

TRAFFICKING IN HUMAN BEINGS

MANUAL FOR LAWYERS

ASTRA – Anti Trafficking Action
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NETHERLANDS HELSINKI COMMITTEE



Kingdom of the Netherlands



TRAFFICKING IN HUMAN BEINGS-MANUAL FOR LAWYERS

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INTRODUCTION

This Manual for Lawyers is the crowning achievement of the triennial project *Promotion of the Rights of Trafficked Persons in Serbia with Emphasis on Legal Support – A Human Rights-Based Approach*. From 2009 to 2012, this project has been implemented by ASTRA - Anti Trafficking Action in partnership with the Netherlands Helsinki Committee, and in cooperation with a great number of experts, both from the Netherlands and from Serbia. The project was financed by the MATRA programme of the Netherlands Ministry of Foreign Affairs.

The primary aim of the project was to ensure that trafficked persons in the Republic of Serbia are informed in a timely manner about their rights as victims and witnesses, and are properly represented in criminal and civil proceedings, from the very beginning. The crucial activity to achieve these goals was the establishment of a network of 27 attorneys who, over a period of three years, attended a basic training programme and participated in expert meetings on human trafficking and the protection of the rights of victims of human trafficking. The expert meetings covered access to compensation, the practice of the European Court of Human Rights in regard to human trafficking, and the health and psychological consequences of human trafficking. During the project period the attorneys provided legal aid and representation in 191 cases.

In addition, 25 law students were trained in human trafficking and victims' rights in court proceedings. Following the training, they monitored 95 trials on human trafficking, with a focus on the treatment of trafficking victims as witnesses/injured parties. The findings were carefully analysed and led to a set of recommendations to improve the position of trafficking victims in court proceedings. Both the outcomes of the monitoring process and the recommendations are published in the report "The Position of Trafficking Victims in Court Proceedings - The Analysis of Judicial Practice through the Monitoring of Trials and Court Judgments".

During the three years of the project, judgments on trafficking cases in the Republic of Serbia were collected and analysed. In cooperation with the "Paragraf" database, parts of selected sentences were published. The collected case law will be highly valuable as reference for professionals, providing them with an insight into examples of good practice. This database will particularly serve judges, prosecutors and attorneys who may encounter cases of human trafficking in their work.

The most valuable achievement of this project is the establishment of a sustainable network of attorneys covering the entire territory of Serbia, whose members are trained and sensitised to work with victims of human trafficking, and to represent victims of human trafficking in court proceedings. The network of attorneys is available to all human trafficking victims in Serbia who are in need of legal advice or court representation. Furthermore, the network is available for all state authorities and non-governmental organizations, that may encounter human trafficking victims in their course of work. The formation of the network helped to solve the lack of specialised attorneys in some parts of the country, and created the conditions for trafficking victims to be represented in court by skilled attorneys,

which rarely happened before. Following the example of this network, in 2012 ASTRA also established a network of psychotherapists throughout Serbia.

This Manual represents the collected principles of work and *modi operandi* of the network of lawyers. It is primarily made for those attorneys who provide legal advice to, or represent, victims of human trafficking as injured parties in judicial proceedings. The focus of this Manual is on the protection of the rights of victims, the promotion of international standards in this area, legal options in the Republic of Serbia, and positive experiences and practices. The Manual will therefore also be useful to other professionals that may encounter human trafficking victims and victims of other types of violence in their work. The Manual is published in Serbian and in English.

AUTHORS

In Belgrade, October 2012

CHAPTER 1. HUMAN TRAFFICKING AS A GLOBAL PHENOMENON

Introduction

This chapter provides basic information on trafficking in human beings. It briefly discusses the character and scope of trafficking, the difference between trafficking and smuggling and between trafficking and sex work, as well as the push and pull factors.

Character and scope of trafficking

Human trafficking implies the selling and buying of human beings with the purpose of exploiting them under forced labour or slavery-like conditions, as well as all other actions that may be a part of the process (e.g. recruitment, transportation, hiding, keeping and the like). Exploitation is always initiated and maintained by the use of force, threat, deceit, abuse of authority or abuse of a vulnerable position. When coercion and deceit are used, the (initial) consent of the victim is not relevant. Trafficking and exploitation of children is always a crime, even when the elements of threat, coercion, abuse of power, etc. are not present. The purpose of human trafficking is making profit (or some other benefit) through the exploitation of the victim.

