Court of Human Right’s finding in the Rantsev case.

In that judgment the Court held that human trafficking falls within the protective scope of the non-derogable rights of Article 4 of the European Convention of Human Rights and that a positive obligation on States to investigate human trafficking arises where circumstances give rise to, or ought to give rise to, a credible suspicion that the person had been trafficked. In such cases, where no investigation of the trafficker takes place but the criminalization of the victim proceeds, this will give rise to an extremely serious violation of that person’s human rights and also the State’s obligations under EU law.”

Article 8 of the Directive 2011/36/EU states the importance of the non-prosecution and non-application of penalties for victims of trafficking. It provides that:

*“Member States shall...take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit [...]”*

That Directive also recognises the need for the best interests of the child to be a primary consideration in the application of the directive.

### 5.13 Compensation

Compensation is a payment for any personal injury, loss or damage resulting from a criminal offence and a means of redressing the rights violations experienced by victims of trafficking. There is a right to claim compensation under international legal instruments, and it can be claimed from either the trafficker or the State. It can be claimed in criminal and/or civil proceedings, as in most States civil claims can be made in criminal proceedings. Additionally, certain States have specific special compensation funds for victims of trafficking. Victims of trafficking should be entitled to legal assistance when making a claim for compensation.

Prosecutors should ensure that they are aware of the rights of victims of trafficking to compensation and make application when appropriate. Judges should award compensation to victims when they are legally obliged to do so either applying international legal instruments or national legislation. Prosecutors and judges should also be aware that international labour standards also assert the right to remedies including compensation in cases of forced labour and where worker’s rights and migrant’s rights have been abused.<sup>179</sup>

*Sierra case: Bulgarian traffickers conviction including compensation to victims*

*Country: the Netherlands.*

Court: District Criminal Court Alkmaar: Sentence date: 3 February 2012.

Purpose of exploitation: Exploitation of prostitution.

The Bulgarian offender was convicted in the District Criminal Court of Alkmaar together with other offenders. This conviction was for trafficking persons with regard to seven victims from Bulgaria. He had forced them to work in the sex industry for several years in several cities in the Netherlands. This had been done through violence and threat of violence. The victims were forced to earn a minimum sum of EUR 500 a day. Moreover, they had to work for long shift hours and many days in a row, including when they were sick. All proceeds were taken by the offenders for their personal gain.

The Court ruled that the offender had to pay compensation to four of the victims under the criminal proceeding. The said compensation was for material and immaterial damages they had suffered to a total of EUR 150,800.

*Available from*

[https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/sierra-case-bulgarian-traffickers-conviction-including\\_en](https://ec.europa.eu/anti-trafficking/legislation-and-case-law-case-law/sierra-case-bulgarian-traffickers-conviction-including_en)

<sup>179</sup> OSCE/ODIHR 2008 *Compensation for Trafficked and Exploited Persons in the OSCE Region* p20.

*Tas v. Belgium.*

12 May 2009 (decision on admissibility)

This case concerned the confiscation of premises used in connection with offence linked to human-trafficking and exploiting vulnerable aliens. The applicant relied in particular on Article 1 (protection of property) of Protocol No. 1 to the European Convention on Human Beings.

The Court declared the application inadmissible (manifestly ill-founded). Taking into account the margin of appreciation afforded to States in controlling “the use of property in accordance with the general interest”, in particular in the context of a policy aimed at combating criminal activities, it found that the interference with the applicant’s right to the peaceful enjoyment of his possessions had not been disproportionate to the legitimate aim pursued, i.e., in accordance with the general interest, to combat human trafficking and the exploitation of foreigners in a precarious situation.

Article 25.2 of the UNTOC “*Assistance to and protection of victims*” states “*Each State Party shall establish appropriate procedures to provide access to compensation and restitution to victims of offences covered by this convention.*” Therefore, under the UNTOC and the UN Trafficking Protocol State Parties must ensure at least one type of legal procedure is available to victims of trafficking to access compensation and that victims are provided with information about this possibility.<sup>180</sup>

This right to compensation was strengthened by Article 15 of the CoE Convention “*Compensation and legal redress*” which states:

*“3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.*

*4. Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.”*

EU Council Directive 2004/80/EC of 29 April 2004 relating to compensation to for victims of crime ensures that all EU Member States have a national scheme in place which guarantees appropriate compensation to victims of crime, including victims of trafficking. The Directive also ensures that compensation is easily accessible. Accordingly, Member States should create national systems for cooperation between relevant national authorities.

The right to compensation from the trafficker and the State are supported by certain politically-binding (or “soft law”) instruments, most importantly the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, as well as European law such as the EU Council Directive on Compensation to Crime Victims.<sup>181</sup>

International standards have also developed the principle that the profits made by the traffickers through their exploitative activities should be used to benefit the trafficked persons either

<sup>180</sup> OSCE/ODIHR 2008 *Compensation for Trafficked and Exploited Persons in the OSCE Region* p19.

<sup>181</sup> OSCE/ODIHR 2008 *Compensation for Trafficked and Exploited Persons in the OSCE Region* p20.

individually or collectively. The internationally politically binding guidelines also introduce the obligation to establish a pool of recovered assets to compensate trafficked persons.<sup>182</sup>

### 5.13.1 Compensation for children

Article 15 of the CoE Convention “*Compensation and legal redress*” states:

*“3. Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrator”.*

States are under a duty to ensure that child victims can access the necessary procedures to obtain compensation from either or both the State and the trafficker. Child victims of trafficking have the right to claim for compensation and should be provided with legal assistance in making any claim. Child victims shall receive reparation irrespective of their immigration status, the legality or illegality of the work/activity they performed, or their co-operation with law enforcement or judicial authorities. Full and effective reparation can include compensation for damages, restitution and repayment, including unpaid wages, rehabilitation, satisfaction and guarantees of non-repetition.<sup>183</sup>

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<sup>182</sup> Ibid. p21.

<sup>183</sup> UNICEF 2006 *Guidelines for Protection of Child Victims of Trafficking* p34.

## 6. National Legal Framework – Legal Instruments

This chapter considers the national legal definitions of trafficking in persons, and how they relate to the international definition. The different forms of trafficking in persons and the types of exploitation, as defined within national legislation, are identified and explained. The national definition of SOM also is identified and explained.

The Republic of Azerbaijan ratified the UNTOC and the Protocols thereto, on 13 May 2003, and the CoE Convention in 2010. As a participating State of the OSCE (which it became in January 1992), the Republic of Azerbaijan has agreed to implement the political commitments adopted by the Organisation with respect to trafficking and forced labour. Most notably all OSCE participating states have agreed by consensus that implementation of the OSCE Action Plan to Combat Trafficking in Human Beings,<sup>184</sup> of July 2003, would contribute positively to securing comprehensive regional security.<sup>185</sup>

The Republic of Azerbaijan is a member of the CIS. According to the CIS Charter, the supreme body of the Commonwealth is the Council of Heads of States, which discusses and settles fundamental issues connected with the activity of member states in the sphere of their common interests. The Council of the Heads of State approved a co-operation programme for 2015 to 2019 for Member States to counter illegal migration, and a concept for co-operation between CIS Member States to counter trafficking in human beings.<sup>186</sup>

On 4 April 2014,<sup>187</sup> the National Coordinator informed the Parliament about annual anti-trafficking activities and the preparation and adoption of the third National Action Plan (NAP) on Trafficking in Persons, as well as the outcomes of the second NAP. The National Coordinator stated that five criminal groups consisting of 12 persons engaged in human trafficking crimes were arrested in 2013 in Azerbaijan. As a result of criminal investigations, 80 cases of trafficking and four cases of forced labour had been detected, from which 56 trafficked persons had been identified.

The National Coordinator informed Parliament, in April 2015,<sup>188</sup> that as a result of measures taken in 2014, 97 cases of human trafficking, and four 4 cases of forced labour and falsification of ID cards for the purpose of human trafficking were detected. This was 21 per cent more than in 2013. For these actions, 26 persons (18 women, 8 men) were brought to criminal responsibility, and nine organised groups were neutralised.

As a result of the investigations conducted during the last ten years, 681 cases of human trafficking and forced labour were detected. For those crimes, 408 persons were brought to criminal responsibility, of whom 85 per cent were women (347) and 15 per cent (61) men. A total of 167 criminal groups were neutralised. The crimes were committed through deception, by abuse of power or positions of vulnerability. A total of 90 per cent of the 583 victims identified had suffered sexual exploitation, and 10 per cent forced labour. Of the victims, 3.6 per cent (21) were children.<sup>189</sup>

<sup>184</sup> OSCE Action Plan to Combat Trafficking in Human Beings. PC.Dec/557, July 2003.

<sup>185</sup> OSCE Permanent Council Decision No.557.

<sup>186</sup> Written Contribution by the Executive Committee of the Commonwealth States for the Twenty-First Meeting of the OSCE Ministerial Council. Basel, 4 and 5 December 2014.

<sup>187</sup> Available from <http://www.meclis.gov.az/?/az/report/76> (in Azerbaijani)

<sup>188</sup> Available from <http://www.meclis.gov.az/?/az/report/79> (in Azerbaijani)

<sup>189</sup> Available from <http://www.mia.gov.az/?/en/speech/view/33> in English and <http://www.mia.gov.az/?/az/speech/view/33/> in Azerbaijani.

## 6.1 National Law

The Republic of Azerbaijan is a party to international instruments that are important to trafficking in persons within international law<sup>190</sup> and the conventions and treaties signed and ratified by the Republic of Azerbaijan have been expressly recognised. The Republic of Azerbaijan therefore, has a binding obligation in international law to ensure that its own national legislation, policies or practices meet the requirements of the treaties and are consistent with its standards. These obligations are enforceable in international courts and tribunals with appropriate jurisdiction, such as the International Court of Justice, the international Criminal Court and the European Court of Human Rights, and may be enforceable in domestic courts, depending on domestic law.<sup>191</sup>

As Republic of Azerbaijan is signatory to the international instruments relating to human rights, forced labour and trafficking in persons these must be considered by judges and prosecutors, when applying international and national law. Article 151 of the Constitution of Azerbaijan<sup>192</sup> states that whenever there is disagreement between normative-legal acts in the legislative system of the Republic of Azerbaijan (except the Constitution of the Republic of Azerbaijan and Acts accepted by way of referendum) and international agreements to which the Republic of Azerbaijan is party, the provisions of international agreements shall take precedence and provisions of the Criminal Code applies unequivocally.<sup>193</sup>

### Legislation

The Law of the Republic of Azerbaijan on Combating Trafficking in Persons (2004) was adopted in June 2005 with the addition of trafficking in persons and forced labour crimes into Articles 144-1 and 144-2 of the Criminal Code of Azerbaijan.

Article 144-1 was amended in 2013 and it is now similar to the definition in Article 1.0.1 of the Law of the Republic of Azerbaijan on Trafficking in Persons.

Article 144-1. Trafficking in Persons states:

*“144-1.1. Trafficking in persons, i.e. recruitment, obtaining, keeping, harbouring, transporting, giving or receipt of a person by means of threat or use of force, intimidation or other means of coercion, abduction, fraud, deception, abuse of power [influence] or a position of vulnerability, or by giving or receiving payments or benefits, privileges or concessions to achieve the consent of a person having control over another person, for purposes of exploitation – shall be punishable by imprisonment for a term of five to ten years.*

*Note:*

<sup>190</sup> See Annex 1.

<sup>191</sup> Office of the United Nations High Commissioner for Human Rights 2014 *Human Rights and Human Trafficking Fact Sheet No.36* p9.

<sup>192</sup> Azerbaijan: Freedom of Expression on Trial April 2014 Report of the International Bar Association’s Human Rights Institute (IBAHRI) p13.

<sup>193</sup> Article 151 of the Constitution of Azerbaijan clearly refers to the primacy of the international legal agreements over the country’s national normative-legal acts. The same Article makes a significant note regarding two expectations that do not fall under this category. These are the Constitution of the Republic of Azerbaijan itself and Acts accepted through referendum. Furthermore, in this regard Article 12 of the Constitution stipulates that the “rights and liberties of a person and citizen listed in the present Constitution” should be implemented in accordance with the international commitments of Azerbaijan.

1. *“Human exploitation” referred to in this article, shall mean forced labour (servitude), sexual exploitation, slavery and practices similar to slavery and resulting in dependence, illicit transplantation of human organs and tissues, conduct of illicit biomedical researches on the person, use of a woman as surrogate mother as well as engaging in criminal activities.*
2. *Any preliminary consent to exploitation, life style or immoral behaviour of a victim of trafficking shall not be considered as a fact mitigating the penalty for the person suspected of human trafficking offenses.*
3. *Recruitment, obtaining, keeping, harbouring, transporting, giving or receipt of a minor for purposes of exploitation shall be considered trafficking in persons even if the means set forth in Article 144-1.1 of the present Code are not used.*

Article 144-2. Forced labour states:

*“144-2.1. Forcing a person by means of threats, use or threat of coercion, or by means of confinement other than in the situations prescribed by the law to perform certain work (service) - shall be punished by imprisonment for a term of four to eight years”.*

Amendments were made to the Criminal Code on 9 May 2013 to bring national legislation into line with international law. The Criminal Code was amended by removing cross-border transport as a necessary element of the crime; increasing penalties for forced labour; clarifying that means of force, fraud, or coercion need not be demonstrated to prove the crime of sex trafficking of children; and establishing criminal liability for identity document fraud if committed for the purpose of trafficking in persons.

