

The Vienna Forum to fight Human Trafficking  
13-15 February 2008, Austria Center Vienna  
Background Paper

**023 Workshop: The Effectiveness of  
Legal Frameworks and Anti-  
Trafficking Legislation**

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**THE VIENNA FORUM TO FIGHT HUMAN TRAFFICKING  
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**BACKGROUND PAPER**

**WORKSHOP 023  
LEGAL FRAMEWORKS AND ANTI-TRAFFICKING LEGISLATION**

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## **BACKGROUND**

Human trafficking is complex phenomenon which requires States to legislatively arm themselves to confront it as a serious crime, committed by criminals and perpetrated against victims. Several United Nations Conventions and Instruments – with the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereinafter the TIP Protocol), supplementing the United Nations Convention against Transnational Organized Crime (hereinafter the TOC Convention) at the fore – require the implementation of laws which can properly respond to trafficking, in as nuanced and effective a way as the crime is complex and injurious.

The successful prosecution of traffickers and compensation of victims can only be brought about by laws and regulations which have effectively criminalized all elements of trafficking in persons in accordance with Article 5 of the TIP Protocol. The intricate interplay of elements requires that laws be broad enough to cover the varied ways in which people are being exploited, while simultaneously being specific enough to address the often convoluted process of trafficking.

Victims must be efficiently identified as such and recognized in a way that grants them the full range of protection, assistance and support to which they are entitled. Their access to rights must not be hampered by immigration laws which have not been harmonized in accordance with international principles of protection, or by their inappropriate punishment for crimes they committed as a result of having been trafficked. Victim recovery is undermined where victims do not have access to information, mental and physical health services, legal aid, compensation and mechanisms of safe repatriation to their country of nationality or residence. Further to this, the criminal justice system is not able to perform to its full capacity where victim-witnesses are not empowered to testify against their traffickers through inadequate support to do so. Beyond this, these responses must be coordinated among and between state authorities and civil society actors to ensure that responses are holistic.

The TIP Protocol creates mandatory minimum standards upon which States can build their own response to the specific challenges presented by their domestic contexts. It also offers guidance for strengthening and harmonizing legislation. In achieving a comprehensive response, the legislative process of implementing the TIP Protocol must be guided by a range of considerations; In affording victims the rights to which they are entitled, are they best served by the strengthening of existing criminal law or the passage of specific and comprehensive anti-trafficking legislation? Are interventions of governments and other service providers most facilitated by legislative or administrative regulations? What is the interplay between laws and regulations, and do laws concerning labour, health, and immigration facilitate or complicate the fulfilment of obligations States have assumed by becoming parties to the TIP Protocol?

In addition to these considerations, measures to implement the TIP Protocol into a domestic setting should aim to achieve the full potential of legislation to effect attitudinal change. Do state laws, regulations and administrative instructions deter traffickers and protect victims? Do laws against trafficking in persons instil in potential traffickers a real fear of retribution? Do laws mobilize civil society in the provision of

assistance and support to victims? Do laws empower the State to meaningfully play its role in combating transnational organised crime by practically enabling international cooperation against it?

This background paper is not intended to be an exhaustive list of all the challenges that States encounter in implementing the TIP Protocol. Rather, it seeks to raise some of the issues and complexities with which States must grapple in combating trafficking in their domestic contexts. By offering examples from different countries to showcase how different legal systems have mounted their legislative response against human trafficking, this paper seeks not to prescribe solutions, but rather to describe challenges. In raising points of discussion on these intersecting legislative challenges, it is hoped that awareness will be raised and understanding will be deepened among policy decision makers and legislators, concerning the need for comprehensive legislative responses to complicated human trafficking issues.

## **I. CRIMINALIZATION OF ALL FORMS OF TRAFFICKING**

### **Defining trafficking in persons in accordance with Article 3 of the TIP Protocol**

When a country is a party to the TOC Convention and the TIP Protocol, it must bring its definition of trafficking in persons in its national Criminal Code in line with the TIP Protocol; the precise wording of that definition may differ from that contained in the TIP Protocol, but the conduct of trafficking must be criminalised.<sup>1</sup>

Article 5 of the TIP Protocol requires States parties to criminalize trafficking in persons as defined in Article 3 of the TIP Protocol. In addition to the criminalization of the trafficking crime, the TIP Protocol requires criminalization also of:

- Attempt to commit the crime of trafficking
- Participation as an accomplice
- Organizing or directing others to commit trafficking

On the basis of the TIP Protocol definition, trafficking in persons has three constituent elements, any combination of which (ie any conduct that combines any listed action and means and is carried out for any of the listed purposes) should be criminalized as trafficking.

<b>ACT (what is done)</b>		<b>MEANS (how it is done)</b>		<b>PURPOSE (why it is done)</b>	
Recruitment		Threat or use of force		Exploitation, including	
Transport		Coercion		Prostitution of others	
Transfer	+	Abduction	+	Sexual exploitation	=
Harbouring		Fraud		Forced labour	<b>TRAFFICKING</b>
Receipt		Deception		Slavery or similar practices	
		Abuse of power or vulnerability		Removal of organs	
		Giving payments or benefits		...other types of exploitation	

### **Act**

The possible acts (recruitment, transportation, transfer, harbouring and receipt) are not criminal acts themselves. Their illegality stems from two additional elements: the use of any of the means to indicate that the act was committed without the consent or through the vitiated consent of the person concerned and also the goal of the conduct which must be committed for exploitative purposes. There are several elements in this, which may pose complications when the incorporation of this definition into domestic law is being considered, particularly in the absence of formal definitions of all the terms of the TIP Protocol.

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<sup>1</sup> See Article 5 of the TIP Protocol.

## Discussion

- *Are prosecutors hampered by the fact that there are several elements contained in the TIP Protocol definition?*
- *Could the absence of definitions lead to legal challenges by defendants?*
- *Are there actions committed by parties that facilitate the crime of trafficking but fall short of recruitment, transport, transfer, harbouring or receipt of a person?*

## **Means**

The inclusion of fraud, deception and the abuse of power or of a position of vulnerability recognises that trafficking can occur without the use of any overt (physical) force.

The 'abuse of a power or of a position of vulnerability' contained in Article 3 of the TIP Protocol *"is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved."*<sup>2</sup>

This is to acknowledge that many trafficked people are under the influence of someone to whom they are vulnerable to; such as a person holding a position of official authority or a person who is influential to them such as a parent or spouse.<sup>3</sup>

## ***The issue of Consent***

Article 3(b) of the TIP Protocol raises the issue of consent.