There are several types of human trafficking:

- **Sexual exploitation**, e.g. forced prostitution or other forms of forced sexual services
- **Labour exploitation**, e.g. in the agricultural or building industry
- **Forced domestic labour**
- **Forced begging**
- **Coercion to commit crimes**, e.g. stealing
- **Forced marriage**
- **Trafficking in human organs**

Human trafficking is a serious human rights violation. Its victims are deprived of their freedom of movement and freedom of choice; that is, they do not have control over their own lives. Trafficking is also known as a form of “modern slavery”, because the victims are held in slave-like conditions and are treated as property of the people who bought them. Human trafficking often takes place as a form of organized crime, but not necessarily. It is also a type of criminal business conditioned by supply and demand in the market. Human trafficking is thought to be one of the three most profitable criminal activities, together with drug trafficking and illegal weapon trafficking. It has been estimated that the annual earnings of traffickers represent a few hundred billion dollars. Trafficking is usually considered a highly profitable and low-risk criminal activity. Setting up and maintaining a business based on human trafficking requires minimal funds and the profits are huge, while, statistically speaking, very few traffickers in human beings end up in court and are sentenced to (long) imprisonment, and their criminally generated property is rarely being seized.

According to an estimate of the International Labour Organization (ILO)¹, the global annual profit, generated by human trafficking amounts to USD 31.6 billion:

- USD 15.5 billion (49%) – in the industrial countries
- USD 9.7 billion (30.6%) – in Asia and Oceania
- USD 1.3 billion (4.1%) – in Central and Southern America
- USD 1.6 billion (5%) – in Sub-Saharan Africa
- USD 1.5 billion (4.7%) – in the Middle East and Northern Africa

Human trafficking is a global phenomenon that has its impact on all countries – countries in political and economic transition, underdeveloped countries and developing countries, countries at war and post-war countries, which all figure as countries of origin and transit, as well as economically developed countries which figure as countries of destination. According to a report by the UN Office on Drugs and Crime, cases of human trafficking were identified in 161 countries, where 127 countries occur as countries of origin, while 137 countries are countries of destination².

The International Labour Organization³ has estimated that 2.5 million of people are exploited at any moment within a human trafficking chain, with the purpose of either sexual exploitation or some other form of forced labour. The ILO mentions the following figures:

- 1.4 million (56%) – in Asia and Oceania
- 270,000 (10.8%) – in industrial countries
- 250,000 (10%) – in Central and Southern America
- 230,000 (9.2%) – in the Middle East and Northern Africa
- 200,000 (8%) – in the countries in transition
- 130,000 (5.2%) – in Sub-Saharan Africa

Even though some groups more often appear as victims than other groups, anyone can become a victim of human trafficking – men or women, boys or girls, regardless of their origin, age, nationality, education, social status or other characteristic. The same applies to traffickers – a variety of men and women have their role in the trafficking chain, from recruitment to exploitation. Human traffickers are often members of organized criminal groups, but in many cases relatives of the victims, even the closest family members, as well as friends and acquaintances of the victims play a role in the trafficking chain. On the other hand, victims may also be recruited and exploited by an unfamiliar person whom the victim met while he or she was looking for a job, a possibility of schooling in another country or city, marriage, etc. Human trafficking often functions as a “family business”, where every family member has his or her own role.

¹ Patrick Besler, *Forced Labour and Human Trafficking: Estimating the Profits*, working paper (Geneva, International Labour Office, 2005).

² United Nations Office on Drugs and Crime, *Trafficking in Persons: Global Patterns* (Vienna, 2006).

³ International Labour Organization, *Forced Labour Statistics Factsheet* (2007).

According to a UN.GIFT fact sheet:⁴

- Human trafficking victims usually are between 18 and 24 years old.
- An estimated 1.2 million children are trafficked each year.
- 95% of victims have experienced physical or sexual violence during trafficking⁵.
- 43% of victims are forced to perform sex work, 98% of them being women and girls⁶.
- 32% of victims are exposed to other forms of labour exploitation, 56% of them being women and girls.⁷

Human traffickers in the world:⁸

- In 52% of cases the recruitment was done by men, in 42% by women and in 6% jointly by men and women.
- In 54% victims are recruited by a stranger, while in 46% of the cases the recruiter is known to the victim.
- The majority of suspects in human trafficking cases are nationals of the country in which the trafficking process takes place.

Trafficking victims in Serbia

According to the experience of ASTRA, gained by working with more than 420 victims of trafficking (December 2012), there is no such thing as a victim profile, that is a single trait that characterizes all trafficking victims. Even though women from marginalized and socially and economically deprived environments who are forced into prostitution are overrepresented, this does not mean that no other kinds of victims are identified. ASTRA data also refute a number of prejudices, such as that child trafficking is more frequent, or would be a kind of a tradition in Roma communities.

Child trafficking: Children make up 36% of the identified trafficking victims helped by ASTRA. Girls are more frequent victims than boys. The average age of a child victim is 14.7 years. Children in Serbia are trafficked for the purposes of forced begging, prostitution, marriage and the commission of crimes.