The amendments to the Criminal Code ensure that the definition of trafficking in persons covers both national and transnational forms of trafficking and is compliant with international law. A list of means has been added to Article 144-1.1 of the Criminal Code, again to ensure compliance with international law.

## 6.2 National Legal System

### 6.2.1 Courts

The activity and status of the judges of the Constitutional Court of the Republic of Azerbaijan is determined by national legislation of the Republic of Azerbaijan. The Grave Crimes Courts, sitting in Baku, Ganja, Sheki and Lankaran and Nakhchivan AR hear serious crimes cases in accordance with the Criminal Code of the Republic of Azerbaijan within the relevant territorial jurisdiction, and resolve the issue of handover (extradition) of the persons who have committed crimes as specified in the legislation of the Republic of Azerbaijan. The Courts of the Republic of Azerbaijan on Grave Crimes considers crimes as first instance court within the areas of their legal competences. These courts have the competence to hear trafficking in persons cases in the Republic of Azerbaijan.

The Administrative Procedural Code of the Republic of Azerbaijan, which was approved in 2009 and entered into force on 1 September 2010. Article 1 defines the “Scope of the Administrative Procedural Code of the Republic of Azerbaijan”. Article 1.1 establishes the procedural principles and rules for jurisdiction over disputes concerning administrative legal relations, consideration and

settlement of these disputes by a court. Article 2 refers to the “Jurisdiction over administrative disputes” and Article 2.1 states that “Judicial proceeding of cases on administrative disputes shall be held by administrative-economic courts and administrative-economic collegiums, unless other rules of jurisdiction are specified by law.

### *Trafficking in Persons Cases*

The UNTOC and UN Trafficking Protocol are criminal legal instruments and therefore all trafficking in persons cases should be heard before a criminal court and not as administrative cases. It is important that trafficking in persons cases are correctly identified at the outset as this will enable the relevant articles in the Criminal Code and the Law of the Republic of Azerbaijan to be adhered to and the case to be heard before a Grave Crimes Court.

Within the Republic of Azerbaijan forced labour cases are prosecuted as labour violations because they are not recognised or identified as criminal offences or as a form of exploitation within the definition of trafficking in persons. The State response is then to deal with them as a labour violation and examine the case before an Administrative Court.

Trafficking in persons cases are criminal offences and should be tried before the before the Grave Crimes Court. The following case illustrates the type of trafficking in persons case that should be heard before a Grave Crimes Court.

## 6.2.2 Interpretation

Prosecutors and judges should not apply a restrictive interpretation of trafficking in persons cases.<sup>194</sup> They should apply all the means of trafficking as defined (See Chapter 2 – means) and especially debt bondage or abuse of vulnerability. The trafficking qualification should not be limited to cases of extreme violence or deprivation of freedom of movement.

The means used by the traffickers to recruit potential victims are one of the component elements in the definition of trafficking in persons (the means are not applicable to children) were not required in the Republic of Azerbaijan prior to the amendment of Article 144-1 and 144-2 of the Criminal Code of Azerbaijan, in 2013. The list of means was added into both Article 144-1.1 and Article 144-2.1 (Forced labour) of the Criminal Code, in 2013 and the Criminal Code now complies with international legal instruments including the CoE Convention.

There are other legal instruments within national legislation that can be used by prosecutors and judges in combating trafficking in persons. In May 2013, Article 144-3 on *“Illegal acts relating to travel or identity documents for the purpose of human trafficking”* was introduced into the Criminal Code. This establishes criminal liability for identity document fraud if committed for the purpose of trafficking in persons.

Article 144-3 *“Unlawful actions with documents for purposes of trafficking in persons”* states:

*“144-3.1. Falsifying the identity card, passport or another identity or travel document (used to cross borders) of a person for the purposes of trafficking in persons shall be punished by imprisonment for a term of one to three years.*

<sup>194</sup> OSCE Report by the OSCE SR/THB following a visit to Azerbaijan, September 2012.

*144-3.2. Providing a perpetrator or victim of trafficking in persons with a fraudulent identity card, passport, or other identity or travel document (used to cross borders) for purposes of trafficking in persons shall be punished by imprisonment for a term of one to three years.*

*144-3.3. Obtaining a fraudulent identity card, passport, other identity or travel document (used to cross borders) for a perpetrator or victim of trafficking in persons shall be punished by imprisonment for a term of one to three years.*

*144-3.4. Seizing, possessing, concealing, damaging or erasing an identity card, passport, other identity or travel document (used to cross borders) of any person for the purposes of trafficking in persons shall be punished by imprisonment for the term of two to four years”.*

Article 25 was added to the Law of the Republic of Azerbaijan on Trafficking in Persons. This is compliant with the CoE Convention and can assist in combating trafficking for forced labour. This law makes legal entities liable for criminal offences including those related to trafficking in persons.

Article 25. Liability of legal entities for trafficking in persons states:

*“25.1. A legal entity (its branch or representative) functioning in the territory of the Republic of Azerbaijan can be closed down in accordance with legislation of the Republic of Azerbaijan for its links to trafficking in persons.*

*25.2. Once a legal entity engaged in trafficking in persons is identified and abolished, all its property shall be transferred to the funds for assisting victims of trafficking in persons”.*

The Criminal Code contains a number of provisions which are related to trafficking in persons and are used to prosecute offences which may amount to trafficking in persons.

#### *Criminal Code Provisions*

Article 137 on forceful removal of organs.

Article 151 punishing the act of forcing a person into sexual relations.

Article 171 on pushing a minor into prostitution.

Article 242 on the illegal distribution of pornographic material.

Article 243 on pimping.

Article 244 on the maintenance of “immoral houses” for prostitution.

In addition to the specific legislation to combat trafficking in persons within Criminal Code of Azerbaijan and the Law of the Republic of Azerbaijan on Trafficking in Persons, there are additional legal acts and decisions of the Cabinet of Ministers that supplement the anti-trafficking.

The judges in the Supreme Court of Azerbaijan in AZE004 Case No. (102) – 207-2009 (see below) in arriving at their decision would have to have considered both the trafficking process and whether there was an intention to exploit once the trafficker had recruited the victims. If the victims were recruited using one of the means e.g. coercion or deception for the purpose of exploitation the perpetrator can be found guilty of trafficking in persons.

*AZE004Case No. (102)-207-2009 Azerbaijan (Supreme Court of the Republic of Azerbaijan, No. 1 (102)-207/2009, April 29, 2009)*

The defendants recruited the victims for prostitution in Moscow, Russia. Their transportation to Moscow was paid by a person in Moscow, who sexually exploited the victims. This person in Moscow could not be found or arrested.

The Supreme Court decided that there was not enough evidence to prove that the defendant was guilty of trafficking in persons. There was no evidence that the defendant organised the transportation of the victims to another country. The fact that the defendant passed the border of the Republic of Azerbaijan with the victims with the intention of engaging in prostitution abroad did not mean that the defendant had committed the offence of trafficking in persons. Both the defendant and the victims were exploited by another person.

### 6.3 Exploitation

Article 144-1.1 of the Criminal Code of Azerbaijan states that trafficking in persons should be for the purpose of exploitation and the Code also defines the forms of exploitation.

*“Note. 1 “Human exploitation” referred to in this article, shall mean forced labour (servitude), sexual exploitation, slavery and practices similar to slavery and resulting in dependence, illicit transplantation of human organs and tissues, conduct of illicit biomedical research on the person, use of a woman as surrogate mother as well as engaging in criminal activities”.*

#### **Forced labour**

Article 144-1 of the Criminal Code of Azerbaijan states that exploitation shall mean forced labour (servitude) and makes it the criminal offence of trafficking in persons. Article 144-2 criminalises and defines forced labour. It states:

*“Forcing a person by means of threats, use or threat of coercion, or by means of confinement other than in the situations prescribed by the law to perform certain work (service) - shall be punished by imprisonment for a term of four to eight years”.*

Article 17 of the Labour Code entitled “Prohibition of Forced Labour” provides that *“it is prohibited to oblige an employee to perform a job not included in the job description through any kind of duress or use of threat of termination of the employment contract”* and stipulates offenders are to be “held liable under the procedure prescribed by legislation”.<sup>195</sup>

On 25 February 2013, the Baku Grave Crimes Court convicted an Azerbaijani citizen for having committed the offences of trafficking in persons under Article 144-1 and forced labour under Article 144-2 of the Criminal Code with aggravating circumstances.

The victims were other Azerbaijani men who had been recruited by the perpetrator in Azerbaijan and sent to Samara, Russian Federation, to work in a pig farm. The victims were deceived as they were told that they would be working on construction sites. They were forced to work under threat of use of force, had to live on the farm premises in difficult conditions and their passports were confiscated by the employer.

The Court convicted the defendant to a sentence of deprivation of liberty for eight years and six

<sup>195</sup> GRETA 2014 Report concerning the implementation of the CoE Convention by Azerbaijan First Evaluation Round p41.

months under both Article 144-1 and 144-2 of the Criminal Code, and granted compensation to 11 workers.

GRETA 2014 Report concerning the implementation of the CoE Convention by Azerbaijan First Evaluation Round p44.

### Sexual exploitation

In the Republic of Azerbaijan there is only a reference to “sexual exploitation” under Article 144-1 of the Criminal Code. However, Article 1.0.4 of the Law of the Republic of Azerbaijan on Trafficking in Persons defines sexual exploitation as:

*“coercion of a person into prostitution, sexual servitude or production of pornographic materials, or benefiting from the sexual activity of other individuals”.*

[AZE003Case No. \(102\)-267-2010 Azerbaijan](#)

Verdict Date: 2010-05-05 - Sentence Date: 2010-05-05

The defendant deceived the first victim, making her believe that she would be hired to work at a jewellery shop in Bahrain. After the victim was transported to Turkey to wait for her visa to Bahrain, the people hosting her in Turkey sexually exploited her for a month. Afterwards, when they failed to arrange for her visa, they sent the victim to Dubai, UAE and continued to sexually exploit her. The defendant also sent the second victim to Dubai, UAE and forced her into prostitution.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-267/2010, 5 May, 2010.

### Slavery

Article 1.0.6 of the Law of the Republic of Azerbaijan on Trafficking in Persons defines practices similar to slavery; *“the institutes and traditions indicated in Article 1 of 30 April 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery”*. The definition of these forms of exploitation is applicable to their use in the UN Trafficking Protocol.

Article 106 of the Criminal Code of Azerbaijan included a definition of slavery:

*“106.1. Slavery, that is full or partial realisation over a person of the competencies inherent to a property right, shall be punished by imprisonment for a term from five to 10 years.*

*106.2. The same act committed with regard to a minor or with the purpose of moving a person to a foreign state shall be punished by imprisonment for a term from seven to 12 years.*

*106.3. Slavery sales, that is maintenance of a person with the purpose of transfer into slavery or use as a slave, sale or exchange, and also any act connected with sale of slaves or transfer into slavery, as well as sexual slavery or encroachment on sexual freedom on the grounds of slavery shall be punished by imprisonment for a term from five to 10 years”.*

Article 1.0.5 of the Law of the Republic of Azerbaijan on Trafficking in Persons defines slavery as:

*“the full or partial implementation of property rights with respect to an individual”.*

### *Organ removal*

Under Article 144-1 of the Criminal Code of Azerbaijan and Article 1.0.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons '*illicit removal of human organs and tissues*' is referred as the exploitation.<sup>196</sup> However, there have been no recorded cases within the Republic of Azerbaijan.

### *Domestic servitude*

While there has been no cases prosecuted for domestic servitude in Azerbaijan, this phenomenon of trafficking trend should be noted.

### *Conduct of Illicit Biomedical Research on the Person*

Article 144-1 of the Criminal Code of Azerbaijan and Article 1.0.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons both state that the '*Conduct of Illicit Biomedical Research on the Person*' is a form of exploitation but there is no definition providing its exact meaning. .

### *Use of a Woman as a Surrogate Mother*

Article 144-1 of the Criminal Code of Azerbaijan and Article 1.0.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons both state that the '*Use of a Woman as a Surrogate Mother*' is a form of exploitation but provides no definition providing its exact meaning.