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

It is logically and legally impossible to consent to being exploited where consent has been obtained through improper means, or in the case of children<sup>4</sup>, where their particular status as vulnerable persons makes it impossible for them to consent in the first place. Real consent is only possible and legally recognisable, when all the relevant facts are known and a person is free to consent or not. Moreover, one cannot legally consent to forced labour, slavery or practices similar to slavery or servitude.

Consent of the victim can be a defence in domestic law, but as soon as any of the means of trafficking are established, consent becomes irrelevant and consent-based defences cannot be raised. Trafficking occurs if consent is nullified or vitiated by the application of any improper means by the trafficker. In addition, it may be argued that *consent of the victim at one stage of the process cannot be taken as consent at all stages of the process* and without consent at every stage of the process, trafficking has taken place. This means that even if a person consented to work abroad or to enter the country illegally, but did not consent to the exploitation, the offence has been committed.

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<sup>2</sup> See A/55/383/Add.1, paragraphs 63 – 68 concerning Article 3 of the TIP Protocol.

<sup>3</sup> There are a range of positions of vulnerability which have been adopted into national legislation, including illegal or uncertain immigration or residency status, minority status, illness, pregnancy, physical or mental disability. In other countries, courts are able to define and apply the term to the facts on a case by case basis.

<sup>4</sup> Article 3(c) of the Trafficking in Persons Protocol makes the consent of a child irrelevant.

Another legal question which will arise is whether under national law, the subject had the capacity to consent to recruitment or subsequent treatment. The capacity to consent may be further restricted under the national laws of a particular State.

### Discussion

- *If there is any doubt about the issue of consent in national domestic law, how should legislation be drafted or amended? Are the following suggestions adequate?*
  - *The consent of the trafficked person to the (intended) exploitation shall be irrelevant if any of the means is listed. Or*
  - *It is not a defence to the offence of trafficking in persons that the trafficked person consented to the (intended) exploitation, or*
  - *It is not a defence that the trafficked person consented to the activity that forms the subject matter of the charge*
- *Should means be required as an element to establish the offence or should 'means' be considered an aggravating circumstance?*
- *Should national law limit the capacity to consent of vulnerable parties other than children?*
- *Is the issue of consent clear? Can it lead to absolving a trafficker from responsibility where he or she successfully convinced a vulnerable person to be trafficked? Can one consent to being trafficked?*
- *Is the term 'abuse of a position of vulnerability' adequately understood? How is the existence or absence of 'no real and acceptable alternative' to be ascertained?*
  - *How to prove that the abuse was such that the person believed that he or she had no reasonable alternative?*
- *What is the role of the international community (including civil society groups) to convince States on the issue of consent?*

### **Purpose of exploitation**

According to the TIP Protocol, exploitation covers the forms of exploitation that shall be included "at a minimum." This means that the list provided in Article 3 is non-exhaustive. Individual States may include other forms of exploitation in their domestic criminal law, depending on the national experiences with different forms of trafficking. Additional forms of exploitation should be clearly defined.

### **"Exploitation of the prostitution of others or other forms of sexual exploitation"**

'Exploitation of prostitution of others' and 'sexual exploitation' are not defined in the TIP Protocol or elsewhere in international law. They were intentionally left undefined so as to allow all States to ratify the TIP Protocol, irrespective of their domestic laws relating to the legality or illegality of prostitution.<sup>5</sup>

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<sup>5</sup> A/55/383/Add.1, para 64.

This can pose problems when translating the TIP Protocol's definition into criminal domestic law. It should be noted here though that forms of sexual exploitation other than in the context of trafficking in persons are not covered by the TIP Protocol.<sup>6</sup>

### Discussion

*The TIP Protocol criminalizes trafficking into exploitation, but not the different forms of exploitation.*

- *Should exploiters be also prosecuted under national law?*

*Article 19 of the European Convention criminalizes 'the use of services which are the object of exploitation' where the user has knowledge that the person is a victim of trafficking in persons.*

- *Should legislation criminalize the use of such services?*
  - *If so, how should 'knowledge' be established?*
- *In what other ways can legislation address demand?*

### **"Forced labour or services"**

#### ***Labour trafficking: which practices of exploitative labour are included in the definition of trafficking?***

The TIP Protocol definition of exploitation includes all forms of forced labour and slavery-like practices and by this broadens the criminalization of these offences. This poses important challenges for national governments and parliaments. While the vast majority of countries have ratified the major international treaties on slavery and forced labour, many have not provided for the specific offences of forced labour, slavery, slavery-like practices and servitude in their criminal laws or failed to provide for appropriate penalties.

The term 'forced labour' is not defined in the TIP Protocol, but there are several relevant international instruments.<sup>7</sup> According to ILO Convention No. 29 Concerning Forced Labour (1930) and No. 105 on the Abolition of Forced Labour (1957), forced labour is defined as:

"All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily."

According to the ILO Guidelines on Human Trafficking and Forced Labour Exploitation (2005) legislatures and law enforcement have to take into account that the seemingly 'voluntary offer' of a worker / victim may have been manipulated or was not based on an **informed decision**.

The ILO Guidelines identify major elements that can indicate a forced labour situation:

- (threat with) physical or sexual violence

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<sup>6</sup> The issue of prostitution and related matters are outside the scope of trafficking in persons and is specifically reserved for the laws and policies of individual States parties (see interpretative notes A/55/383/Add.1, para 64.).

<sup>7</sup> For a comprehensive list, see Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p.268, fn 14, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>



- Restriction of movement and / or confinement to the workplace or to a limited area
- Debt bondage / bonded labour; withholding wages or refusal of payment
- Retention of passport and identity papers so that the worker cannot leave or prove his/her identity and status
- Threat of denunciation to the authorities

The ILO Global Report notes that a forced labour situation is determined according to the nature of the relationship between a person and an 'employer' and not by the type of activity performed. The legality or illegality of the activity under national law is irrelevant to its determination as forced labour.

### Child labour vs Child Trafficking [Forms of child exploitation]

The TIP Protocol defines trafficking in children as including only the act and the exploitative purpose (i.e., there is no need to prove any of the means was used).