Previous experience of violence: Many trafficking victims have previously experienced violence (most often domestic violence or violence they survived as children in their families). Out of 249 persons (59%) about whom ASTRA has information, as much as 78% had been exposed to some sort of violence (usually domestic) before their trafficking experience.

Nationals make up the majority of trafficking victims identified in Serbia (ASTRA 2002-2012: 78%), whereas Serbia is also the **country of destination** for the majority of them (ASTRA 2002-2012: 37%).

Men form an increasing number of identified victims (ASTRA 2002-2012: 13%). Usually they are adult males who are recruited for the purpose of forced labour, primarily for foreign construction sites.

Trafficking, smuggling and sex work

It is important to distinguish between human trafficking and human smuggling, and human trafficking and prostitution, i.e. consensual adult sex work. However, what started as smuggling or voluntary prostitution may turn into trafficking when people end up being exploited under forced labour or slave-like conditions.

⁴ UN.GIFT, *Human Trafficking – The Facts*.

⁵ The London School of Hygiene & Tropical Medicine, *Stolen smiles: a summary report on the physical and psychological health consequences of women and adolescents trafficked in Europe* (London, 2006).

⁶ International Labour Organization, *Forced Labour Statistics Factsheet* (2007).

⁷ *Ibid.*

⁸ UN.GIFT, *Human Trafficking – The Facts*.

HUMAN TRAFFICKING	HUMAN SMUGGLING
The aim is to make profit through the exploitation of the victim .	The aim is to illegally transfer a person over a national border .
May happen across borders as well as internally, without crossing a border.	Always includes crossing a national border .
The victim does not consent to exploitation ; his/her obedience and participation in exploitation is secured through the use of threats, force, deception, etc.	Smuggling is always performed with the consent of the smuggled person.
Victims of human trafficking are not free to move, to leave their work or to decide about their work and life .	When they arrive to their destination, smuggled persons may go wherever they wish to , i.e. they do not remain tied to the smuggler.* * However, one should bear in mind that illegal migrants are at a higher risk of trafficking, either during their illegal transfer, since they are completely dependent on their smuggler, or when they reach their desired destination, because they are forced to secure their existence on the black labour market, due to their illegal status, and they don't have any kind of protection.
HUMAN TRAFFICKING	CONSENSUAL SEX WORK
Victims are not free to decide about their life and work , since they are completely controlled by the person who bought them.	People who voluntarily engage in sex work are free to decide about their own life and work.
Some trafficking victims are forced into prostitution against their will , others worked in prostitution before or knew they would do so but are consequently subjected to slave-like conditions .	Voluntary sex work, although it may be conditioned by unfavourable personal circumstances or lack of other options, is a free choice of the person concerned .
Victims are not free to move as they want or to quit prostitution if they want.	Free sex workers can move as they want and stop with sex work if they want to.
Sexual exploitation is just one of the many forms of human trafficking.	May, but does not have to entail different forms of force and exploitation.* * Sex workers may become victims of human trafficking, i.e. sexual exploitation, just like anybody else, when the conditions of their work become exploitative, they are not free to stop and have no control over their decisions and life.

Demand and supply

Human trafficking functions on the supply and demand principle. On the supply side inequality, unemployment, poverty, social exclusion, wars, political instability, domestic violence and discrimination lead people to seek a job, continue their education or start a life in another city or country in search of a better life, or to merely survive. On the demand side trafficking is fuelled by the

demand in developed and rich countries⁹ for cheap products and cheap, low-skilled and easily disposable labour - in combination with restrictive immigration policies and lack of labour protections for migrant workers, whether male or female. It is not unimportant that the 20th century was an age of numerous armed conflicts and international peace missions, which on the one hand generates a demand for sexual services wherever army forces are positioned, while on the other hand it leads to a lack of protective institutions and a collapse of the system in the conflict countries, which all favour an unobstructed rise in every kind of criminal activity, including human trafficking. Organized criminal groups profit by earning enormous financial benefits in bridging demand and supply. Apart from the social and economic circumstances that favour the development of human trafficking, there are other factors and causes that may make a country attractive for recruitment of victims, ranging from natural catastrophes to strict visa and immigration regulations among developed countries.

The different causes of trafficking may be divided into **push and pull factors**. Push and pull factors of human trafficking coincide with the factors that lead to migration.