### *Engaging in criminal activities*

Article 144-1 of the Criminal Code of Azerbaijan and Article 1.0.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons include '*engaging in criminal activities*' as a form of exploitation. There is no reference to '*criminal activities*' in either the UN Trafficking Protocol or the CoE Convention. However, Article 2 of EU Directive 2011/36/EU includes '*the exploitation of criminal activities*' as a form of exploitation and states:

*"should be understood as the exploitation of a person to commit, inter alia, pick-pocketing, shop-lifting, drug trafficking and other similar activities which are subject to penalties and imply financial gain".*

There have been no reported cases of trafficking by '*engaging in criminal activities*' within the Republic of Azerbaijan. However, there have been recorded cases in other countries.<sup>197</sup>

<sup>196</sup> Vilayat Eyvazov, the National Coordinator for Combating Human Trafficking, in his report dated 2 November 2012 stated that "Rules and terms of organ and tissue transplantation, lists of specialised medical establishments realising such kind of operations, rules of taking, preparing and keeping of organs and tissues for the purpose of transplantation were approved by the Cabinet of Ministers".

<sup>197</sup> It would also appear that human traffickers and criminal groups prefer minors to adults, as children are easier to control and their relatively small stature gives them an advantage in committing crimes such as burglary or shop-lifting. There have been reported cases of minors, some as young as 13 years old, being exploited by a trafficking organization and being forced to shop-lift in northern Italy. There have also been reports of minors being involved in criminal activities, within the Netherlands, as a result of social issues. (Basco, F. et al. 2009 *Human Trafficking Patterns* ed. Friesendorf, C. Strategies against Human Trafficking: The Role of the Security Sector p50.)

## **Begging**

Whilst there is no reference to ‘*begging*’ as a form of exploitation in either the Criminal Code of Azerbaijan or the Law of the Republic of Azerbaijan on Trafficking in Persons, it could be argued that the definition of ‘*criminal activities*’ within the national law of the Republic of Azerbaijan is wide enough to incorporate ‘*begging*’ as defined in international legal instruments.

## **6.4 Internal Trafficking**

The amendments made to the Articles of the Criminal Code, on 9th May 2013, which removed the necessity for cross-border transport should enable prosecutors and judges to identify potential cases of internal trafficking.

## **6.5 Children**

### **6.5.1 National definition of child trafficking**

Article 1 of the Law of the Republic Of Azerbaijan On Trafficking In Persons states that:

*“recruitment, obtaining, keeping, harbouring, transporting, giving or receipt of a minor for purposes of exploitation shall be considered trafficking in persons even if the means set forth in this provision are not used”.*

Under the law of Azerbaijan, a minor is a person under 18 years of age.

Article 151 of the Constitution of Azerbaijan provides that international treaties, including the Convention on the Rights of the Child, have superior status to national legislation. The Republic of Azerbaijan accords legal priority to ratified international treaties, and the courts should apply the Convention on the Rights of the Child.

In both cross-border and internal trafficking situations, child victims should be treated fairly and equally, regardless of their own, their parents or their guardians race, religion, age, family status, culture, language, ethnicity, national or social origin, citizenship, gender, sexual orientation, political or other opinion, disability, property, birth, immigration status, whether fact the child has been trafficked or has participated in the sex industry, or any other status.<sup>198</sup>

### **National Action Plans**

The main measures of the National Action Plan (NAP) 2008 - 2013 included “Improvement of the assistance rendered to child victims of trafficking in persons” which sets out actions to be taken for the protection of the rights and legal interests of child victims of trafficking in persons in accordance with national legislation.

The NAP 2014 – 2018 sets out measures to combat the trafficking in persons of children. This includes legislative measures such as the ratification of the Council of Europe Convention on

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<sup>198</sup> OSCE 2011 *Trafficking in Human Beings: Identification of Potential and Presumed Victims. A Community Policing Approach* p31.

Protection of Children from Sexual Exploitation and Sexual Abuse (3.3). Criminal prosecutions against the crimes of trafficking in persons, including children are to be intensified (5.6).

Measures are provided for “The improvement of assistance provided to victims and potential victims of human trafficking and their protection” (7) and include:

*“7.1. The interests of the child victims or potential victims of trafficking shall prevail while providing them assistance, and appropriate measures shall be taken to protect the rights and legal interests of the child in accordance with the laws of Republic of Azerbaijan on “Combating trafficking in human beings” and “Child rights”, the UN Convention on the Rights of the Child as well as the other laws of Republic of Azerbaijan and the international agreements that it is party to. Alongside with the abovementioned legal framework, guided by the provisions of the legislation on prevention of minors’ negligence and violations of the law the social rehabilitation of child victims of trafficking shall be carried out based on specially designed programmes”.*

In 2013, the President signed several amendments to the Criminal Code and to the Law of the Republic of Azerbaijan on the Fight against Trafficking in Persons to strengthen protections for children who may be victims of human trafficking and raise penalties against those involved in human trafficking. The Ministry of Labour and Social Protection of the Population and the State Committee on Family, Women and Children's Affairs also signed a Joint Action Plan (2013-2015) on Elimination of Child Labour Exploitation.

### **Age Assessment**

Where the age of a child is uncertain and there are reasons to believe the victim is a child, the presumption shall be that the victim is a child. Pending the victim’s age, the victim will be treated as a child and accorded all protection measures that a child is entitled to.<sup>199</sup>

Article 16.3 of the Law of the Republic of Azerbaijan on Trafficking in Persons states:

*“A person shall be considered to be a child if his/her age is impossible to identify, but is believed to be under 18, while placing him/her in a shelter. The limit for the sheltering of children is 60 days. The sheltering time can be prolonged based on a request from a specialised police unit, guardianship and foster care agencies or the Commission on Children’s Affairs and Protection of Rights. Should a child be 10 years old or over, his/her opinion shall be asked when he is placed in the shelter, or the sheltering time is prolonged”.*

### **Victim identification**

The NAP of the Republic of Azerbaijan states in “The Goals and Principles of Implementation of the National Action Plan” that:

*“2.1. the goal of the National Action Plan is to ensure duration of the measures taken in the following directions:*

*[...]*

*2.1.4. identification and prevention of all forms of trafficking in human beings, as well as prevention of their results”.*

<sup>199</sup> UNICEF 2006 *Guidelines on the Protection of Child Victims of Trafficking* p15

Article 8 of the Law of the Republic of Azerbaijan on Trafficking in Persons “Specialised police unit for combating trafficking in persons” states that:

*“identification of victims of trafficking is the responsibility of the specialised police unit which is the Department of Combating Trafficking in Persons”.*

In its general provisions, Decision No. 131 of the Cabinet of Ministers of the Republic of Azerbaijan (2009) on ratification of “Rules (indicators) for identification of victims of trafficking in human beings”:

*“1.2. Identification of victims is an integral part of the system of measures for the protection of trafficked persons and ensures their right to access necessary assistance. This is one of the principal factors to provide their reintegration to society and a normal lifestyle as well as to reduce their likelihood of being a victim of trafficking in human beings again.*

*1.3. The objective of these Rules is to facilitate the disclosure of victims, implement urgent measures for protection of their rights, and train the officials of competent authorities with necessary knowledge with regard to identification of victims of trafficking.”*

The ‘Rules on indicators’ for identification of victims of trafficking in persons provides definitions of the legal aspects of victim’s identification, victim’s indicators (general indicators) specific to certain forms of exploitation, methods for identification of victims, identification methodology, and inquiry for identification, questions for evaluation, supplementary confirmative material, and additional recommendations concerning a questionnaire of victims of trafficking.

The ‘Rules on indicators’ stress that sometimes victims do not consider themselves as such due to the psychological trauma they have experienced. The ‘Rules on indicators’ contain a list of measures to be taken during the inquiry in order to identify potential victims of trafficking and the method to be followed for interviewing a possible victim.<sup>200</sup>

## 6.6. Victim Assistance in the Republic of Azerbaijan

One of the “Goals and Principles of Implementation of the NAP for the years 2014-2018 on Combating trafficking in human beings in Republic of Azerbaijan” is “2.1.5 Protection of the victims of trafficking in human beings, ensuring the protection of their rights and social rehabilitation”. This follows on from the NAP 2008-2013, which also had the aim of “protection of victims of trafficking in human beings”.

Article 1.0.10 of the Law of the Republic of Azerbaijan on Trafficking in Persons does not include migrant workers. They are only entitled to protection and assistance under international legal instruments if they are potential victims of trafficking.

<sup>201</sup> GRETA 2014 Report concerning the implementation of the CoE Convention against Trafficking in Human Beings in Azerbaijan p36.

### 6.6.1 National Referral Mechanism

The Republic of Azerbaijan formally established a NRM for implementation, under the National Coordinator, by 'Decision No. 123 of the Cabinet of Ministers of the Republic of Azerbaijan, 11 August, 2009' on the ratification of the 'Rules for the National Referral Mechanism on victims of trafficking in human beings'. This Decision set out the rules, which were prepared according to the "National Action Plan of the Republic of Azerbaijan (2009-2013) on struggle against trafficking in human beings", and defines the rules for implementation of national referral mechanism on victims of trafficking.

General provision 1 states:

*"1.2. The primary objective of the National Referral Mechanism on victims of trafficking is to create an effective system and to form rules in this field for protection of victims` rights, their handover to the relevant authorities, provision of their safety, repatriation and social rehabilitation.*

*1.3. The National Referral Mechanism on victims of trafficking is implemented through prioritising the following principles:*

*1.3.1. provision of rights and freedoms of victims;*

*1.3.2. provision of confidentiality of information about victims;*

*1.3.3. provision of equality of victims in the application of protection and social rehabilitation measures;*

*1.3.4. ensuring individuality of protection and social rehabilitation measures with regard to the needs of victims;*

*1.3.5. ensuring mutual cooperation between state authorities and non – governmental organisation;*

*1.3.6. ensuring the effectiveness of regional and international cooperation".*

Chapter IV of the Law of the Republic of Azerbaijan on Trafficking in Persons defines "Social rehabilitation and protection of the victims of trafficking in persons". Article 14-1, which was introduced in 2013 enables victims of trafficking to benefit from a 'recovery and reflection period'.

Article 14-1 states:

*"14-1.1. A victim of trafficking shall be given a 30-day period to recover, to deflect from crime effects and to take a firm decision whether to cooperate with investigation authorities.*

*14-1.2. During the recovery and reflection period the victims of trafficking may have access to the specialised facility referred to in Article 12 of this Law in order to meet his/her safety and protection needs and to ensure his/her physical, psychological and social recovery.*

*14-1.3. Expulsion from the Republic of Azerbaijan shall not be applied to the victim of trafficking during the recovery and reflection period.*

*14-1.4. If the person is not identified as a victim of trafficking (s)he is not eligible for the recovery and reflection period. If (s)he has been given this period it shall be immediately terminated after such an identification".*

Article 14-1 does not specify that the recovery and reflection period should be granted *when “there are reasonable grounds to believe that the person concerned is a victim of trafficking”*. The definition of *“victim of trafficking”* in Azerbaijani law includes *“a person believed to be subjected to trafficking”*. Therefore, to be in accordance with the CoE Convention, Article 14-1 of the Azerbaijani law should be interpreted as covering possible victims for whom *“there are reasonable grounds to believe that they are victims of trafficking”*.<sup>201</sup>

Article 4 of the Rules of the National Referral Mechanism on victims of trafficking in human beings *“Handover of victims to the relevant authorities”* sets out the procedures to be followed:

*“4.1. In case a person is presumed to be a victim of trafficking or other authorities reveal the organisation or commitment of trafficking crime, the relevant police authority shall be immediately informed to ensure the victims` safety, and provide professional assistance and provide the central, collection of data on combatting trafficking. .*

*4.2. The applications of victims or presumed victims of trafficking will be officially registered after they are revealed. Their relevant documents will be sent to the mentioned body and they will be assisted by taking immediate measures to handover them to the special police authority within 24 hours.*

*4.3. The rights and freedom, honour and dignity of victims or presumed victims of trafficking must not be violated and each of them must be treated politely in the process of identification and handover to the special police authority.*

*4.4. Victims or presumed victims of trafficking and their documents must be handed over to the special police authority on duty. 4.5. Handover of victims or presumed victims of trafficking to other police authority or law -enforcement bodies are prohibited”.*

## 6.6.2 National Referral Mechanism for Children

Article 16 of the Law of the Republic of Azerbaijan on Trafficking in Persons provides the legal basis for the referral mechanism within the Republic of Azerbaijan. The Rules on placement and accommodation in shelters of victims of child trafficking, which was adopted by Decision of the Cabinet Minister on 19 November 2009, stipulate that when providing assistance, priority should be given to the child’s legitimate interests and all necessary measures should be taken to protect the child’s rights in accordance with Azerbaijani legislation and relevant international treaties.