Article 2 of the Optional Protocol to the Convention on the Right of the Child on the sale of children, child prostitution and child pornography<sup>8</sup> offers the following definitions;

- (a) Sale of children means any act or transaction whereby a child is transferred by any person or group of persons to another for remuneration or any other consideration
- (b) Child prostitution means the use of a child in sexual activities for remuneration or any other form of consideration;
- (c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

Article 2(b) of the 1994 Inter-American Convention on International Traffic in Minors defines the 'international traffic in minors' as:

"the abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means."<sup>9</sup>

Article 3 of the ILO Convention No. 182 on the Worst Forms of Child Labour<sup>10</sup> provides a list of the worst forms of child labour, including, for example,

"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." (subsection (d))

### Discussion

- *Where State legislation does not provide for the specific offence of child labour;*

<sup>8</sup> Entered into force 18 January 2002, available at <http://www2.ohchr.org/english/law/crc-sale.htm>

<sup>9</sup> Article 2(b) Inter-American Convention on International Traffic in Minors, adopted March 18, 1994 in Mexico, available at <http://www.oas.org/juridico/English/treaties/b-57.html>

<sup>10</sup> Article 3, ILO Convention No. 182 on the Worst Forms of Child Labour Convention, 1999, available at <http://www.ilocarib.org.tt/childlabour/c182.htm>

- *What are the implications with respect to the rights of children and the special protections to which they are entitled?*
- *What are the implications with respect to applicable penalties?*
- *Which forms of child labour can be considered a form of exploitation which fall under the definition of trafficking?*
- *Can forms of exploitation be expanded where the means are not established?*

### **“Slavery or practices similar to slavery and servitude”**

#### ***How does the definition of contemporary or modern-day slavery differ from slavery in the traditional sense?***<sup>11</sup>

The TIP Protocol evolved from earlier instruments against slavery.<sup>12</sup> Reconciling earlier definitions of slavery with modern-definitions of slavery and the TIP Protocol is aided by Article 14(1) of the TIP Protocol,<sup>13</sup> which notes the existence of other international instruments in interpreting the TIP Protocol. Concepts such as forced labour, slavery and practices similar to slavery are elaborated in a number of existing treaties and conventions, which, where applicable to particular States, should provide interpretative guidance.

#### Discussion

Article 1(1) of the 1926 Slavery Convention defines slavery as:

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

- *Given that definitions of slavery attach the concept to rights of ownership which does not exist anymore, how is slavery to be defined?*
  - *Should ‘property’ be substituted for ‘the right of ownership’*
  - *Should it be clarified that slavery can occur regardless of whether the victim received remuneration?*
- *Should definitions attach to ‘exercise of control’ rather than ownership?*
  - *Should examples be given of this status and condition? For example, ‘substantive control over the life of the victim or severe abrogation of freedom’?*

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<sup>11</sup> For a complete list of instruments concerning slavery, see Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, pp.261-163.

<sup>12</sup> Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p. 256. For a complete list of instruments relating to slavery, see pp.261-163, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

<sup>13</sup> “Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

## **Other (optional) forms of exploitation**

The forms of exploitation explicitly contained in the TIP Protocol are preceded by the words "at a minimum". The intention of the drafters of the TIP Protocol was for states to address forms of exploitation which may be relevant in their contexts but which were not included in the TIP Protocol or anticipated by its drafters. In determining and defining other forms of exploitation, the key questions to be asked are:

- *What are the prevalent forms of exploitation in your domestic context?*
- *Should domestic legislation be specific about these types of exploitation or should the law be left general so as to include new forms of exploitation?*

### ***Child sex tourism***

Thousands of tourists and businessmen who travel internationally engage in sex, including with children, or make pornographic material. In general, sex tours are arranged informally among friends or colleagues; however, there have been cases of travel agents being prosecuted for supplying and arranging sex tours.

In response to the abuses committed by foreigners, many States have resorted to an extraterritorial jurisdiction over offences related to the sexual exploitation of children by their nationals in other countries.

### ***Trafficking for the purpose of production of pornography***

Women and children are trafficked for the purpose of producing pornography. This situation is not explicitly addressed by the TIP Protocol, but is addressed with respect to children Article 2(c) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography which defines child pornography as "any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primary sexual purposes."<sup>14</sup>

#### Discussion

- *Is trafficking for this purpose entailed within sexual exploitation?*
- *Does domestic legislation criminalize this activity?*
- *Is 'pornography' defined broadly enough to protect victims who are trafficked for the purpose of producing it?*

### ***Trafficking for the purpose of forced marriage (and marriage for the purpose of trafficking)***

There are cases of women and young girls being trafficked internally or transnationally for the purpose of marriage. Marriages which can comprise an exploitative purpose of trafficking include early marriage, forced marriage, arranged marriage, temporary marriages, marriage by catalogue (the 'mail order bride' phenomenon), and marriage

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<sup>14</sup> Entered into force 18 January 2002, available at <http://www2.ohchr.org/english/law/crc-sale.htm>

for the purpose of child bearing.<sup>15</sup>

Alternatively, marriages are used to facilitate the trafficking in persons (for instance, to acquire travel documentation) or to conceal the crime of trafficking in persons (for instance, where victims are forced to marry their trafficker.)

Often exploitation amounts to 'servile forms of marriage', defined by the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and the Institutions and Practices Similar to Slavery, as: "Any institution or practice whereby:

- 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
- 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
- a woman on the death of her husband is liable to be inherited by another person."<sup>16</sup>

The 'mail order bride' industry has been linked to trafficking in persons with international 'matchmaking' organizations operating as a front for the recruitment of trafficking victims who are offered as 'brides' but sold privately into sexual exploitation, forced marriage (sometimes entailing forced prostitution), or held in domestic slavery. The industry does not screen its male customers and there is no formal means of ascertaining whether male clients are already married, and whether they have a criminal record.

#### Discussion

- *Which forms of forced marriage would fall under sexual exploitation?*
- *How can legislation regarding marriage be amended to avoid misuse and manipulation of marriage by traffickers?*
- *How should domestic laws pertaining to marriage be amended so as to grant full rights to victims of trafficking and avoid the impunity of traffickers?*
- *How can legislation reconcile the need to criminalize 'trafficking in persons for the purpose of forced marriage' with legitimate cultural rights and practices which are not in conflict with international law?*
- *What form of trafficking for the purpose of marriage should be criminalized? What is the line between trafficking for the purpose of marriage and marriages of convenience? Are all forced marriages trafficking?*
- *When marriage is used to traffick a women for other exploitative purposes, do those other purposes cover the offence?*

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<sup>15</sup> As with other forms of trafficking, there may be consent to the initial marriage, but that consent is rendered meaningless by the use of means established by Article 3 of the Protocol.

<sup>16</sup> E/CN.4/Sub.2/2003/31.

## ***Illegal adoption***

References to slavery and similar practices may include illegal adoption in some circumstances.<sup>17</sup> Illegal adoption can include purposes of exploitation (such as the removal of organs for ritual purpose, the use of a person to obtain state benefits).

Article 1(1) of the 1926 Slavery Convention prohibits the “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.”

## ***Forced Pregnancy***

Pregnant women are sometime trafficked for the purpose of removing their babies after their birth, or trafficked women are impregnated for this purpose.