PUSH FACTORS	PULL FACTORS
<ul style="list-style-type: none"> • Overall situation in the country of origin • Labour market discrimination • Social factors • Violence against women • Presence of foreign troops in the region • Natural catastrophes • The wish for a better life or a life without violence 	<ul style="list-style-type: none"> • Attractive employment offers • Better living conditions in more developed and richer countries • Availability of work/ employment opportunities • Possibility to escape from violence or traditional gender and family constraints or to find means for an independent life

⁹ The state of development in the country of destination should not be assessed *per se*, but in the context of underdevelopment, poverty and instability of the country of origin.

CHAPTER 2. THE TRAFFICKING PROCESS: RECRUITMENT, CONTROL AND LEAVING THE TRAFFICKING CHAIN

Introduction

In this chapter we describe the three stages of the trafficking process: recruitment, transit and exploitation. Attention is paid to the difficulties for victim in leaving the trafficking situation and the problems they face once they are out of the (direct) trafficking situation. It also describes and tackles a number of stereotypes about trafficking and trafficking victims.

Recruitment

Victims are often recruited by a person familiar to, and trusted by, them: a friend, cousin, godfather, neighbour, aunt, boyfriend, husband, etc. Traffickers (the recruiter, intermediary, employer, corrupted official, the person who provides transport, exploiter, etc.) abuse the victim's trust and his or her wish for a better life, sometimes simulating an emotional relationship and abusing the victim's desire to be loved. Recruitment strategies differ: they are creative and ever changing, but the one thing that they have in common is the promise of a good job, a better life and the fulfilment of one's dreams. Modern technologies, the internet and social networks are increasingly used to recruit victims.

The most common recruitment strategies are:

- **False business and other proposals made by persons familiar to or trusted by the victim.**
- **"Loverboy"** – a guy who simulates a love relationship with a girl, only to ask her at some point, when he has gained her trust, to come with him to another country/city to try their luck and start a new, happier life together.
- **Deceptive advertisement for a job in different media (newspapers, the internet, social networks).** The jobs being offered are better paid or they come with better working conditions than in the country where the potential victim is living.
- **Selling by family members** – sometimes due to poverty and other problems, sometimes also because of the parents' belief that their child will have a better life elsewhere, not suspecting that he/she will become a slave.
- **Kidnapping** is a possible, but not very frequent, recruitment strategy.

Transit

Transit includes the transfer or transportation of the victim within a country or across national borders towards the final destination. The final destination is the place of the highest demand, where the highest profits can be made through exploitation. Sometimes victims are transported and forced to work in several countries.

Victims may be transported by land, air or sea and borders may be crossed legally or illegally, using false documents. Some victims are transported hidden in trucks, vans, on ships, or they cross a border by foot, through the woods, across a river, etc.

The first instance of exploitation and violence may be encountered by a victim during the transit itself, before he or she arrives at the final destination. Sometimes victims are re-sold a number of times during their journey.

Transport does not necessarily include the crossing of a national border, since human trafficking may also take place within a country. Victims may be transported from town to town, from one bar or brothel to another, from house to house, all within a single country.

Exploitation

Exploitation of victims may happen in different ways but all serve the final purpose of trafficking, i.e. making as much profit as possible for the traffickers. Depending on the type of exploitation (e.g. exploitation in the sex industry, on construction sites, as domestic worker or as beggar), victims may encounter different types of violence and torture in order to become fully controlled and obedient.

Victims are controlled by the trafficker by isolating them, strictly controlling their movements, and by **taking away their personal documents**, allegedly for "keeping them safe" or to "fix" their working permit, etc. In this way the victim loses his or her legal identity. For many victims this is **the first time that they leave their country; they do not know the language, do not know where they are, what they could do, or what rights they have**. They are sometimes afraid of institutions, especially the **police**, so they do not dare to seek help from them. Often traffickers prevent their victims from asking for help from the police by convincing them that **"the police are corrupt and work in conspiracy with them"**.

Obedience of the victim is secured by **violence, blackmail and threats**, not only against the victim, but often against their children or family members. Drugs and alcohol addiction is often created in order to break the victim's resistance and secure his/her full obedience. Moreover, the victim is held in constant fear of the potential consequences of his or her escape and reporting to the police by persuading them that they themselves have committed a crime or by telling them that the police is corrupt and cooperates with the traffickers, which unfortunately is true in many cases.

Victims are usually **forced to work all day long without rest, while the major part or the entire earnings are taken away from them**. Depending on the type of exploitation, they may be forced to meet **work quotas**. They do not have the right to complain about the working conditions and are not free to leave. When they protest or resist, they are deprived from food, threatened or punished in some other way.

The amount of money that the victim might get from the traffickers for his/her forced labour is not important when the other elements that indicate exploitation are present. This must be taken into serious consideration, especially since in recent years the exploitation of trafficking victims in Serbia tends to involve less violence and "better" working conditions, in order for the traffickers, in case they are uncovered, to be able to more easily prove that the victims had been with them "voluntarily".