Article 16 of the Law of the Republic of Azerbaijan on Trafficking in Persons *“Assisting children who became victims of trafficking”* states:

*“16.1 When assisting a child, who became a victim of trafficking, the interests of the child shall be given priority and all measures shall be taken in accordance with the Law of the Republic of Azerbaijan “On Children’s Rights”, the UN Convention on the Rights of the Child and other legislative acts of the Republic of Azerbaijan and treaties to which Azerbaijan is party”.*

Article 16 sets out the reporting mechanisms for the protection of a child, the arrangements for placement in sheltered accommodation, and the social rehabilitation of victims of child trafficking

<sup>201</sup> GRETA 2014 *Report concerning the implementation of the CoE Convention against Trafficking in Human Beings in Azerbaijan* p36.

## 6.7 Repatriation

Article 20 of the Law of the Republic of Azerbaijan on Trafficking in Persons “*Repatriation of foreigners and stateless persons who are victims of trafficking*” states:

*20.1. If a foreigner or stateless person is considered to be a victim of trafficking, (s)he shall not be expelled from the Republic of Azerbaijan and the relevant executive authority shall not take a decision on his/her expulsion from the Republic of Azerbaijan within one year.*

*20.2. If the period defined in Article 20.1 of this Law expires and the foreigner or stateless person is still cooperating with the investigation authorities in respect of a criminal cases, that person shall not be expelled from the Republic of Azerbaijan and the relevant executive authority shall not take a decision on his/her expulsion from the Republic of Azerbaijan until completion of the criminal prosecution”.*

In September 2013, the Cabinet of Ministers approved amendments to the anti-trafficking law on the repatriation of foreign victims of trafficking that allowed for the provision (on the victims’ request) of temporary residence permits for recognised victims for up to one year (Article 2.3).

The legislation states:

*“If at the end of an automatic one year stay of deportation, which is granted to every recognised foreign victim of trafficking, the victim decides to assist with a criminal investigation/proceedings, the victim may stay in the Republic of Azerbaijan without penalty until the criminal proceedings are complete”.*

The National Action Plan 2014-2018 sets out as one of the measures “6. Rehabilitation and Reintegration of the victims of human trafficking” which states:

*“6.1. The social rehabilitation and reintegration of the victims of trafficking is implemented with the purpose of returning them to a normal life-style and it is envisaged to provide legal assistance to the victims of human trafficking, to take measures for continuation of their education, their psychological, medical and professional rehabilitation, use of possibilities to provide those persons with employment and living area.”*

### 6.7.1 Repatriation of Children

Article 20 of the Law of Azerbaijan on Trafficking in Persons “*Repatriation of foreigners and stateless persons who became victims of human trafficking*” states:

*“20.3. Expulsion from the Republic of Azerbaijan shall not be applied to child victims of trafficking and relevant executive authority shall not take a decision on their expulsion from the Republic of Azerbaijan. Child victims of trafficking shall be returned to home countries or to parents unless the risk of re-trafficking has been excluded. Child victims of trafficking over the age of 10 years shall be consulted and allowed to participate in the decision-making process on their return to home countries or to parents”.*

Children should only be repatriated when it is in the best interests and there is no risk of re-victimisation. If the child is over 10 years of age they should be asked what their opinion is and it should be taken into account. A risk assessment should be undertaken prior to the repatriation of

any child victim. This should include, the risk of re-trafficking, threats from perpetrators and availability of assistance.<sup>202</sup>

## 6.8 Confidentiality

Article 17 of the Law of the Republic of Azerbaijan on Trafficking in Persons states:

*“17.4. Dissemination of information which is a private or a family secret of the victims of human trafficking shall lead to a responsibility in accordance with the legislation of the Republic of Azerbaijan. The information that represents a danger to life and health of the victim of human trafficking, his/her close relatives as well as individuals assisting in combatting trafficking in persons shall be considered confidential and its dissemination is prohibited.*

*17.5. Illegally collecting confidential information about the victim of human trafficking or about security measures applied with regard to him/her or intentionally disseminating this information shall lead to responsibility in accordance with the legislation of the Republic of Azerbaijan.”.*

## 6.9 Legal assistance

The National Action Plan for Azerbaijan for 2009-2013 in Chapter 6 *“enhancing prosecution against trafficking crimes”* included a provision to *“involve lawyers in the protection of victims in court proceedings”*. In addition, the NAP required the Government to ensure that legal assistance to victims is efficient, long term and sustainable.<sup>203</sup>

Article 3 of the Rules of the National Referral Mechanism for victims of trafficking in human beings *“Protection of victims` rights”* states:

*“3.1. Victims are entitled to receive legal assistance free of charge. Victims receive information about free of charge legal assistance and organisations providing this service from proper police authorities and non-governmental organisations”.*

In October 2014 the Law in the Azerbaijan was amended to enable a trafficked victim to be represented by a victim relative or Bar Association Member

## 6.10 Role of Prosecutors and Judges in Republic of Azerbaijan

Trafficking in persons cases are the competence of the five regional Grave Crimes Courts. Whenever regional prosecutors come across a suspected case of trafficking in persons, they must transfer it to the General Prosecutor’s Office and they will immediately send all information on the case to the Ministry of Internal Affairs’ Department for Combating Trafficking in Persons, which in turn will contact the Ministry’s Organised Crime Department for initial investigations to be conducted. The

<sup>202</sup> GRETA 2014 Report concerning the implementation of the CoE Convention by Azerbaijan p40.

<sup>203</sup> 145 OSCE Needs Assessment Report Anti-trafficking response in Republic of Azerbaijan 2010 p22.

Prosecutor General's Office will supervise the investigations and deal with the case once it reaches the courts.<sup>204</sup>

The Prosecutor's Office of the Republic of Azerbaijan controls the execution and application of laws under the procedures and in the cases stipulated by law; initiates a criminal case in cases stipulated by law and conducts the primary investigation; has procedural leading on primary investigation and ensures observation of laws,, states the charge in the courts; raises the claim in courts; participates as a claimant in cases related to civil and economic disputes; can appeal court decisions.

The Prosecutor's Office also oversees implementation of penalties imposed by the courts, execution and application of laws by bodies of investigation, and the operative search and execution and application of laws in cases specified by legislation. It is unacceptable to impose duties on the Prosecutor's Office, which are not specified in the law and the Constitution of the Republic of Azerbaijan.<sup>205</sup>

The rights and duties of the State prosecutor during court proceedings are set out in Article 84 of the Criminal Procedure Code of the Republic of Azerbaijan.

*"The prosecutor in criminal proceedings relies on the results of the investigation and all evidence collected to substantiate the charges against the accused according to the required standard of proof, namely to determine that the accused is guilty beyond reasonable doubt.*

*If other parties and/or participants to the criminal proceedings raise an objection against the prosecutor, articles 322.1.14 and 322.1.15 of the CPC apply. Articles 112 and 109 of the CPC set out the reasons for the objection.*

*The prosecutor may withdraw all or some of the charges against the accused if during the course of the court proceedings he/she discovered that the evidence available did not substantiate those charges according to the standards of proof".<sup>206</sup>*

The judges' professional duties and obligations while adjudicating court proceedings, as well as their responsibilities when they fail to comply with those duties, are outlined under the Code of Judicial Ethics (CJE) of the Republic of Azerbaijan. In accordance with Chapter IV of the Code, the Judicial Legal Council is the national institution in charge of establishing and upholding the judicial standards that govern the work of judges and ensuring that judges' performance is up to the required high quality standards.

*Chapter I of the Code of Judicial Ethics, quoted below, regulates the main duties of judges while adjudicating court cases*

Article 1. During their tenure, a judge shall remain faithful to the judicial oath that reflects his/her responsibility before the state, the citizen and the due process; and demonstrate conduct appropriate to the said oath in the performance of their duties as well as other judicial functions.

Article 2. In all instances a judge shall observe the Constitution of the Republic of Azerbaijan, comply with the Law of the Republic of Azerbaijan "Courts and judges" and other normative legal acts,

<sup>204</sup> Office of Public Prosecutor of the Republic of Azerbaijan. Available from <https://www.azerbaijans.com> › Home page › GOVERNMENT BODIES.

<sup>205</sup> GRETA 2014 Report concerning the implementation of the CoE Convention by Azerbaijan p14.

<sup>206</sup> OSCE Office in Baku – Rule of Law and Human Rights Unit Trial Manual for Judges: First Instance Criminal Courts p8.

promulgate public confidence in judicial power, and exercise judicial independence and impartiality.

Article 3. The first and foremost important characteristic of the judiciary is in the exercise of impartiality during judicial proceedings.

Article 4. A judge shall perform his/her duties with dignity and remain fair, impartial and incorruptible in the discharge of their judicial functions.

Article 5. A judge shall always uphold honour and dignity and refrain from engaging in activities, that would likely interfere with or affect the reputation of judicial power and the good name of the judge or cast doubt on the judge's independence and objectivity during the course of judicial proceedings.

*OSCE Office In Baku, Rule of Law And Human Rights Unit Trial Manual For Judges: First Instance Criminal Courts, p7.*

## 6.11 Investigative Good Practice

### 6.11.1 Financial Investigations

Article 22 of the Law of the Republic of Azerbaijan on Trafficking in Persons "Forfeiture and use of proceeds of trafficking in persons" states:

*"22.1. All proceeds of trafficking in persons (real estate, funds, securities and other assets) shall be confiscated by a court decision, and shall be transferred to the special created trafficking assistance fund for victims of trafficking as defined by legislation.*

*22.2. Proceeds accumulated into the assistance fund for victims of trafficking in persons shall be utilised to pay compensation to the victims of trafficking in persons, and for their social rehabilitation, medical and other necessary expenses.*

*22.3. Transparency shall be provided in the utilisation and management of the assets of the assistance fund for victims of trafficking in persons. A relevant executive authority of the Republic of Azerbaijan shall define the legal basis for the functioning of the fund".*

### 6.11.2 Joint Investigation Teams

Article 26 of the Law of the Republic of Azerbaijan on Trafficking in Persons "International cooperation in trafficking in persons" states:

*"Pursuant to the relevant interstate treaties to which it is a party, the Republic of Azerbaijan shall cooperate in the fight against trafficking in persons with foreign countries and their law enforcement agencies and with international organisations which deal with fighting against trafficking in persons".*

## 6.12 Protection Measures in the Republic of Azerbaijan

Article 7 of the Law of the Republic of Azerbaijan on State Protection of Persons Taking Part in Criminal Procedures sets out the type of security measures available in the Republic of Azerbaijan.

*“Security measures can be classified into:*

- 1. Guarding of the protected person, his/her apartment and property;*
- 2. Issuing the protected person with special personal protection equipment, and warning him/her of existing danger;*
- 3. Temporary billeting of the protected person in a secure place;*
- 4. Ensuring secrecy of information about the protected person;*
- 5. Transferring the protected person to alternative employment, changing her/his place of work/study, moving him/her to another place of residence;*
- 6. Changing the documents and appearance of the protected person;*
- 7. Conducting closed court sessions under the procedure defined in legislation, provided the protected person participates there.*

*Rules of implementation of security measures shall be regulated by the present Law and other legislative acts of the Republic of Azerbaijan”.*

Article 14, “Conducting of Closed Court Sessions under the Procedure Defined in Legislation, Provided the Protected Person Participates There states:

*“Where it is required for the security of the protected persons, conduct of a closed court session shall be allowed by decision of the judge (court), under the procedure stipulated for in the criminal procedural legislation of the Republic of Azerbaijan. For questioning of these persons without the physical presence of the defendant, the judge (court) shall adopt a reasoned decision on the matter. With such reasoning, the defendant can be questioned separately from each other”.*

Article 24 of the Law of the Republic of Azerbaijan on Trafficking in Persons “Consideration of cases related to trafficking in persons” states:

*“24.1. Consideration of criminal cases on trafficking in persons, and cases for restitution of losses caused by the trafficking in persons may be conducted in closed court sessions on the victim’s request and in accordance with legislation of the Republic of Azerbaijan.*

*24.2. Special testimonial measures such as teleconferencing or use of video-taped statements can be arranged with the purpose of ensuring the safety of the victims of trafficking in persons and preventing human traffickers from influencing them, as well as taking into consideration the emotional and psychological condition of the victim”.*

Article 18.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons states:

*“Safety measures taken with respect of the victim of trafficking in persons shall be continued unless the threat is fully eliminated during the preliminary investigation and the trial of a trafficking in persons crime, and during the post-trial period”.*

### **6.12.1 Victim Protection in the Republic of Azerbaijan**

Protection is also provided to victims in the Republic of Azerbaijan under Article 18 of the Law of the Republic of Azerbaijan on Trafficking in Persons. This provides:

*“18.1 The safety of victims of trafficking in persons shall be provided for in compliance with the Law of the Republic of Azerbaijan “On State Protection of Participants of Criminal Process.” An officer of the agency implementing the criminal process shall notify a victim of trafficking in persons about the possibilities for ensuring safety, and the measures of protection.*

*18.2 Safety measures taken with respect to the victim of trafficking in persons shall be continued unless the threat is fully eliminated during the preliminary investigation and trial of a trafficking in persons crime, and post-trial time.*

*18.3 Pseudo (false) names shall be used in an effort to provide the anonymity of victims trafficking”.*

The National Action Plan for the years 2014-2018 on Combating trafficking in Persons in Republic of Azerbaijan sets out as one of the measures.