### Discussion

- *How is this situation addressed by the TIP Protocol?*
- *Does legislation address this situation?*
- *Does legislation adequately recognize the victimization of both the mother and the child in this situation?*
- *At what point does legislation acknowledge the unborn child as a victim?*

## ***Removal of Organs***

Trafficking in persons for the purpose of removal of organs is addressed by the TIP Protocol. The inclusion of this form of exploitation into the TIP Protocol is intended to cover those situations where a person is exploited for the purposes of a trafficker obtaining profit in the ‘organ market’, and situations where a person is trafficked for the purpose of the removal of their organs and/or body parts for witchcraft and traditional medicine.

### Discussion

The trafficking of organs alone is not addressed by the TIP Protocol, given that the removal of organs does not always entail coercive elements; to constitute the crime of trafficking in person for organ removal, the actual person has to be transported for the purpose of removing their organs.

- *How to make a clear distinction between trafficking in persons for the purpose of organ removal and trafficking in organs?*
- *Is extreme poverty a sufficient position of vulnerability to vitiate consent?*
- *How can consent be ascertained in border-line situations (e.g. the victim received some payment but not the one promised)?*

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<sup>17</sup> A/55/383/Add.1, para 66.

## **II. IDENTIFICATION AND RECOGNITION OF TRAFFICKING VICTIMS**

### **Defining, Identifying and Recognizing Victims of Trafficking in Persons**

A key feature of essential anti-trafficking legislation is the recognition of trafficked persons as victims of crime who are entitled to basic human rights. Where victims of trafficking cannot easily establish their status as such, they may experience difficulties in accessing services that are available to them. Beyond this, victims who are provided with the appropriate care are more likely to testify against traffickers.

States parties should therefore consider developing methods to confirm the 'victim status' of individuals and their resulting eligibility for various services including temporary residence permits, health services, shelter and protection.

Victims' rights should not be compromised by state authorities in charge of law enforcement; the interests of investigation should not justify coercing victims or otherwise vitiating their consent to cooperate with law enforcement. Therefore, assistance to victims and their impunity from punishment for related offences should not be conditional on their cooperation.

In order for victims to be recognised as such, there must be some consensus as to how a 'victim of trafficking in persons' is defined.

#### ***The Legal Definition of 'victims of trafficking in persons'***

In order for a person to be afforded the appropriate treatment they are entitled to, a person should be considered as a victim of trafficking in persons and treated as such where they have suffered harm as a result of the crime defined by Article 3. However, although the TIP Protocol recognizes trafficked persons as victims of crime, it does not define a victim of trafficking. The IOM Glossary on Migration defines a victim of human trafficking as "An individual who is a victim of the crime of trafficking"<sup>18</sup>, providing little guidance on the point at which a person can be considered to be a victim entitled to full and appropriate range of assistance and support.

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power defines "Victim of Crime" as:

"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."

Under this Declaration, the person is to be considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.

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<sup>18</sup> International Organization of Migration (IOM), Glossary on Migration, 2004, p.69 available at <http://www.old.iom.int/DOCUMENTS/PUBLICATION/EN/Glossary.pdf>

The European Council Framework Decision of March 15, 2001 on the Standing of Victims in Criminal Proceedings defines a victim as:

“A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.”

The European Convention on Action Against Trafficking in Human Beings, May 16, 2005, CETS No. 197, provides that:

**“Victim shall mean any natural person who is subject to trafficking in human beings.”**

Following on from this reasoning, one possible definition of a ‘victim of trafficking in persons’ is “a person who has suffered physical, mental or economic harm from the crime of trafficking in persons, as defined by Article 3 of the Trafficking Protocol.” This should be so irrespective of whether or not there is a strong suspicion against an alleged trafficker or, or official recognition of victim status; so as not to deny victims from receiving the full range of rights of assistance and protection available to them as victims. Where victim assistance and support measures to be withheld pending the verification of a the perpetrator as a trafficker or the victim as an officially recognised victim, further harm could result to them amounting to secondary victimization and ultimately leave them vulnerable again to being re trafficked.

Therefore, specifically on the basis of the definition of trafficking in persons provided by Article 3 of the TIP Protocol, a victim is anyone who is subjected to a combination of elements: acts, means and purpose established by Article 3(a) of the TIP Protocol. However, where the person who has suffered harm is a child, they are to be considered as victims regardless of whether ‘means’ have been established.<sup>19</sup> However, where a definition of a victim of trafficking is linked to the offence, questions are raised as to the level of proof needed to ascertain that an offence has indeed been committed.

### ***Recognition of Victims of Trafficking***

Article 10 of the European Convention on Action Against Trafficking in Human Beings imposes various obligations on Member States with regard to victim identification:

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.

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<sup>19</sup> For further discussion on means, see p.4 above.

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. 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.

In cases where steps are taken to provide assistance to victims, legislators may wish to consider establishing a process whereby victims or others acting on their behalf can seek certification of their status as victims. Generally, these might involve any or all of the following:

- Allowing courts or tribunals that convict traffickers or deal with trafficking in civil or other litigation to certify as such any victims that are identified during the proceedings, whether or not they actually participate in those proceedings.
- Allowing a judicial or administrative determination to be made based on the application of law enforcement, border control or other officials who encounter victims in the course of investigations or prosecutions.
- Allowing a judicial or administrative determination to be made based on the application of the alleged victim personally or some representative, such as a representative of a non-governmental organization.

However, these types of more “formal” measures may be needed when deciding upon the immigration status of the victim, but when victims are first rescued there should be an operational mechanism that allows quick identification and referral to assistance.

Example: The Certification process in the United States of America

- The United States Department of Health and Human Services manages a victim certification process whereby victims of trafficking in persons who are not citizens of the United States are eligible for the necessary documentation to be able to receive special visas and certain benefits and services under any federal or state activity to the same extent as a refugee.



Child victims of trafficking do not need to be certified in order to receive services and benefits; they will be issued with a letter stating that they are a victim of a severe form trafficking and are therefore eligible for benefits.<sup>20</sup>

### Discussion

The following suggestions are offered for victim recognition.

- (1) A victim shall mean a natural person in relation to whom there is the slightest indication/suspicion that that person might be a victim of trafficking in persons as defined by Article 3 of the TIP Protocol;
- (2) A victim would be recognised as "alleged" victim until there is sufficient evidence that the offence was committed;
- (3) Identification of victims of trafficking shall take place at the earliest stage possible based on criteria approved by competent authorities of the State;
- (4) Identification of victims of trafficking shall be performed by competent authorities, possibly in cooperation with NGOs.