A frequent control strategy is **"debt bondage"**: the victim is pointed out the expenses that the trafficker has made in order to get him or her to the country of destination, and this amount is increased by high interest rates and living expenses, while the victim is made to believe that he/she can regain his/her freedom as soon as this debt is repaid. The dynamics of the debt

decreasing and increasing is regulated by the trafficker so that the victim, hoping that the situation in question will end, remains obedient and does whatever is demanded of him/her, while the victim never succeeds in paying of his or her debt. You can read more about debt bondage on page 35-36.

A complicating factor is that in some cases victims do not feel themselves exploited because they lived in such extreme poverty, that even the exploitative conditions in the trafficking chain are better than where they came from. In the case of "loverboys", the trafficker keeps the victim in a state of emotional captivity, manipulating the victim's need for love and maintaining her false belief that she is loved and that her engagement in prostitution is not the result of force, but an investment in the future for the two of them.

Leaving the trafficking chain

When victims leave the trafficking situation, they will need considerable time to recover and rebuild their lives. During this period, they require different kinds of help, ranging from medical aid to address poor health conditions and/or physical injuries, to social and psychological help and support. This process is immensely important, because in many cases victims return to the very same environment and situation that they tried to escape from, and need to solve the very same problems. They need to be provided all the help they need in order for them to regain control over their life and reduce the risk of re-trafficking.

The most common ways through which victims **get out** of the trafficking chain are:

- **Police intervention**
- **Help of clients or other third parties**
- More rarely: **escape on their own**
- **Release by the traffickers** when they assess that they cannot make profit from them anymore, and that due to their poor physical and mental state, victims do not pose a threat.

However, the **majority of trafficking victims are never identified** as such. Either they do not manage to leave the trafficking chain or, if they manage to escape, they **remain outside the support system**. Various sources estimate that as little as 10-25% of victims are identified. Some less optimistic assessments indicate that only 1% of the estimated number of the trafficking victims worldwide is identified.

When leaving the trafficking situation, victims face different problems:

- Concern about survival: where they will live and how they are going to support themselves, connected to their objective and subjective capacity to provide for a decent subsistence in a short time.
- Administrative obstacles: victims usually do not possess valid personal documents to prove their identity and get access to medical and social care.
- Fear of stigmatization and condemnation by their family, community and other people because of what they were forced to do, especially in the case of sexual exploitation.
- Fear for their personal safety: even when the traffickers are detained, their associates may be free, together with their family

members, friends, etc. The police have limited options to provide long-term protection, while any interest for the victims stops after they give testimony in the court.

- Fear of giving testimony: victims are expected to participate in court proceedings and provide key evidence against the traffickers with precise, consistent and believable testimonies. Often they are not able to do this due to the traumatic character of their experiences. Moreover threats from traffickers and their associates usually do not stop when the victim gets out of the trafficking situation. Generally their decision not to participate is disregarded, as is their decision to withdraw or to avoid telling some facts.
- The expectations of those who provide support: victims may be expected to gratefully accept the offered help, immediately recover and change their way of life.

Due to the physical and psychological health consequences of trafficking, it is highly important to allow the victim enough time for recovery and reflection. Any attempts to make the victim cooperate in criminal proceedings against the traffickers during this period are not only harmful to the victim, but may also have a detrimental effect on the criminal case, especially if the case primarily relies on the victims' testimonies. In the first period upon leaving the trafficking situation, the victim is usually unable to give a consistent account of what has happened, due to trauma, but also because of fear of the traffickers and their associates.

Stereotypes and misconceptions about human trafficking and its victims

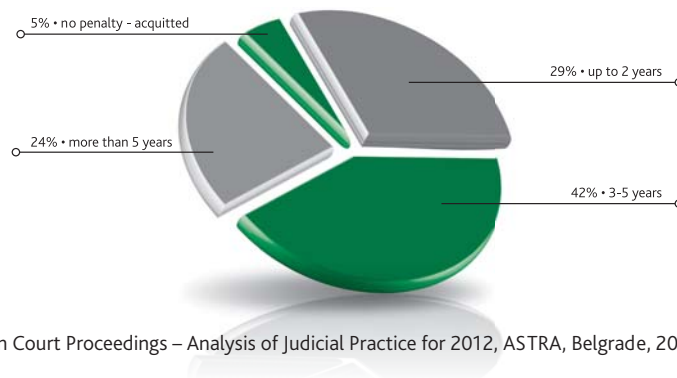
One of the barriers to adequately combat trafficking is the existence of various stereotypes about trafficking and trafficking victims. In the box below the various stereotypes are pointed out and compared with what is actually the case.