*“5. The criminal prosecution against the crimes of human trafficking:*

*[...] 5.3. It is envisaged to improve the protection of witnesses and persons cooperating with the authorities implementing the criminal prosecution in combating trafficking in persons, and to continue to measures to stimulate the provision of information useful for the investigation”.*

Article 4.0.2 of the Law of the Republic of Azerbaijan on Trafficking in Persons states that one of the basic principles for combating trafficking in persons is:

*“Providing safe and fair treatment of the victims of trafficking in persons”.*

Article 17 of the Law of the Republic of Azerbaijan on Trafficking in Persons defines *“Measures on the protection and assistance of victims of human trafficking”*. Article 18 of the same Law *“Providing for the safety of the victims of trafficking in person”*, sets out victim protection measures during the criminal justice process.<sup>207</sup>

Protection is also provided to victims under the Law of Azerbaijan on State Protection of Taking Part in Criminal Proceedings.

Article 1, “Purpose of the Law”, states:

*“The present Law shall define a system of measures that ensures security and social protection of victims, criminal case witnesses and other persons participating in the criminal procedure. Security measures, determined by this Law, shall be implemented where it is impossible to ensure the security of the above persons by other means”.*

### 6.12.2 Sentencing Child Trafficking

Article 144 (1.2.3) of the Criminal Code of Azerbaijan provides for the commission of an offence of trafficking in persons against a minor. Article 144 (1.3) of the Criminal Code prescribes for an increased sentence *“for a term of ten to fifteen years”*.

<sup>207</sup> See Annex 5.

## 6.13 Legal Assistance

The National Action Plan for Azerbaijan for 2009-2013 in Chapter 6 *“enhancing prosecution against trafficking crimes”* included a provision to *“involve lawyers in the protection of victims in court proceedings”*. In addition, the NAP required the Government to ensure that legal assistance to victims is efficient, long term and sustainable.<sup>208</sup>

Article 3 of the Rules of National Referral Mechanism on victims of trafficking in human beings *“Protection of victims` rights”* states:

*“3.1. Victims are entitled to get free of charge legal assistance. Victims get information about free of charge legal assistance and organizations providing this service from proper police authorities and non-governmental organizations”.*

### 6.13.1 Non-punishment of victims

Article 17.7 of the Law of Azerbaijan on Trafficking in Persons *“Measures on the protection and assistance of victims of human trafficking”* states:

*“Persons who have suffered trafficking in persons are exempted from civil, administrative or criminal liability for offences committed under coercion or intimidation while they were victims of trafficking in persons.”*

## 6.14 Compensation in the Republic of Azerbaijan

Chapter 20 of the Code of Criminal Procedure of the Republic of Azerbaijan (adopted 14 July 2000) defines the *“Payment of Compensation to Victims”*. Article 189 sets out the right of victims to receive compensation, Article 190 sets out the amount of compensation paid to victims, and under Article 191 victims can claim compensation from the State as a result of a criminal act before the criminal courts.

Article 191 *“Decision on payment of state compensation to victims”* states:

*“191.1. The question of the payment to a victim of compensation under the state budget of the Republic of Azerbaijan for the damage caused by an act provided for in criminal law shall be resolved by a court further to an application by the victim.*

*191.2. When including the decision to award state compensation to a victim in its judgment convicting the accused, the court shall also state the amount which the convicted person shall contribute to the compensation”.*

Article 3 of the Rules of the National Referral Mechanism on victims of trafficking in human beings *“Protection of victim`s rights”* states:

*“3.6. Victims are entitled to raise a civil claim to receive compensation and to recover material and moral damages resulting from a criminal act.*

*3.7. Victims receive getting compensation from the Relief Fund for Victims of Trafficking in Human Beings (hereinafter referred to as the Relief Fund) established under the Ministry of*

<sup>208</sup> OSCE 2010 *Needs Assessment Report Anti-Trafficking response in Republic of Azerbaijan* p22.

*Internal Affairs of the Republic of Azerbaijan under the rules set forth in legislation. The compensation is paid regardless of whether the person affected cooperated with the law - enforcement bodies.*

*3.8. The damages of persons affected by trafficking will be paid from the assets of the property of traffickers under the procedural legislation. If this property is insufficient, victims will be compensated from the Relief Fund.*

*3.9. Compensation paid from the Relief Fund will not deprive victims of the right to claim compensation for moral and material damages as a result of criminal act”.*

The national laws of the Republic of Azerbaijan allow victims of trafficking to raise a civil claim for compensation for material or moral damages resulting from a criminal act before either the criminal or the civil courts (see Article 3, Rules of the National Referral Mechanism). They can claim compensation from the State for prejudice suffered as a result of a criminal act before the criminal courts (see Article 191 of the Criminal Procedure Code). They can also claim compensation through civil proceedings after completion of the criminal proceedings under Article 2 of the Law on the Adoption and Implementation of the Civil Procedure Code. The court can use assets confiscated from the traffickers to compensate victims of trafficking.

Article 22 of the Law of the Republic of Azerbaijan on Trafficking in Persons “*Forfeiture and use of proceeds of trafficking in persons*” states:

*“22.1 All proceeds of trafficking in persons (real estate, funds, securities and other assets) shall be confiscated by a court decision, and shall be transferred to the specially created trafficking in persons victims’ assistance fund, as defined in legislation.*

*22.2. Proceeds accumulated into the assistance fund for victims of trafficking in persons shall be utilised to pay compensation to the victims of trafficking in persons, and for their social rehabilitation, medical and other necessary expenses”.*

Victims of trafficking can claim compensation from the Republic of Azerbaijan under Articles 22 and 23 of the Law on Combating Trafficking in Persons and the Decision No. 68 of the Cabinet of Ministers concerning Regulations on the Assistance Fund for Victims of Trafficking in Persons. These articles provide for the setting up of an assistance fund for victims of trafficking. Compensation can be paid from this fund even if victims of trafficking do not co-operate with law enforcement agencies. The fund can be financed by using money and assets seized from traffickers. Once a victim has been identified as a victim of trafficking they receive a payment of 400 AZN. Victims who co-operate with law enforcement agencies can make a compensation claim against the traffickers.

Victims of trafficking may have rights in labour law that exist regardless of whether they have a contract or regardless of the provisions of that contract. Alternatively, the victim of trafficking may have an action for breach of a labour contract, oral or written, that is actionable in a labour court. These rights and contractual breaches can be enforced and compensation claimed. These claims can be pursued in addition to or instead of criminal proceedings.

If a situation is trafficking for forced labour this should be identified as a criminal offence and proceeding commenced. This would enable victims of trafficking to claim from the assistance fund and for moral and material damages instead of just the salary owing.

## 6.15 Smuggling of Migrants

The Republic of Azerbaijan signed and ratified the UNTOC and the Smuggling Protocol on 13th May 2003. Article 318 of the Criminal Code of Azerbaijan defines the illegal crossing of the state border of the Republic of Azerbaijan as:

*“318.1. Crossing of the protected frontier of the Republic of Azerbaijan without established documents or outside of the check point of the state frontier shall be punished by a fine of two to five hundred manats or imprisonment for a term of up to two years.*

*318.2. The acts specified in article 318.1 of the present Code, if they are committed by a group of persons who have conspired beforehand or an organised group, or with application of violence or with threat of its application shall be punished by imprisonment for a term of up to five years.*

*NOTE: The provisions of the present article shall not apply to a foreigner or stateless person arrived in the Republic of Azerbaijan, by violating the rules for crossing the protected frontier of the Republic of Azerbaijan, to use the right of political asylum established by the Constitution of the Republic of Azerbaijan, if his/her acts do not contain elements of another crime.”*

In 1999 the Republic of Azerbaijan acceded to the United Nations, International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990). Article 11 states that *“(i) No migrant worker or member of his family shall be held in slavery or servitude (ii) No migrant worker or member of his family shall be required to perform forced or compulsory labour”*.

## 6.16 Republic of Azerbaijan Trafficking in Persons Jurisprudence (on UNODC Human Trafficking Law Database)

### **AZE004 Case No. (102)-207-2009 Azerbaijan**

*Verdict Date: 2009-03-02 - Sentence Date: 2009-03-02*

The defendants recruited the victims for prostitution in Moscow, Russia. Their transportation to Moscow was paid by a person in Moscow, who sexually exploited the victims. This person in Moscow could not be found or arrested.

The Supreme Court decided that there was not enough evidence to prove that the defendant was guilty of human trafficking. There was no evidence that the defendant organized the transportation of the victims into another country. The fact that the defendant passed the border of the Republic of Azerbaijan with the victims with the intention of engaging in prostitution abroad does not mean that the defendant committed human trafficking. Both the defendant and the victims were exploited by another person.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-207/2009, April 29, 2009.

### **AZE003 Case No. (102)-267-2010 Azerbaijan**

*Verdict Date: 2010-05-05 - Sentence Date: 2010-05-05*

The defendant deceived the first victim, making her believe that she would be hired to work at a jewellery shop in Bahrain. After the victim was transported to Turkey to wait for her visa to Bahrain, the people hosting her in Turkey sexually exploited her for a month. Afterwards, when they failed to arrange for her visa, they sent the victim to Dubai, UAE and continued to sexually exploit her. The defendant also sent the second victim to Dubai, UAE and forced her into prostitution.

The Baku Court of Appeals on January 22, 2010 reduced the sentence from 8.5 years to 6 years of imprisonment. The reasoning was because the defendant's criminal act was covered under Article 144-1.2.5 (human trafficking) of the Criminal Code, the defendant should not be held liable for the same act also under Article 243.1 (recruitment for prostitution). Since human trafficking, by definition, includes the recruitment for prostitution, the charge under Article 243.1 must be dismissed.

On appeal the term of imprisonment was reduced to 2 years. The legal reasoning was that the lower courts failed to take into account mitigating factors (such as the defendant's regret, family status, etc.). Also, the lower courts did not calculate the sentence correctly.

Although the defendant's attorney claimed that the defendant did not deceive the victims, the evidence indicated otherwise. The attorney also claimed that according to the UN Protocol and the Law of the Republic of Azerbaijan on Preventing Human Trafficking, human trafficking is not found if the victim voluntarily agreed to be sexually exploited and was not deceived. This argument was not considered.

*The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-267/2010, May 5, 2010*

**AZE002Case No. (102)-384-2009 Azerbaijan**

*Verdict Date: 2009-07-28 - Sentence Date: 2009-07-28*

The defendant bought tickets and obtained the necessary visa for the victim to fly to Dubai, UAE. The defendant met the victim in Dubai, hosted the victim at her apartment, and organized and operated the victim's prostitution.

The Supreme Court decided that the defendant's acts were already covered by Article 144-1.1 (Human Trafficking) of the Criminal Code, and therefore the defendant should not be held liable for the same act also under Article 243.1 (Recruitment for Prostitution). The Court reasoned that according to the Criminal Code, human trafficking meant *inter alia* the recruitment, transportation, transfer, harbouring or receipt of persons for commercial sexual exploitation. Thus, the Court held that the charge of recruitment for prostitution, which human trafficking by definition already covers, should be dismissed. The Court held that the defendant was liable only under Article 144-1.1 and reduced the imprisonment period to 2 years.

*The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-384/2009, July 28, 2009.*

**AZE001Case No. (102)-339-2008 Azerbaijan**

*Verdict Date: 2008-05-20 - Sentence Date: 2008-05-20*

The defendant bought tickets and arranged a visa for the victim to fly to Dubai, UAE. The

defendant planned to send the victim to a person, who would subject the victim to prostitution in Dubai and expropriate all the money that the victim earned. The victim was detained by the police at the airport in Baku, Azerbaijan who suspected that she was a victim of human trafficking. The police later arrested the defendant.

The Supreme Court stated that because neither the transportation nor the sexual exploitation of the victim actually occurred, the crime was never completed. Therefore, the Court reduced the imprisonment period to 2 years.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-339/2008, May 20, 2008.

This decision was made before the amendment to the Criminal Code and at the time of this decision the Criminal Code of the Republic of Azerbaijan (the only law in Azerbaijan that may stipulate criminal liability) defined human trafficking as “concluding sale agreements or any other agreement concerning ownership over a person, or transferring a person from the territory of the Republic of Azerbaijan for the purpose of exploitation or recruiting, obtaining, keeping, harbouring, transporting, giving or receiving of persons for the purpose of exploitation.”