Discuss the above suggestion in light of the following considerations:

- *Should the term "victim" be defined? If so, how?*
- *What is the weight of evidence required to establish a person as a victim? For instance, should the test be 'slightest indication' or 'suspicion' or 'some basis'?*
- *Should a clause be added stating that in cases of doubt, the person will be considered a victim?*
- *Should a list of relevant circumstantial evidence be compiled?*
  - *What should the list include as relevant pieces of circumstantial evidence?*
  - *Who should that list be distributed to? (for example, NGOs, law enforcers, immigration officials, hospital staff, courts and tribunals)?*
  - *Should circumstantial evidence be anchored in law, regulations or administrative procedures?*
- *Should criteria for identification be established in law or in guidelines?*
- *Who are 'competent authorities' to identify victims? NGOs? States? Law enforcers? Service providers?*
  - *What are the advantages and disadvantages of various 'competent authorities'?*
- *Which benefits should be linked to the recognition of this status in line with international law?*

### **Principle of non-punishment of a victim of trafficking in persons**

In order for a trafficked person to be meaningfully recognized as a victim and enjoy the protections this status entails, the principle of non-punishment must be applied.<sup>21</sup>

This means that victims of trafficking should be immune from liability every time they commit an illegal act as long as those acts are related to their trafficking, as the nature

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<sup>20</sup> *Source:* United States Department of Health and Human Services, Campaign to Rescue and Restore Victims of Human Trafficking, available at [www.acf.hhs.gov/trafficking/about/cert\\_victims.html](http://www.acf.hhs.gov/trafficking/about/cert_victims.html)

<sup>21</sup> The term non-punishment is used rather than non-criminalization so as to enable its application in legal systems without prosecutorial discretion.

of this offence may entail commission of offences by the victims. For instance, a trafficked persons should not be prosecuted or punished for trafficked related offences such as holding false passports or working without authorization even if they agreed to do these things. Similarly, regardless of whether or not prostitution is legal, States should not prosecute persons for being trafficked into sexual exploitation, even if they previously agreed to work in the sex industry.

Neither the TOC Convention nor the TIP Protocol explicitly obligate States parties to refrain from criminalizing victims of trafficking in persons. However, there are various non-binding guidelines, declarations and resolutions which enjoin States to prevent trafficked persons from being prosecuted. Such guidelines are consistent with the treatment of trafficked persons as victims of crime, whether or not perpetrators of the crime are identified, arrested, charged, prosecuted or convicted.

#### Guidelines:

The United Nations High Commissioner for Human Rights Recommended Principles and Guidelines offer considerations on non-punishment of trafficked persons. Recommended principle No. 7 concerning Protection and assistance states that:

“Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.”<sup>22</sup>

Further to this, the UNHCHR recommended guideline No. 8 concerning special measures for the protection and support of child victims of trafficking states:

“Ensuring that children who are victims of trafficking are not subjected to criminal procedures or sanctions for offences related to their situation as trafficked persons.”<sup>23</sup>

The Council of Europe Convention on Action against Trafficking in Human Beings (CETS No. 197) was adopted by the Committee of Ministers of 3 May 2005 and opened for signature in Warsaw on the 16<sup>th</sup> of May 2005. Article 26 of the Convention concerns non-punishment of victims:

“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.”<sup>24</sup>

The Organization for Security and Cooperation in Europe Action Plan to Combat Trafficking in Persons recommends action at the level through its Recommendation 1.8;

“Ensuring that victims of trafficking are not subjected to criminal proceedings solely as a

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<sup>22</sup> United Nations High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’, E/2002/68/Add.1, Guideline 7.

<sup>23</sup> United Nations High Commissioner for Human Rights, ‘Recommended Principles and Guidelines on Human Rights and Human Trafficking’, E/2002/68/Add.1, Guideline 8.

<sup>24</sup> Article 26, Council of Europe Convention on Action against Trafficking in Human Beings, CETS, No. 197.

direct result of them having been trafficked.”<sup>25</sup>

Paragraph 13 of General Assembly Resolution 55/67

“...invites Governments to consider preventing, within the legal framework and in accordance with national policies, victims of trafficking, in particular women and girls, from being prosecuted for their illegal entry or residence, taking into account that they are victims of exploitation”<sup>26</sup>

#### Examples:

- UNMIK Regulation No. 2001/4 on the Prohibition of Trafficking in Persons in Kosovo “a person is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking.”<sup>27</sup>
- The United States Trafficking Victims Protection Act acknowledges that victims of trafficking should not be “penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.”<sup>28</sup>

Some countries have made the non-liability of victims conditional on their cooperation with criminal justice processes, however, this does not represent best practice as victims may become reluctant to report to authorities when this is the case.

#### Discussion

- *Should criteria for exemption from criminal liability be contingent on the victims’ cooperation with the criminal justice process or their willingness to act as witnesses?*
  - *What are the likely effects of such policy on the credibility of witnesses?*
  - *What is the difference between this situation and that of a state witness who is consequently not prosecuted? Should there be a difference?*
  - *What is the meaning of ‘cooperation’? Does it mean ‘testifying’?*
  - *Does this policy compromise the concept that victims whose autonomy was violated must be given full autonomy to decide whether to cooperate with law enforcement?*
- *What criteria should be used to assess eligibility for immunity?*
  - *Causation – the offence is connected or related to the trafficking*
    - *Acts ‘incidental to’*
    - *Acts ‘caused by’*
    - *Acts ‘directly related to’*
    - *Acts ‘committed as a result of his or her being the subject of trafficking in persons*
  - *Coercion / duress*
    - *‘to the extent that they have been compelled to do so’*
- *What is the proper policy regarding victims who become traffickers or accomplices of trafficking? Should their former status as victims be considered*

<sup>25</sup> OSCE Action Plan to Combat Trafficking in Persons, Decision 557, Revision 1, 7 July 2005.

<sup>26</sup> A/Res/55/67, 31 January 2001

<sup>27</sup> United Nations Interim Administration in Kosovo (UNMIK), UNMIK/REG/2001/4

<sup>28</sup> Trafficking Victims Protection Act of 2000, 18 U.S.C. §7101(17), (19) (2000).

*only at the sentencing stage or should it be a consideration not to prosecute under certain conditions (such as threat of harm)?*

- *How can legislators achieve balance between the needs of prosecution and preventing reoccurrence of trafficking on the one hand, and the rights of victims on the other?*

### **III. IMMIGRATION STATUS OF VICTIMS OF TRAFFICKING**

#### **Interpretation of Article 7 of the TIP Protocol**

TIP Protocol Article 7. Status of victims of trafficking in persons in receiving States.

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.<sup>29</sup>

There is no mandatory obligation to legislate on the immigration status of a victim of trafficking in persons. However, Article 7 of the TIP Protocol urges states to “consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily, permanently, in appropriate cases.” In countries where measures have been adopted for the temporary or permanent residence of victims of trafficking they have had a positive effect on victims participating in the criminal justice process. Victims have used this time to decide to come forward and testify against traffickers, and non-governmental organisations providing support and assistance to victims have encouraged them to report incidents.