MISCONCEPTION	IN REALITY
Trafficking necessarily involves the crossing of a national border	Internal trafficking, where the entire process, from recruitment to exploitation, takes place within a single country, is happening as much as trafficking across borders.
Victims know what they engage in and what certain “business” proposals actually mean, so they cannot be regarded as a victim.	Even when a person agrees to (illegally) migrate or to work in the sex industry, this does not mean that they consent to be exploited under slave-like conditions and that they cannot be victims of trafficking. If deceit, coercion, abuse of authority or any other deceptive or coercive means is used, the alleged consent of the victim is irrelevant. Deceit can refer to the type of work as well as to the conditions of work.

MISCONCEPTION	IN REALITY
Trafficking cannot exist when the victim and the trafficker are in a relationship or are married.	The partner or spouse may be the exploiter, while "loverboy" is a well known recruitment strategy. Sometimes fake marriages are used as a means to control the victim or arrange a residence permit. Furthermore it must be kept in mind that in practice familiar persons are more likely to recruit a victim, than total strangers.
Legal migrants cannot become the victims of trafficking.	Trafficking victims may enter the country of destination illegally or with false papers, but in many cases they enter the country of destination legally with a valid passport and tourist visa or work permit. There are different ways for the traffickers to regulate the victim's residence status, in order to decrease the risk of being identified by the immigration authorities. In many cases victims enter legally to have their identity papers taken away after arrival.
Trafficking victims are only women and children.	Women and children are most often identified as victims, but the number of (identified) male victims in Serbia is increasing. Male victims are often exploited in the agricultural or building industry, and face the same torture and intimidation as female victims of sexual exploitation.
Trafficking victims can at any point return home and stop doing what they do.	Victims rarely succeed in escaping the trafficking situation on their own. The traffickers secure their stay and obedience by the use of violence and threats of violence, not only against the victim, but also against their family. Furthermore, victims often find themselves in an unknown country of which they do not speak the language, without legal documents, afraid of the police and immigration authorities and intimidated by the fear that they will be charged for the criminal offences that they were forced to commit.
All trafficking victims enter the chain of exploitation against their will and under duress.	In our region, kidnappings for the purpose of trafficking are very rare. The majority of victims were deceived or lured to willingly agree through the use of false promises of a better life or better employment opportunities in the country of destination.
If a person states that he or she lives better, or economically more advantaged than before, then it cannot be a case of human trafficking.	Traffickers usually recruit their victims among extremely poor persons; they buy them food, clothes, presents, they give them small sums of money, thus creating the illusion of well-being, while they make profit by exploiting their work.

MISCONCEPTION	IN REALITY
A person cannot be a trafficking victim unless sexually exploited.	Sexual exploitation is only one form of trafficking. Other people are trafficked for forced labour in other industries, are forced to beg, or to commit crimes, without sexual violence, or the sexual violence is used as a punishment, not as a profitable activity.
Trafficking victims are exposed to physical violence, are locked in, and are not paid for their work.	In a great number of cases, trafficking victims are exposed to severe physical violence and restriction of their freedom of movement. However, their obedience may also be secured by threats, psychological manipulation, debt-bondage and other non-violent methods, which makes them seemingly free to make their own decisions. Often traffickers give their victims a small part of what they earn to more tightly bind them.
If a trafficking victim refuses to be helped, then this is not a trafficking victim.	There are many reasons that may make a person refuse help or not perceive him/herself as a victim of exploitation, which may imply their refusal to participate in the criminal procedure. However, this should not influence their status or the availability of support measures.

Length of Penalty for Traffickers *



* Source: Position of Trafficking Victims in Court Proceedings – Analysis of Judicial Practice for 2012, ASTRA, Belgrade, 2012

CHAPTER 3. SERBIAN LEGAL FRAMEWORK

Introduction

This chapter presents an overview of the legal framework in Serbia. It discusses the relevant articles in the Criminal Code of Serbia, as well as other provisions relevant for trafficking in human beings.