Unlike the UN Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, the Criminal Code did not require the means of “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person” for an act to constitute human trafficking. Under the Criminal Code, means are irrelevant; merely “recruiting, obtaining, keeping, harbouring, transporting, giving or receiving of persons for the purpose of exploitation” or any other elements mentioned in the definition above suffice for an act to constitute human trafficking.

Therefore, here, either the defendant did not employ any means stipulated in the Trafficking in Persons Protocol or the court did not discuss the means (as it is irrelevant in establishing the crime of human trafficking in Azerbaijan).

**AZE010Case no. 101-683-2014 Azerbaijan**

*Verdict Date: 2014-07-31 - Sentence Date: 2014-07-31*

The defendant deceived the three victims by promising legal employment in Dubai, United Arab Emirates as hotel receptionists, when actually intending to sexually exploit them for the purpose of prostitution in the target country. By misusing the victims' vulnerable situation due to economic hardships and false promises, the defendant managed to attain the victims' consent and initial interest to cooperate. Upon arrival to Dubai, the victims were met and subsequently held by accomplices who took away the victims' passports and travel documents. The accomplices confiscated the victims' money and issued constant threats in case of non-compliance, keeping the victims under guard for the majority of time. All three victims were forced into prostitution with the intent of exploitation by the group of accomplices.

All three victims managed to attain their passports and to subsequently flee to a hotel where they stayed for the next two days. A trusted acquaintance in bought travel tickets and organized the three victims' return to Baku. He also advised the victims to contact relevant judicial authorities upon arrival in Baku.

The Baku Court on Grave Crimes sentenced the defendant to four years in prison based on the evidence gathered from witness' and victims' testimonies. Due to the defendant's difficult economic situation, punishment was mitigated from a 5-year prison term to 4 years, as well as not including any litigation costs and any forms of special confiscation.

Ruling of the Baku Court on Grave Crimes, no. 1(101)-683/14, 31 July 2014.

This decision was made before the amendment to the Criminal Code therefore, here, either the defendant did not employ any means stipulated in the Trafficking in Persons Protocol or the court did not discuss the means (as it is irrelevant in establishing the crime of human trafficking in Azerbaijan).

**AZE006Case No. (103)-81-2009 Azerbaijan**

*Verdict Date: 2009-02-09 - Sentence Date: 2009-02-09*

The defendant transferred the victims to Turkey and placed them at a hotel in Istanbul, Turkey, where she exploited them for prostitution. The victims were sexually exploited for 20 days. After the victims returned to Azerbaijan, one of them reported that she had been a victim of human trafficking to the police (Police Department on Prevention of Human Trafficking). Subsequently, the police arrested the defendant and she was charged with the crime of human trafficking.

The lower court correctly established that the defendant had committed the crime of human trafficking, and its sentence took into account all the mitigating factors. The defendant was sentenced to 2 years imprisonment.

*The Decision of Baku Court of Appeals, No. 1 (103)-81/2009, February 9, 2009.*

This decision was made before the amendment to the Criminal Code therefore, here, either the defendant did not employ any means stipulated in the Trafficking in Persons Protocol or the court did not discuss the means (as it is irrelevant in establishing the crime of human trafficking in Azerbaijan).

**AZE005Case No. (103)-115-2009 Azerbaijan**

*Verdict Date: 2009-03-02 - Sentence Date: 2009-03-02*

After learning that the victim was in financial need, the defendant lied to the victim and deceived her, promising the victim work as a house-cleaner in Turkey. The defendant transported the victim to Turkey and kept her at a hotel. On the first day at the hotel, a man entered the victim's room for sexual service, claiming that he had paid the defendant to have sex with the victim. The victim resisted, and the client left the room. When the defendant found out about this, she beat the victim multiple times to force her into prostitution.

The lower court correctly found that the defendant was guilty of human trafficking, and sufficiently took into account the mitigating factors (such as her regret, her family status, etc.) when deciding the case. The defendant was sentenced to 5 years imprisonment.

The Decision of Baku Court of Appeals, No. 1 (103)-115/2009, March 2, 2009.

**AZE009Case No. (102)-457-2010 Azerbaijan**

*Verdict Date: 2010-07-28 - Sentence Date: 2010-07-28*

The defendant recruited the victim and transported her to Dubai, UAE (and paid her travel costs)

for commercial sexual exploitation.

The defendant was found guilty and was sentenced to 5 years and 6 months of imprisonment. The Baku Court of Appeals decided not to hear the case on the merits. The defendant appealed this decision to the Supreme Court of the Republic of Azerbaijan. The Supreme Court decided that the Baku Court of Appeal is authorized to decide not to hear the case on the merits. The Supreme Court upheld the decision of the Baku Court of Appeals.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-457/2010, July 28, 2010.

**AZE008Case No. (102)-465-2009 Azerbaijan**

*Verdict Date: 2009-10-13 - Sentence Date: 2009-10-13*

H.A., an Azerbaijani citizen, after giving birth to a girl, told the defendant that her husband wanted a boy. The defendant told H.A. that she could arrange to find a new-born boy through a doctor, T.I. T.I. told the defendant that she had incidentally found a baby boy and could sell the baby for 2000 USD. The defendant took 2000 USD from H.A. and gave the money to T.I. to receive the baby.

The Supreme Court highlighted that human trafficking is a crime committed for financial gain. According to the Court, because the defendant received 2000 USD for the new-born baby and gave the entire amount to the doctor who found and brought the baby, the defendant was only a participant in the crime, and therefore, the defendant's sentence must be reduced. The Court reduced the term of imprisonment to 3 years.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-465/2009, October 13, 2009.

This decision was made before the amendment to the Criminal Code therefore, here, either the defendant did not employ any means stipulated in the Trafficking in Persons Protocol or the court did not discuss the means (as it is irrelevant in establishing the crime of human trafficking in Azerbaijan).

**AZE007Case No. (102)-674-2009 Azerbaijan**

*Verdict Date: 2009-12-30 - Sentence Date: 2009-12-30*

The defendant arranged for the victim's foreign passport and for her trip to Turkey, with the purpose of submitting the victim to prostitution. The victim stayed at a hostel in Erzurum, Turkey and was sexually exploited.

The defendant was sentenced to 4 years. The defendant appealed to the Supreme Court, requesting the Court to change the remaining imprisonment period under the lower court's sentence to a conditional sentence. The plaintiff called for the Court to take into account her age, family status and her regret. The Court held that the lower court's sentence had already taken into account the mitigating factors and that the sentence given was actually lower than the minimum imprisonment period for such crime under the laws. The Court upheld the lower court's decision.

The Decision of the Supreme Court of the Republic of Azerbaijan, No. 1 (102)-674/2009, December 30, 2009.

## 7. International Cooperation

This chapter will explain the importance and legal framework of international co-operation and the process of mutual legal assistance. It will explain the role of international cooperation in the prosecution of trafficking in persons cases and the procedures for extradition. It will also explain why international cooperation is important in victim protection, assistance and repatriation.

One of the primary aims of the United Nations Convention Against Transnational Organized Crime (UNTOC) was to promote international cooperation to combat transnational organised crime. The purpose of Article 2 of the UN Trafficking Protocol was to promote cooperation among State Parties in order to meet the objectives of the Protocol. Whilst the crime of trafficking in persons can be committed within the borders of a State, internal trafficking, a sizeable number of trafficking in persons cases are transnational.

International cooperation is required because trafficking in persons cases present complications and challenges due to the transnational nature of the crime. Often victims, witnesses and defendants can all, potentially, be from different States and located in different States. This can be further complicated by the fact that the offence may have taken place in another State. Traffickers may also have been arrested outside the jurisdiction and this could necessitate extradition proceedings, possibly following an international arrest warrant. International cooperation may also be needed to support financial investigations by identifying and seizing the profits of the criminality.

Whilst international cooperation can be challenging due to legal, cultural, political and language issues, legal rules and procedures to facilitate cooperation and the tools required to prosecute the traffickers exist. The UNTOC contains detailed provisions on both formal and informal cooperation in criminal matters. These are also applicable, *mutatis mutandis*, to the Trafficking Protocol, as follows:

- Extradition (art. 16);
- Transfer of sentenced persons (art. 17);
- Mutual legal assistance (art. 18);
- Joint investigations (art. 19);
- Cooperation in using special investigative techniques (art. 20);
- Transfer of criminal proceedings (art. 21);
- International cooperation for purposes of confiscation (art. 13-14);
- Law enforcement cooperation (art. 27).

Article 26 of the Law of the Republic of Azerbaijan on Trafficking in Persons “*International cooperation in trafficking in persons*” states:

*“Pursuant to the relevant interstate treaties to which it is a party, the Republic of Azerbaijan shall cooperate in the fight against trafficking in persons with foreign countries and their law enforcement agencies and with international organisations, which deal with fighting against trafficking in persons”.*

## 7.1 Jurisdiction

The international legal rules on jurisdiction in trafficking situations are set out in major international and regional treaties. Their objective is to eliminate jurisdictional safe havens of the traffickers by ensuring that all parts of the crime can be punished wherever they took place. Another concern is to ensure that coordination mechanisms are effective in cases where more than one State has grounds to assert jurisdiction.<sup>209</sup>

“Article 15 of the UNTOC *“Jurisdiction”* states that:

*“1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with articles 5, 6, 8 and 23 of this Convention when*

*(a) The offence is committed in the territory of that State Party; or*

*(b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.”*

Article 27 of the Law of the Republic of Azerbaijan on Trafficking in Persons *“Jurisdiction of the Republic of Azerbaijan on human trafficking”* states:

*“Should citizens of the Republic of Azerbaijan, foreigners or persons without citizenship commit offences of trafficking in persons or children, they shall be subject to criminal liability under the Criminal Code of the Republic of Azerbaijan regardless of where the offence was committed”.*

## 7.2 Procedural

Prosecutors and judges need to be cognisant of the benefits of international cooperation as well as the obstacles. Whilst international cooperation can expedite and improve the quality of investigations and prosecutions, a strong national focus hinders international investigations. The most common form of international cooperation, requesting mutual legal assistance (MLA), is usually done for a limited purpose rather than to build a genuinely international case.<sup>210</sup>

### *Evidentiary Value of Facts Gathered in the Process of International Operational Cooperation in Azerbaijan.*

The legal system of Azerbaijan envisages the possibility of admitting factual data gathered in the process of international operational cooperation (in response to requests for assistance), i.e. not received during the implementation of requests for legal assistance, as evidence in court. This may be done on the basis of the procedural regulation that documents obtained by the court or law enforcement agencies and raising no suspicions regarding their source and the method by which they were obtained (specifically, those received on the basis of a court ruling, if this is precisely what the law requires) can be used as evidence.

Information gathered as a result of a joint secret operation, electronic surveillance, controlled

<sup>209</sup> ASEAN Handbook on International Legal Cooperation in Trafficking in Persons 2009 p20.

<sup>210</sup> Jernow, A. 2009 *Human Trafficking, Prosecutors and Judges* ed. Friesendof, C. Strategies Against Human Trafficking: The Role of the Security Sector p347.

delivery, conducted at the request of Azerbaijani law enforcement agencies by law enforcement agencies of another country on the basis of an international treaty can also be used as evidence in Azerbaijan.

OECD 2013 *Mutual Legal Assistance and other forms of Cooperation between Law Enforcement Agencies* p12.

Bureaucratic challenges including delays, language problems and different legal systems can cause problems. Practitioners consider the need for MLA to be an obstacle in criminal cases and the traditional provisions for judicial collaboration, such as letters rogatory, have been found to be inadequate.<sup>211</sup> Prosecutors should consider using international platforms such as Interpol, Eurojust and SEPAG, as well as any agreements between Prosecutor General's offices of the CIS member States. These platforms can help with in expediting MLA, providing formal and informal advice and assistance, and assisting with trafficking investigations and victim protection.

Direct transmission of requests for mutual legal assistance (MLA), the authorisation of cross-border interception of communications, covert investigations and JITs have improved capacity for international cooperation. The United Nations Informal Expert Working Group on Mutual Legal Assistance Casework Best Practices noted that cooperation can be expedited through the use of alternatives to formal MLA requests, such as informal police channels, communication mechanisms or JITs with the capacity to directly transmit and satisfy informal requests for assistance.<sup>212</sup>

Prosecutors and judges can also utilise the GUAM legal framework for Operational Cooperation and for Provision and Receipt of Legal Assistance.

*The legal framework for operational cooperation between law enforcement agencies of GUAM member countries [...] and multilateral agreements within the GUAM framework.*

- Cooperation Agreement between the governments of GUAM member countries in the fight against terrorism, organised crime, drug trafficking, and other dangerous crimes dated 20 July 2002 (entered into force on 25 August 2004) and its protocol of 4 December 2008;
- Agreement on establishment of the GUAM Virtual Centre for the fight against terrorism, organised crime, drug trafficking, and other dangerous crimes, and the GUAM Inter-State Information Management System dated 4 July 2003 (entered into force on 8 October 2004);
- Agreement on mutual legal assistance and cooperation in customs matters between governments of GUAM member countries dated 4 July 2003 (entered into force for Azerbaijan and Ukraine on 06 July 2004).