Though a victim’s participation in the criminal justice process should not be a condition of the granting of the reflection period, legislators should bear in mind that allowing victims adequate time to physically and psychologically stabilise, to come to terms with their new situation and to understand the options and services available to them, can ultimately make them decide to testify and in such cases they tend to be more credible witnesses than they would be without this period. This also raises the question:

- *What is the importance of ‘witness protection provisions’ in domestic anti-trafficking legislation?*

#### **Granting a victim of trafficking a residency status on a humanitarian basis**

Article 7(2) of the TIP Protocol provides that States Parties shall give appropriate

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<sup>29</sup> Article 7 of the Trafficking in Persons Protocol

consideration to humanitarian and compassionate factors in the implementation of measures regarding residency status of victims. Furthermore, the saving clause of Article 14(1) of the TIP Protocol states that

“Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.”

This same provision is included in Article 40 of the European Convention.

### ***Humanitarian grounds***

Temporary or permanent residence permits granted to trafficked persons (often referred to as ‘humanitarian residence permits’) find grounds in a number of international instruments, including Declarations, United Nations Conventions and guidelines<sup>30</sup>, and politically binding documents of the Council of Europe, the European Union and the OSCE

### ***Compassionate grounds***

Article 7(2) of the TIP Protocol states that States shall give appropriate consideration to humanitarian measures in considering the adoption or legislation or other appropriate measures permitting victims to stay in their territory temporarily or permanently. This provision must be read in conjunction with Article 6 concerning the assistance and protection of victims of trafficking.

The inclusion of this provision ensures that the specific situation of the trafficked person concerned is considered in deciding whether they can remain in their country.

### **Discussion**

- *What factors can be considered ‘compassionate factors’ to be considered in permitting a victim to stay in a given territory?*
- *What period meets humanitarian and compassionate aims?*
  - *Is the primary aim of such a visa to allow for rehabilitation or allow for rehabilitation to commence?*
- *Should permanent visas be issued to trafficking victims? Under what circumstances and conditions?*

### **Reflection Period**

Article 13 of the European Convention stipulates that a minimum 30 day period of reflection should be granted by domestic law. This provision is intended to apply to victims of trafficking in persons who are illegally present in a country or who are legally

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<sup>30</sup> See for instance the United Nations High Commissioner for Human Rights Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1). Guidelines 6 concerns protection and support for trafficked persons.

residence but with a short-term residence period.<sup>31</sup> Such persons are vulnerable after their trafficking experience and are likely to be removed from the territory in which they are.

The second issue here is the way in which victims are removed from the destination country, which can impact on their rights as victims in varying degrees.

Deportation (that is, "The act of a State in the exercise of its sovereignty in removing an alien from its territory to a certain place after refusal of admission or termination of permission to remain"<sup>32</sup>) can impinge on the rights of a victim where that deportation occurs before he or she has the opportunity to prove that he or she is a victim of trafficking.

A more grave violation of their rights as victims occurs when they are forcibly expelled from the country of destination, an expulsion being "an act by an authority of the State with the intention and with the effect of security the removal of a person or persons against their will from the territory of that State".<sup>33</sup>

### **Temporary Residency Status**

As discussed above, the granting of reflection periods and residency status has a positive impact on the prosecution of offenders, but this should not be the sole foundation on which such status is granted; there are humanitarian considerations which promote the granting of residence permits whether a victim participates in legal proceedings or not. This is not mandated by the TIP Protocol, yet States may wish to consider adopting such measures.

Article 14(1) of the European Convention provides that victims of trafficking in persons shall be granted renewable residence permits, as a means of both meeting needs of victims and of combating trafficking. The two requirements laid down by Article 14(1) of the European Convention for the issue of a residence permit are that:

- it may be necessary for the victim to stay owing to their personal situation (for their safety, health, family situation or other factor)
- it may be necessary for the victim to stay for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings (this requirement acts to assuage fears of victims that they will be immediately sent back to their country of origin if they contact authorities)

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<sup>31</sup> The Expert Group on Trafficking in Human Beings of the European Commission on Reflection Period issued an opinion on 16 April 2004, which stresses the status of victims of trafficking as victims of serious crime. In the background to the opinion issued, the Expert Group states that a reflection period should be followed by a temporary residence permit, regardless of whether the trafficked person is able or willing to give evidence as a witness in legal proceedings. This, it says, assists States in fulfilling their obligation to protect the human rights of trafficked persons and avoids the risk of treating such persons as purely instrumental in the criminal justice system. The opinion offered by the Expert Group also states that: One of the purposes of the reflection period is the identification of whether a person has been trafficked. Reflection periods should therefore be granted to all those who there is reason to suspect have been trafficked (as well as for reasons of enabling the person to recover and decide on their future course).

<sup>32</sup> International Organization of Migration (IOM), Glossary on Migration, 2004, p.18 available at <http://www.old.iom.int/DOCUMENTS/PUBLICATION/EN/Glossary.pdf>

<sup>33</sup> International Organization of Migration (IOM), Glossary on Migration, 2004, p.22 <http://www.old.iom.int/DOCUMENTS/PUBLICATION/EN/Glossary.pdf>

The European Convention residency permit does not stipulate a particular length of stay, but does provide that the residence permit must be renewable.<sup>34</sup>

### ***Temporary residence independent of court proceedings***

There are strong examples of victims being granted temporary residence status where they are deemed to be victims of trafficking, regardless of whether they give evidence against traffickers.

#### **Italy**

Article 18 of the 1998 Italian Immigration Law provides victims of trafficking who are aliens a special residency period for a six-month period, regardless of their ability or willingness to give evidence as a witness in legal proceedings.<sup>35</sup> The purpose of this is to give them the opportunity to escape from the violence and from the influence of the criminal organization and to participate in an assistance and social integration programme. The temporary residence permit allows access to assistance services, education or employment. The residence permit is valid for six months and can be renewed for one year, or for a longer period, if required. Italy grants protection to victims independently of their readiness to testify.<sup>36</sup>

#### **Norway**

Article 8(2) of the Norwegian Immigration Act and Instruction AI-10/2006 provide a temporary residence permit to a person if there is reason to believe that he or she is a trafficked person. The reflection period is 6 months and allows the alleged trafficked person to participate in a programme providing him or her with legal aid, safe housing, health and social services and employment. The requirement for providing the reflection period is that the person wants to receive the support programme services and intends to break away from the trafficker and the trafficking situation; they are encouraged but not required to make an official complaint against the trafficker. Following the initial six months, the permit can be renewed for one year, or for a longer period, on a case by case decision made by the competent authorities. This decision of extending the residence permit emphasise more the need for the victim's cooperation or presence in the country to enable the successful prosecution of the trafficker.