Relevant laws:

- Law on Ratification of the UN Convention against Transnational Organized Crime and Protocols Thereto
- Law on Ratification of Council of Europe Convention on Action against Trafficking In Human Beings
- Law on Ratification of the Convention on High Technology Crime
- Law on Ratification of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime
- Law on Ratification of Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism
- Law on Ratification of UN Convention on the Rights of the Child
- Law on Confirmation of Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography
- Law on Confirmation of Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
- Constitution of the Republic of Serbia
- Criminal Code
- Criminal Procedure Code
- Law on Public Order and Peace
- Law on Aliens
- Social Protection Law
- Healthcare Law
- Law on Seizure and Confiscation of the Proceeds from Crime
- Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles
- Law on the Protection Program for Participants in Criminal Proceedings
- Law on Personal Data Protection
- Law on Prohibition of Discrimination

**Constitution of the Republic Of Serbia
(Official Gazette RS, no. 98/2006)
Prohibition of slavery, servitude and forced labour
Article 26**

No person may be kept in slavery or servitude.
All forms of human trafficking are prohibited.
Forced labour is prohibited. Sexual or financial exploitation of person in unfavourable position shall be deemed forced labour. Labour or service of persons serving sentence of imprisonment if their labour is based on the principle of voluntariness with financial compensation, labour or service of military persons, nor labour or services during war or state of emergency in accordance with measures prescribed on the declaration of war or state of emergency, shall not be considered forced labour.

**Criminal Code of Serbia
(Official Gazette RS, No. 85/2005, 88/2005 - correction
107/2005 - correction, 72/2009, 111/2009 and 121/2012)
Human trafficking
Article 388**

(1) Whoever by force or threat, deception or maintaining deception, abuse of authority, trust, dependency relationship, difficult circumstances of another, retaining identity papers or by giving or accepting money or other benefit, recruits, transports, transfers, sells, buys, acts as intermediary in sale, hides or holds another person aimed at exploiting such person's labour, forced labour, commission of offenses, prostitution, other forms of sexual exploitation, begging, pornography, establishing slavery or slavery-like relation, the removal of organs or body parts or service in armed conflicts, shall be punished by imprisonment of three to twelve years.

(2) When the offence specified in Paragraph 1 of this Article is committed against a minor, the offender shall be punished by the penalty prescribed for that offense even if there was no use of force, threat or any of the other mentioned methods of perpetration.

Trafficking in human beings in the Serbian legislation

Even though the State Union of Serbia and Montenegro became party to the UN Convention against Transnational Organized Crime in 2000 in Palermo, trafficking in human beings only became punishable as a separate and distinct crime in April 2003, when Article 111b on Trafficking in Human Beings was introduced in the Criminal Law of the Republic of Serbia.¹⁰

Legislation that is currently in force is the Criminal Code of Serbia (CCS)¹¹, active since 1st January 2006, in which trafficking in human beings was regulated in Article 388.

On 31st August 2009, the Serbian Parliament adopted Amendments to the Criminal Code¹², by which the sentences for trafficking were increased. The sentence for the basic form of the crime is now 3 to 12 years of imprisonment, while the minimum sentence for child trafficking increased from 3 to 5 years of imprisonment. The sentence also increased when the crime is committed by an organized criminal group. At the same time penalties were introduced for users of the services of trafficked persons who know or could have known that they are dealing with human trafficking victims.

Legal analysis for the criminal act of human trafficking, conducted by ASTRA in 2012, shows that 95% of those accused of committing this crime were found guilty. The maximum sentence duration was 10 years in prison. The average sentence for human trafficking is 22 months.

An important novelty is Article 389 CCS, which criminalises trafficking in minors for the purpose of adoption. The legislator

¹⁰ Official Gazette RS, no. 39/2003 and 67/2003

¹¹ Official Gazette RS, no. 85/2005, 88/2005 – amend. And 107/2005 – amend

¹² Official Gazette RS, no. 72/09

(3) If the offence specified in Paragraph 1 of this Article is committed against a minor, the offender shall be punished by imprisonment of not less than five years.

(4) If the offence specified in Paragraphs 1 and 2 of this Article resulted in grave bodily injury of a person, the offender shall be punished by imprisonment of five to fifteen years.

If the offence specified in Paragraph 3 hereof resulted in grave bodily injury of a minor, the offender shall be punished by imprisonment of not less than five years..

(5) If the offence specified in Paragraphs 1 and 3 of this Article resulted in death of one or more persons, the offender shall be punished by imprisonment of not less than ten years.

(6) Whoever habitually engages in offences specified in Paragraphs 1 to 3 of this Article or if the offence is committed by a group, shall be punished by imprisonment of not less than five years.

(7) If the offence specified in Paragraphs 1 to 3 of this Article is committed by an organized group, the offender shall be punished by imprisonment of not less than ten years.

(8) Whoever knew or could have known that a person is the victim of trafficking, but nevertheless made use of her/his position or facilitated another person to make use of her/his position for the purpose of exploitation referred to in Paragraph 1 of this Article, shall be punished by imprisonment of six months to five years.

(9) If the offence referred to in Paragraph 8 of this Article was committed against a minor of which fact the offender was or could have been aware, such offender shall be punished by imprisonment of one to eight years.