The legal framework also includes bilateral intergovernmental and inter-agency treaties concluded between relevant bodies of GUAM members,

OECD 2013 *Mutual Legal Assistance and other forms of Cooperation between Law Enforcement Agencies* p7

<sup>211</sup> Ibid.

<sup>212</sup> Dandurand, Y. 2012 *International Cooperation* ed. Winterdyk, J. et al Human Trafficking Exploring the International Nature, Concerns and Complexities p220.

### 7.3 Mutual Legal Assistance

Trafficking in persons has a truly international dimension and investigations usually extend to other jurisdictions, requiring evidence for prosecutions to be obtained from abroad. The principal mechanism for obtaining or exchanging information between different jurisdictions is through MLA. MLA is requested through a letter of request for assistance in obtaining evidence specified in the letter for use in criminal proceedings or to support an investigation. MLA is a process States use to provide and obtain formal government-to-government assistance in criminal investigations and prosecutions. The exact type of MLA that States will provide to one another is subject to national law and international arrangements.<sup>213</sup>

Article 18 of the UNTOC “*Mutual legal assistance*” states:

*1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention as provided for in article 3 and shall reciprocally extend to one another similar assistance where the requesting State Party has reasonable grounds to suspect that the offence referred to in article 3, paragraph 1 (a) or (b), is transnational in nature, including that victims, witnesses, proceeds, instrumentalities or evidence of such offences are located in the requested State Party and that the offence involves an organized criminal group”.*

MLA is based upon bilateral and multilateral treaties, and relies on national legislation which either gives full effect to the relevant treaties or enables mutual legal assistance in the absence of a treaty. MLA can include the taking of evidence and statements, locating and identifying witnesses and suspects, searches, seizure of property, executing legal documents, identifying and tracing proceeds of crime, providing information, evidentiary items and expert evaluations, or transferring prisoners to provide evidence.<sup>214</sup>

### 7.4 Extradition

Extradition is the formal name given to the process whereby one State (the Requesting State) asks another State (the Requested State) to return an individual to face criminal charges or punishment in the Requesting State. The individual can be prosecuted or sentenced for an offence for which they have already been convicted, or carry out a sentence that has already been imposed. It is a formal and, most frequently, a treaty-based process, with treaty provisions varying from State to State and not always covering the same offence. States usually rely on multilateral or bilateral extradition treaties which, in more recent treaties, rely on the principle of dual criminality.<sup>215</sup> In the absence of a treaty the legal basis is the domestic law of the respective States.

<sup>213</sup> ASEAN Handbook on International Legal Cooperation in Trafficking in Persons 2009 p33.

<sup>214</sup> Dandurand, Y. 2012 *International Cooperation* ed. Winterdyk, J. et al Human Trafficking Exploring the International Nature, Concerns and Complexities p220.

<sup>215</sup> When the same conduct is criminalised in both the requesting and requested States and the penalties provided for it are above a defined threshold. In this way authorities do not constantly have to update treaties for the coverage of new offences.

Extradition is an important component of an effective criminal justice response to trafficking in persons.<sup>216</sup> The transnational nature of many trafficking in persons cases may mean that extradition is essential for a successful prosecution.

*Kodos v Prosecutor General's Office of the Republic of Lithuania: Country: UK  
Court: Queen's Bench Division: Sentence date: 28 April 2010.*

Purpose of exploitation: Sexual exploitation – Extradition Proceedings.

The Prosecutor General's Office sought the defendant for the purpose of prosecution in respect of a total 22 offences of people trafficking concerning eight women, earning from the prostitution of another person and engaging another person in prostitution in accordance with Article 147, 307 and 308 of the Criminal Code of the Republic of Lithuania.

Article 29 of the Law of the Republic of Azerbaijan on Combatting Trafficking in Persons "*Extradition of persons committing trafficking in persons crimes*", states:

*"Human traffickers or persons who participated in committing offenses related to trafficking in persons may be extradited to foreign countries for criminal prosecution, or execution of the sentence, in compliance with the legislation of the Republic of Azerbaijan and the international treaties to which the Republic of Azerbaijan is a party".*

## 7.5 Proceeds of Crime

The crime of trafficking in persons can often be relatively low risk and high profit.<sup>217</sup> Prosecutors and judges can increase these risks through the use of effective strategies when prosecuting those responsible for trafficking crimes and by identifying, seizing and confiscating the financial profits or proceeds of the trafficking crimes.

Specific international cooperation measures are necessary to enable States to seize and confiscate the assets used to commit crime and the proceeds gained from trafficking activities. Recovery of proceeds of crime across international borders is a form of mutual legal assistance. As such, the laws, principles, preconditions and procedures that apply to mutual legal assistance will also apply to recovery of proceeds of crime.<sup>218</sup>

Article 12 of the UNTOC "*Confiscation and seizure*" states:

*"1. State 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".*

<sup>216</sup> ASEAN 2009 *Handbook on International Legal Cooperation in Trafficking in Persons* p109.

<sup>217</sup> ASEAN 2009 *Handbook on International Legal Cooperation in Trafficking in Persons* p91.

<sup>218</sup> *Ibid.* p97.

Article 12 of the UNTOC also requires State parties to adopt measures to enable the identification, tracing, freezing and seizing of items for the purpose of eventual confiscation. Article 13 of the UNTOC sets forth procedures for international cooperation in confiscation matters and Article 14 addresses the final stage of the confiscation process, the disposal of confiscated assets.

In order to effectively carry out their legal responsibilities, prosecutors and judges need to know exactly what is covered by the terminology ‘proceeds of crime’. It generally refers to any property that is derived from criminal activity. The ‘instrumentalities’ of crime refers to property or equipment that is used in the commission of an offence.<sup>219</sup>

*‘Proceeds of crime’ could potentially include.*

- Profits from the services and exploitation of the victim.
- Costs paid by victims (e.g. agents’ fees for obtaining passports, visas or transportation).
- Vehicles used to transport victims.
- Premises such as factories, brothels or boats, where the exploitation took place.
- Profits from the ‘sale’ of a person from one trafficker to another.
- Value of unpaid salaries, which would otherwise have been paid to the person exploited.
- Bribes paid by government officials to facilitate trafficking.

ASEAN 2009 *Handbook on International Legal Cooperation in Trafficking in Persons* p91.

### 7.5.1 Money laundering

The international regime against money laundering is the result of a framework and international standards adopted in the context of various regional and international organisations. Article 7 of the UNTOC includes provisions against money laundering and offers some standards along which national laws and practices can be aligned. An extensive international regime exists to prevent money laundering and to facilitate the tracing, interception and confiscation of criminal assets and the proceeds of crime.<sup>220</sup>

### 7.6 Victim Protection

Article 24 of the UNTOC *Protection of Witnesses* states:

*“1. Each State party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them”.*

<sup>219</sup> ASEAN 2009 *Handbook on International Legal Cooperation in Trafficking in Persons* p91.

<sup>220</sup> Schreier, F. *Human Trafficking, Organised Crime & Intelligence* ed. Friesendorf, C. *Strategies Against Human Trafficking: The Role of the Security Sector* p221

During the course of criminal proceedings, victims of trafficking may move from one country to another for their own protection or because the State they are due to testify in cannot provide adequate protection. Prosecutors and judges should be aware of the potential threats to victims which can result in direct threats or intimidation, both physical and psychological, from those involved in the criminality. These threats can also be made against relatives or other persons close to the victim and may necessitate the victim being removed from the State in which the criminal proceeding are being undertaken or their relatives requiring protection in another State.

International cooperation can be required to provide protection to victims. Those responsible for the protection of victims will need to collaborate with the authorities in the State where the victim is being protected. Victims can also provide testimony from the State in which they are being protected if the domestic legislation of the States permits or if there is a bilateral agreement between the States.

## 7.7 Victim Assistance and Repatriation

Victim repatriation is a unique aspect of international cooperation with respect to trafficking in persons. Cooperation is vital for the effective protection of victims and for safe return to their home States. Therefore, international cooperation is required to enable safe repatriation and to permit a victim to provide testimony after repatriation.

Victims of trafficking can request to return and be repatriated to their State of origin or another State. Article 8 of the UN Trafficking Protocol and Article 16 of the CoE Convention both state that a State Party, of which the victim is a national or has the right to permanent residence, shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or reasonable delay.

To ensure that a victim is safely repatriated will require cooperation between State authorities. The State party returning the victim has to pay due regard to the safety of the victim and to “the status of any legal proceedings related to the fact that the person is a victim of trafficking”. The return should not jeopardise the rights of the victim to redress and to compensation and therefore to participate in the relevant court proceedings to the necessary extent.<sup>221</sup>

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<sup>221</sup> ICMPD 2006 *Anti-Trafficking Training Material for Judges and Prosecutors Background Reader in EU Member States and Accession and Candidate Countries* p55.

## Annex 1. International Legal Instruments

International Instrument	Purpose	Ratification/Accession
UN Convention against Transnational Organized Crime (2000)	To promote cooperation to prevent and combat transnational organized crime more effectively (Article 1)	2003
The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Woman and Children (2000)	(a) To prevent and combat trafficking in persons, paying particular attention to women and children: (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and (c) To promote cooperation among State Parties in order the meet those objectives. (Article 2)	2003
United Nations Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Organised Crime (2000)	To prevent and combat the smuggling of migrants, as well as promote cooperation amongst State Parties to that end, whilst protecting the rights of smuggled migrants. (Article 2)	2003
The Universal Declaration of Human Rights 1948.	No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms. (Article 4)	1995
The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979)	To take appropriate measures to suppress all forms of trafficking in women and exploitation of prostitution of women.	1995
UN Slavery Convention 1926	Defines slavery as “Slavery is a status or condition of a person over whom any or all of the powers of attaching to the right of ownership are exercised”. (Article 1)	1992
Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices Similar to Slavery (1956)	Describes ‘practices similar to slavery’ including debt bondage, and institutions and practices that discriminate against women.	1996
International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)	The convention sets a standard in terms of access to human rights for migrants. It seeks to establish minimum standards that the States parties should apply to migrant workers and members of their families, irrespective of their migration status.	1999
Cairo Declaration on Human Rights in Islam (1990)	(a) Human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty. (b) Colonialism of all types being one of the most evil forms of enslavement is totally prohibited. Peoples suffering from colonialism have the full right to freedom and self-determination.... Article 11	1990

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000)	States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol. (Article 1).	2002
UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (2002)	The primacy of human rights 1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.	
UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985)	1. Affirms the necessity of adopting national and international measures in order to secure the universal and effective recognition of, and respect for, the rights of victims of crime and of abuse of power.	
Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (2005)	1. The obligation to respect, ensure respect for and implement international human rights law and international humanitarian law as provided for under the respective bodies of law emanates from:  (a) Treaties to which a State is a party; (b) Customary international law; (c) The domestic law of each State.	