Other strong examples of reflection periods / temporary residence permits being granted to victims of trafficking regardless of their willingness or ability to assist with criminal proceedings include the following:

- In June 2007, the Canadian Ministry of Citizenship and Immigration introduced measures extending the length of the temporary resident permit for victims to

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<sup>34</sup> Article 14(2) of the European Convention concerns children. That provision clarifies that the best interests of the child take precedence over any other considerations with respect to the granting of residency permits. Decisions concerning residence permits for children should be irrespective of a child's willingness or capacity to cooperate with authorities.

<sup>35</sup> Consolidation Act of the Provisions Concerning the Regulation of Immigration and Law Rules on the Condition of Foreigners, No. 286 of July 15, 1998, art. 18, Gazz. Uff No. 191 of Aug. 18, 1998 (Italy).

<sup>36</sup> See <http://www.antislavery.org/homepage/resources/humantrafficking/italy.pdf> and [http://www.enawa.org/NGO/Blinn\\_Final\\_Report.pdf](http://www.enawa.org/NGO/Blinn_Final_Report.pdf)

180 days, up from 120. Depending on individual circumstances, this visa can be renewed at the end of the 180-day period. Victims of trafficking with a legal status of temporary residence permit, have access to federally-funded emergency medical services, including psychological and social counselling and services such as legal assistance. Holders of this special temporary residence permit are able to apply for a work permit to protect them from revictimization.<sup>37</sup>

- The Ministry of Interior of the Republic of Montenegro passed an 'Instruction on the conditions and manner of regulating the residence of foreign citizens – victims of trafficking' which states that where a foreign citizen is determined by the competent Ministry of Labour and Social Welfare as a victim of trafficking in need of protection and treatment, they should be granted three month, six month or one year residence permits. The period of the permit is determined on a case-by-case basis, and are extendable.<sup>38</sup>

### Discussion

- *Where residency permits are related to the willingness or ability of a trafficked person to testify against traffickers, how does this impact on:*
  - *The right of a victims to assistance*
  - *The reliability of such witness?*
- *Where a reflection period is granted, should the victims be in contact with recognized NGOs, shelters and legal aid? If so, how does one avoid 'sullyng' the investigation if these entities interview victims before law enforcement investigators do?*

### **Repatriation**

Article 8(2) of the TIP Protocol states that:

"When a State Party returns a victim of trafficking in persons to a State Party of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving State Party, the right of permanent residence, such return shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary."

The international principle of non-refoulement and the prohibition on inhuman or degrading treatment under international human rights law must be taken into account.

With respect to Children, General Comment No. 6 on the Convention on the Rights of the Child makes clear that children who are at risk of being re-trafficked should not be returned to their country of origin unless it is in their best interests and appropriate measures for their protection have been taken. Complementary forms of protection should be considered where such return is not in their best interests.

In 1999, the High Commissioner for Human Rights made the following view on the

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<sup>37</sup> More information about the temporary residence permit arrangements in Canada are available through Citizen and Immigration Canada at [www.cic.gc.ca](http://www.cic.gc.ca)

<sup>38</sup> Source: [www.vlada.cg.yu/eng/antitraf/vijesti.php?akcija=vijesti&id=10133](http://www.vlada.cg.yu/eng/antitraf/vijesti.php?akcija=vijesti&id=10133)



status of trafficked persons:

"The High Commissioner is of the view that safe and, as far as possible, voluntary return must be at the core of any credible protection strategy for trafficked persons. A failure to include provision for safe and (to the extent possible) voluntary return would amount to little more than an endorsement of the forced deportation and repatriation of victims of trafficking. When trafficking occurs in the context of organized crime, such an endorsement presents an unacceptable safety risk to victims."<sup>39</sup>

### Discussion

The words "shall preferably be voluntary" are generally interpreted not to place any obligation on the State party returning the victim. The implication therefore is that returns can also be involuntary, albeit limited to returns that are safe and with due regard for legal proceedings. Actual repatriations should also take into consideration the status of any ongoing legal proceedings involving the victim as such. Repatriation should not be carried out until any relevant nationality or residency status has been ascertained.<sup>40</sup>

- *How is the right of State to return a victim balanced with the victim's right to be protected as victims of trafficking?*
- *How is the right of a State to return a victim reconciled with international principles of non-refoulement and the prohibition of inhuman or degrading treatment under international human rights law?*
- *Are there any obligations for the state of origin to cooperate in ascertaining the identity of victims or providing documents?*
- *Does a State have any obligations towards a victim where the crime of trafficking was:*
  - *Committed in another country (ie the country is not a State of origin, transit or destination), and the victim is not a national or permanent resident of the State?*
- *Does a State have an obligation to allow the victim to reside within its borders in order to carry on (civil or criminal) court proceedings?*
  - *If so, up to what stage of the proceedings is it incumbent upon State to allow this?*
- *What is the importance of registration of victim status for ascertaining the national or residency status of victims?*

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<sup>39</sup> Informal Note by the United Nations High Commissioner for Human Rights Ad Hoc Committee on the Elaboration of a Convention of Transnational Organized Crime, UN Doc A/AC.254/16, para 20. 54<sup>th</sup> Session of the General Assembly, 1 June 1999.

<sup>40</sup> A/55/383/Add.1, paragraph 113.

## **IV. CHALLENGES IN ACCESSING COMPENSATION**

Article 6(6) of the TIP Protocol obliges State Parties to ensure that its domestic legal system contains measures that offer victims the possibility of obtaining compensation for damages suffered. Article 25(2) of the TOC Convention states that State Parties shall establish appropriate procedures to provide access to compensation and restitution for victims.<sup>41</sup>

Receiving compensation is important for victims of trafficking not only because of the financial component but also because of its symbolic meaning.

- At a societal level, awarding compensation acknowledges that trafficking is a crime
- At an individual level, the harm suffered by the victim is acknowledged and compensation can constitute a first step towards overcoming trauma inflicted and abuse suffered
- At a practical level, compensation can assist victims rebuild their lives
- At a retributive level, compensation paid by traffickers can constitute a form of punishment and deter other traffickers.

The TIP Protocol does not prescribe potential sources of victim compensation. This means that the following options are generally sufficient to meet TIP Protocol requirements:

- Provisions allowing criminal courts to award criminal damages (to order that compensation be paid by offenders to victims) or impose orders for compensation or restitution against persons convicted of offences
- Provisions allowing victims to sue offenders or others under statutory or common-law torts for civil damages
- Provisions establishing dedicated funds or schemes whereby victims can claim compensation from the State for injuries or damages suffered as a result of a criminal offence.<sup>42</sup>

In accessing compensation to which they are entitled, victims often face a range of challenges.