## Annex 2. ILO Conventions

Convention	Purpose	Ratification/Accession
ILO Convention No 29 on Forced Labour 1930 (in force 1 May 1932)	Defines forced labour (Article 2), requires States to criminalise it and contains list of exceptions. Requires each State to undertake to suppress the use of forced or compulsory labour in all its forms in the shortest time possible.	1992
ILO Convention No 105 Abolition of Forced Labour (1957)	Complementary to and builds upon Convention No. 29. To prohibit forced or compulsory labour in specific instances (Article 1).	2000
ILO Convention No 182 on Worst Forms of Child Labour (1999)	Prohibits for all children under 18 years of age, all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage.... And procuring or offering of all children for the purpose of prostitution (Article 3).	2004
ILO Committee of Experts on the Meaning of Forced Labour	Committee of Experts offered its views on the meaning of the elements of forced labour given in Article 2 Forced Labour Convention No. 29.	N/A
ILO Convention No 189 on Decent Work for Domestic Workers (2011)	Specific protection to domestic workers. It lays down basic rights and principles, and requires States to take a series of measures with a view to making decent work a reality for domestic workers.	Not ratified

### Annex 3. European Conventions

Instrument	Purpose	Ratification/Accession
Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (1950) as amended by Protocols No. 11 and No. 14.	<p>Article 4 – Prohibition of slavery and forced labour</p> <ol style="list-style-type: none"> <li>1. No one shall be held in slavery or servitude.</li> <li>2. No one shall be required to perform forced or compulsory labour.</li> <li>3. For the purpose of this article the term "forced or compulsory labour" shall not include:               <ol style="list-style-type: none"> <li>a. any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;</li> <li>b. any service of a military character or, in case of conscientious objectors in countries where they are recognised, service exacted instead of compulsory military service;</li> <li>c. any service exacted in case of an emergency or calamity threatening the life or well-being of the community;</li> <li>d. any work or service which forms part of normal civic obligations.</li> </ol> </li> </ol>	2002
The Council of Europe Convention on Action against Trafficking in Human Beings (2005)	<ol style="list-style-type: none"> <li>a. to prevent and combat trafficking in human beings, while guaranteeing gender equality</li> <li>b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;</li> <li>c. to promote international cooperation on action against trafficking in human beings. (Article 1).</li> </ol>	2010
The EU Convention on Cybercrime	An international treaty that seeks to harmonise national laws on cybercrime, improve national capabilities for investigating such crimes, and increase cooperation on investigations.	2010
European Convention on Mutual Assistance in Criminal Matters and First Additional Protocol (1959)	Contracting Parties undertake to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial	2003

	authorities of the requesting Party.	
European Convention on Extradition and Additional Protocols (entry into force 1960)	To establish extradition principles acceptable to all Members of the Council. It "provides for the extradition between Parties of persons wanted for criminal proceedings or for the carrying out of a sentence. The Convention does not apply to political or military offences and any Party may refuse to extradite its own citizens to a foreign country."	2002
European Convention on the Compensation of Victims of Violent Crimes (1983)	<p>1. When compensation is not fully available from other sources the State shall contribute to compensate:</p> <p>a. those who have sustained serious bodily injury or impairment of health directly attributable to an intentional crime of violence;</p> <p>b. the dependants of persons who have died as a result of such crime.</p> <p>2. Compensation shall be awarded in the above cases even if the offender cannot be prosecuted or punished.</p>	1983

## Annex 4. Republic of Azerbaijan Legislation on trafficking in persons

### ***Legislation on trafficking in persons includes:***

- Law on Combating Trafficking in Human Beings of 28 June 2005, as amended by Law No. 609-IVQD of 19 April 2013;
- Law on Social Services of 30 December 2011;
- Migration Code established by Law No. 713-IVQ of 2 July 2013, which replaced several other laws and contains provisions on the legal status of foreigners and stateless persons, immigration and labour migration;
- Law on the State Protection of Persons Participating in Criminal Proceedings of 11 December 1998;

### ***Secondary legislation on trafficking in persons includes:***

- Decision No. 203 of 9 November 2005 of the Cabinet of Ministers concerning the Rules on establishing, financing, operating and supervising special institutions for victims of trafficking in human beings;
- Decision No. 68 of 12 January 2006 of the Cabinet of Ministers concerning the Regulations on the Assistance Fund for victims of trafficking in human beings;
- Decision No. 62 of 6 March 2006 of the Cabinet of Ministers concerning the Rules on social rehabilitation of victims of trafficking in human beings;
- Decision No. 152 of 17 June 2006 of the Cabinet of Ministers on determining the allowances paid to victims of human trafficking during the reintegration period;
- Decision No. 21 of 1 February 2008 of the Cabinet of Ministers concerning the Rules on referring victims of human trafficking to the special police unit on combating trafficking in human beings;
- Decision No. 123 of 11 August 2009 of the Cabinet of Ministers concerning the Rules on the National Referral Mechanism for victims of trafficking in human beings;
- Decision No. 131 of 3 September 2009 of the Cabinet of Ministers concerning the Rules (indicators) for identification of victims of trafficking in human beings;
- Decision No. 180 of 19 November 2009 of the Cabinet of Ministers concerning the Rules on shelters for child victims of trafficking;
- Decision No. 81 of 20 May 2011 of the Cabinet of Ministers concerning the Programme on elimination of social problems leading to trafficking in human beings;
- Decision No. 252 of 10 October 2013 of the Cabinet of Ministers concerning the Rules on the repatriation of victims of trafficking in human beings;
- Charter on the hotline telephone for persons subjected to trafficking in human beings and presumed and potential victims of trafficking in human beings, approved on 12 October 2007 by Order No. 590 of the Ministry of Internal Affairs.

## Annex 5. Republic of Azerbaijan legislation and policy documents on victim assistance

- National Action Plan for Combating Trafficking in Human Beings for 2009-2013 (adopted on 6 February 2009);
- The Law on Combating Trafficking in Persons, adopted in June 2005 (adopted on 29 June 2005);
- Rules on National Referral Mechanisms for Victims of Trafficking, approved by the Decision No 123 of the Cabinet of Ministers of Azerbaijan, 11 August 2009;
- Rules on the Identification of Victims of Trafficking in Human Beings (Indicators), approved by the Decision No. 131 of the Cabinet of Ministers of Azerbaijan, 3 September 2009;
- Rules on Referring Victims of Trafficking to the Special Police Agency, approved by the Decision 21 of the Cabinet of Ministers of Azerbaijan, 1 February 2008;
- Rules on Establishing, Financing, Operating, and Supervision of Special Institutions for Victims of Human Trafficking, approved by the Decision No. 203 of the Cabinet of Ministers of Azerbaijan, 9 November 2005;
- Regulation on Social Rehabilitation of Victims of Trafficking in Human Beings, approved by the Decision No. 62 of the Cabinet of Ministers of Azerbaijan, 6 March 2006;
- Rules on shelters for children victims of trafficking in human beings approved by the Decision No. 180 of the Cabinet of Ministers of Azerbaijan, 19 November 2009;
- Regulation on Assistance Fund for Victims of Trafficking in Human Beings, approved by the Decision No. 68 of the Cabinet of Ministers of Azerbaijan, 12 January 2006;
- Rules on determining the allowance paid to victims of trafficking in human beings during the reintegration Period, approved by the Decision No. 152 of the Cabinet of Ministers of Azerbaijan, 17 June 2006.

## Annex 6. International Child Trafficking in Persons Instruments

Instrument	Purpose	Year of Ratification
The United Nations Convention of the Rights of the Child and optional protocols.	Grants all children and young people (aged 17 and under) a comprehensive set of rights.	1992
ILO Convention No 182 on Worst Forms of Child Labour (1999)	Prohibits for all children under 18 years of age, all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage.... And procuring or offering of all children for the purpose of prostitution (Article 3).	2004
Optional Protocol on the sale of children, child prostitution and child pornography.	States Parties shall prohibit the sale of children, child prostitution and child pornography as provided for by the present Protocol.	2002
Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse.	Consolidation of existing standards, assures coherence and equal protection of all children by establishing clear and common standards and definitions, in particular through harmonising criminal law and other relevant measures.	Not ratified
ILO Convention No. 138 on the minimum age for admission to employment: Application in law and practice.	The pursuit of “national policy designed to ensure the effective abolition of child labour and to raise progressively the minimum age for admission to employment or work”.	1992

## Annex 7. Basic Principles for the Protection of Victims

In addition to the overriding principle of 'do no harm' some basic principles for the ethical treatment of victims of trafficking have been developed.

*(a) Respect for and Protection of Human Rights*

Human trafficking is a serious human rights violation. All assistance and protection efforts should strive towards the restoration of the human rights of the victim of trafficking.

*(b) Informed Consent*

Assistance to a victim of trafficking should proceed on the basis of the victim's full and informed consent. To enable informed consent to be obtained it is important that all relevant actions, policies and procedures are explained. If staff are unable to communicate with the victim in a language that they understand all necessary efforts should be made to secure the assistance of an interpreter.

*(c) Non Discrimination*

Services to victims of trafficking should be provided without discrimination on the basis of gender, sexual orientation, age, disability, colour, social class, race, religion, language, political beliefs or any other status.

*(d) Confidentiality and Right to Privacy*

All information with regard to the victim must be treated with due regard for the victim's right to confidentiality and privacy. All organizations should ensure that all staff handle victim data responsibly, only collecting and sharing information on a victim following the principle of informed consent and on a 'needs to know' basis. It is fundamental that staff understand that by breaching confidentiality and the privacy of the victim their life and the life of others may be put at risk.

*(e) Self Determination and Participation*

In recognition of the right and need of victims to make their own informed choices and decisions, they should be encouraged to participate as much as possible in the decision making process as it affects them.

*(f) Individualized treatment and care*

While recognizing that victims of trafficking share a number of common experiences, it should also be acknowledged that all are individuals. This individuality of the person in respect to their cultural, gender and age differences should be recognized as well as the difference of their experience during and after being trafficked. As far as possible care offered should be personalized to this individual's needs.

*(g) Do not re-traumatise.*

Effort should be made not to re-traumatize a victim of trafficking by asking questions intended to provoke an emotional response.

*IOM 2010 Counter-trafficking Training modules: Human trafficking is a modern day form of slavery p38.*

## Annex 8. Specialist Investigative Techniques

### *1. Surveillance*

The objective of surveillance is to obtain private information about a person either by following that person or by obtaining information from their place of residence.

### *2. Undercover Law Enforcement*

The objective is to use an undercover police officer who poses as a criminal for the purposes of obtaining intelligence and information about criminal offending.

### *3. Covert Human Intelligence Source*

A person who, under the direction of a specialist police investigator, covertly establishes or maintains a relationship with another person for the purpose of using that relationship to either obtain intelligence or information or to access intelligence or information about criminal offending.

### *4. Test purchase*

A law enforcement officer obtains intelligence or information by presenting themselves as a potential buyer of services or employee. Their objective is to ascertain whether the situation is one where victims are being exploited.

### *5. Controlled delivery*

When in receipt of information that a human trafficking operation is to involve the movement of victims, instead of police investigators intercepting the operation it is allowed to continue subject to safeguards. The victims and perpetrators are kept under surveillance and an on-going risk assessment is undertaken. The objective is to obtain intelligence and information about all those involved in the trafficking operation from those who recruit to those responsible for the transportation and exploitation.

### *6. Telephone intercept/use communications data*

The lawful interception of communications to obtain data that can provide intelligence or information that can be used in an investigation.

## Annex 9. Financial Remedies

### *1. Money Laundering*

The process by which the proceeds of crime are converted into assets which appear to have a legitimate origin, so that they can be retained permanently or recycled into other criminal enterprises.

### *2. Civil Seizure*

The seizure of cash where there is a reasonable cause to believe it is from a criminal activity or to be used in crime. The cash seized can be kept if a subsequent criminal case fails.

### *3. Confiscation*

The removal of assets from a criminal following conviction for a criminal offence.

### *4. Forfeiture*

The seizure of items used in the commission of a crime (for example land, vehicles, ships and airplanes). These can then be sold and the assets raised could potentially benefit victims.

### *5. Restrain/Freeze Assets*

An application to restrain or freeze the assets of an alleged trafficker that prohibits dealings within any “realisable” property.

## Annex 10. OSCE/ODIHR Recommendations for improving implementation of the right to compensation<sup>222</sup>

### *Law enforcement, lawyers, prosecutors and judiciary*

- Strengthen the legal obligations on police and prosecutors to provide information about the right to compensation to trafficked persons in an appropriate language and medium.
- Provide training for all police, judges and prosecutors on trafficked persons rights and their own role in realising those rights (e.g. drafting claims for damages, gathering evidence regarding damages, ensuring a claim is dealt with adequately in proceedings).
- Prepare practical guidance and tools for officials to use e.g. in the form of standard information sheets or questionnaires to ease the implementation of these rights.
- Integrate guidance for legal and other actors to ensure consistent application within each profession and across professions. Avoid issuing too many guidance documents with unclear legal status. One core document entrenched with enforcement powers is useful and focuses the minds of officials and victims alike.
- Consider the merits of a specialised team of prosecutors focusing on trafficking cases.
- Within each prosecutor's office establish a post specifically responsible for victim/witness support (e.g. victim-witness co-ordinator in the US).
- Develop ways of sharing information about legal developments and case law e.g. in relation to damages calculations and within and across the professions (e.g. newsletters, regular meetings of judges or bar associations).
- In order to encourage crime reporting and redress for trafficked persons ensure that individuals with irregular status who come forward to the police or prosecution service are not automatically referred to immigration services.
- Lawyers should network more with NGOs and trade unions assisting trafficked persons to work together to find creative solutions to seeking compensation.
- Lawyers should be trained to use civil and labour law creatively when assisting trafficked persons to ensure they maximize their claims e.g. train in jurisprudence and practice from other legal systems, borrow legal argumentation, use creatively sourced evidence. Professional communities of lawyers (e.g. bar associations) should be pro-active in developing their knowledge of the law as it relates to the rights of victims of trafficking and compensation both in countries of origin and destination.
- Lawyers should pool resources and share experiences on trafficking cases, and should offer their help free of charge where a trafficked person cannot finance the costs.

*OSCE/ODIHR 2008 Compensation for Trafficked and Exploited Persons in the OSCE Region p166.*

<sup>222</sup> This is only a partial list of the recommendations. The full list is available from OSCE/ODIHR 2008 Compensation for Trafficked and Exploited Persons in the OSCE Region pp165 - 171.

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