- Where states do not have legislation ensuring the non-punishment of victims for acts they committed as a result of being trafficked, their ability to access compensation may be jeopardized.
- Victims may be removed from a country before they are aware of and/or able to seek compensation.<sup>43</sup> Alternatively, compensation may be granted but there is

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<sup>41</sup> For more on victim compensation see Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p.285-286, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

<sup>42</sup> Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p.286, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

<sup>43</sup> The April 29, 2004 European Council Directive Relating to Compensation to Crime Victims provides that “crime victims in the European Union should be entitled to fair and appropriate compensation for the injuries they have suffered, regardless of where in the European Community the crime was committed.”

no mechanism in place to ensure that the victim is located and the money forwarded to them.

- Victims may not have access to information and the resources necessary to seek compensation (for instance, they may not be able to afford to file a civil suit, they may not have adequate information about their rights to seek compensation, they may not have access to legal aid nor be able to afford legal representation).
- Victims may not be able to access compensation because there is no mechanism in place to provide for compensation and/or the assets of the trafficker are difficult to trace.

## **Access to Legal Representation**

Article 6(2)(b) of the TIP Protocol provides that States Parties shall ensure that its domestic, legal or administrative system contains measures that provide victims, in appropriate cases with "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." By virtue of Article 6(2)(a) the TIP Protocol also requires States to provide victims of trafficking with information on relevant court and administrative proceedings and, by virtue of Article 6(3)(b) with counselling and information, in particular about their legal rights, in a language they can understand.

Many jurisdictions allow victims to hire a lawyer to advise and accompany them throughout the proceedings, if they pay for these services themselves. Victims of trafficking, however, usually have no financial means to pay for legal counselling. Therefore, it is necessary to make available state-paid legal counselling. Furthermore, the professional legal counsels should be familiar with the needs and situations of victims of human trafficking and have acquired the required expertise to represent them effectively during the various legal proceedings.

### Examples

- Article 15(2) of the Council of Europe Convention on Action Against trafficking in Human Beings provides that parties "shall 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."<sup>44</sup>
- At its plenary sitting on 18 December 2006, the National Assembly of Bulgaria adopted the "Assistance and Compensation to Crime Victims Act" which provides for compensation of victims of crime, including persons who have been trafficked. The mechanism provides for support such as medical assistance and legal advice. Authorities are given the responsibility of informing victims of such rights.<sup>45</sup>

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<sup>44</sup> Article 15, the Council of Europe Convention on Action Against Trafficking in Human Beings, CETS No. 197, adopted by the Committee of Ministers on 3 May 2005. Available at [http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/default\\_en.asp](http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/default_en.asp)

<sup>45</sup> For more information, see [www.parliament.bg](http://www.parliament.bg)

## Discussion

Article 6(2) of the TIP Protocol requires that victims be furnished with any practical assistance needed to support the presentation of 'views or concerns'<sup>46</sup>.

- *Does the assistance offered by Article 6(2) of the TIP Protocol provide for mandatory provision of legal representation?*

## **Tracing and disposal of traffickers' assets for victim compensation funds**

Article 14 of the TOC Convention governs the disposal of confiscated proceeds of crime. National laws should ensure that the disposal of traffickers' assets is done in a manner that benefits trafficked persons; those assets should be used to pay compensation, restitution and damages to trafficked persons in countries of destination, transit and origin.<sup>47</sup>

Where traffickers have hidden or moved their assets to, or assets are held by another government, this can hinder the enforcement of compensation claims. In order to overcome this obstacle, States should strengthen international enforcement cooperation to secure access to the traffickers' assets abroad.

The assets confiscated from traffickers can be used to establish a Victim Fund specifically for victims of trafficking or (as is the case in a number of countries) for victims of serious crimes in general. Its objectives can be limited to the assistance and compensation of victims or to wider costs related to the prevention and combating of trafficking in persons.

Such funds may be financed through fines, confiscated property and assets of perpetrators, tax revenues, donations or other means. Access to them should not be excluded on the grounds of 'illegality' and should be administered as efficiently and effectively as possible.

## Examples:

- Article 12 of the Italian Law No. 356/1992 establishes mandatory confiscation in the case of conviction for certain criminal offences including trafficking in persons (after law 228/2003) of all monies, property and other pecuniary resources which are not under the direct or indirect control of the offender when their value appears to be out of all proportion to one's income and that person is unwilling or unable to provide a satisfactory explanation. In cases of trafficking in persons, the sums resulting from the confiscation will finance the Fund for Anti-Trafficking Measures, which is designed to finance programs of assistance and social integration for victims.
- The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, as amended in December of 2005, provides for the creation of a 'trust fund' from which to draw funds to both provide for victims' needs while they are in the custody of the National Agency for the Prohibition of Traffic in Persons and other Related Matters (NAPTIP) and to provide them with

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<sup>46</sup> UNODC, Division for Treaty Affairs, Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto (2005), p.284.

<sup>47</sup> For more on disposal of confiscated assets, see Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols thereto, UNODC, October 2004, p.143, available at <http://www.unodc.org/unodc/en/treaties/CTOC/legislative-guide.html>

compensation. The fund is to be derived from the auction of seized and forfeited assets of traffickers. Further to this, the Victim's Support Manual of NAPTIP states that trafficked persons have a right to compensation against his/her trafficker for economic, physical and psychological damages.<sup>48</sup>

- Article 15(4) of the European Convention on Action Against Trafficking in Human Beings provides that States parties "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."<sup>49</sup>

### Discussion

- *What should victims be compensated for?*
- *Should funds be specialized for trafficked victims or more broadly be for victims of serious crime?*
- *From what sources other than confiscated assets of traffickers should be drawn upon in funding victim compensation funds? What about fines?*
- *To which victims should compensation be available? To which victims should compensation not be available?*
- *How should a victim's return to their country of origin impact on their right to access compensation?*
- *If a forfeiture fund exists – is it proper to allocate funds to bodies and for purposes other than for victim compensation (for example, for law enforcement and prevention)?*

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This paper has been prepared to provide some broad background material for the workshop. Please note that fuller materials, including speaker summaries and workshop conclusions, will be included in the official report of the Vienna Forum.

If you have any further information regarding this topic, please contact:

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<sup>48</sup> For more information about the Trafficking in Persons (Prohibition) Law Enforcement and Administration Act 2003, visit <http://www.naptip.gov.ng/victimsup.htm>

<sup>49</sup> Article 15, the Council of Europe Convention on Action Against Trafficking in Human Beings, CETS No. 197, adopted by the Committee of Ministers on 3 May 2005. Available at [http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/default\\_en.asp](http://www.coe.int/t/dg2/trafficking/campaign/Docs/Convntn/default_en.asp)