10) The consent to exploitation or to the establishment of slavery or slavery-like relation referred to in paragraph 1 of this Article has no bearing on the existence of criminal offence referred to in Paragraphs 1, 2 and 6 of this Article.

decided to introduce this article because of the changes in the Family Law on child adoption.

Before the introduction of Article 388 CCS it often occurred that when a number of girls were found during police raids on sex workers, they themselves were charged and sentenced to imprisonment on the basis of Article 14 of the Law on Public Peace and Order. In some cases, their traffickers would engage lawyers for the exploited girls and paid their fines. Consequently, the girls were forced to return to their traffickers in order to repay their debts. In the case of foreign citizens, they were also fined for illegal entry and stay in Serbia (Article 106 and 107 of the then effective Law on Movement and Stay of Aliens).

Other, relevant articles of the Criminal Code are:

- Pimping and procuring sexual intercourse (Article 183),
- Mediation in prostitution (Article 184),
- Showing, obtaining and possession of pornographic material and using minor persons in pornography (Article 185),
- Inducement of a minor person to witness sexual acts (Article 185a),
- Use of a computer network or other technical communication solutions for the commission of crimes against sexual freedom of minor persons (Article 185b),
- Prosecution of offences against sexual freedom (Article 186),
- Illegal crossing of state border and human smuggling (Article 350),
- Holding in slavery and transportation of enslaved persons (Article 390)

Criminal Code ("Official Gazette RS", no. 85/2005, 88/2005 - amend, 107/2005 - amend, 72/2009 and 111/2009).

Trafficking in Minors for Adoption

Article 389

- (1) Whoever abducts a child under 16 years of age for the purpose of adoption contrary to laws in force or whoever adopts such a child or mediates in such adoption or whoever for that purpose buys, sells or hands over another person under 16 years of age or transports such a person, provides accommodation or conceals such a person, shall be punished by imprisonment of one to five years.
- (2) Whoever habitually engages in activities specified in paragraph 1 of this Article or if the offense is committed by a group, shall be punished by imprisonment of not less than three years.
- (3) If the offence referred to in Paragraph 1 of this Article is committed by an organized group, the perpetrator shall be punished by imprisonment of not less than five years.

Good examples of cooperation for the purpose of protecting victims' safety are two cases in which the victims were young women. Both of them were provided legal, psychological, technical and material support by the NGOs who also contacted a police official. The victims were instructed to instantly inform NGOs in case anyone tried to exert pressure on them. Right before the trial, traffickers actually attempted to exert pressure on them and threaten them by making phone calls and sending third persons to linger in front of the victims' houses. The victims momentarily informed the NGOs who, in their turn, contacted the police. The victims talked to the police and felt that they were safe and protected. The persons exerting pressure were prosecuted for what they had done. In quite a short time, one of the persons was detained and was pronounced guilty in the criminal trial. In the other case, investigation is underway. These were instances of extraordinarily swift reaction and cooperation of NGOs, police and the judiciary. (Novi Sad Basic Court K.2430/12)

Cooperation between various anti-trafficking actors appears increasingly often in recent years, significantly affecting the quality of work and protection of victims. Here are a few examples of good practice.

A good example was a case of cooperation between a victim's attorney and the deputy prosecutor, who represented prosecution against the traffickers, in a repeated trial for human trafficking (Article 388 CCS). In the course of the proceedings, the victim was repeatedly being provoked by the defendants and their attorneys by being asked questions relating to her personal life. This stopped the victim from testifying. The proceedings were discontinued for several days. There was a danger of the victim refusing to testify altogether. The deputy prosecutor contacted the victim's attorney and offered to schedule a meeting where they all could have an unofficial conversation with the victim. During the meeting, the deputy prosecutor talked to the victim in a friendly and assuring way, working exclusively on her empowerment yet without coaching the victim what to say. In the resumed court proceedings, the victim provided an assured, clear and true testimony. After the proceedings, the victim felt empowered and she was bursting with self-confidence. It turned out that the cooperation between prosecutors and attorneys may lead to improved results. (Novi Sad Higher Court, no. K.195/2010)

Another example of cooperation is one involving a state institution, an NGO and the judiciary in the case of an underage victim of human trafficking. A psychologist of a social welfare centre was summoned to interview the underage victim, since she had to be prepared for her testimony. The psychologist contacted an anti-trafficking NGO, which took participation. The court was presented with the victim's special protection needs, and the psychologist was in attendance during each of the victim's testimonies. During the main hearing, the victim testified over video-link.

At the trial for human trafficking, the victim was brought to trial from the prison, where she served a sentence for prostitution because of the failure to identify her as a trafficked person in her first contact with the police. The defense counsel asked inter alia: "If she is a trafficking victim, why isn't she brought from the Safe House but from the prison?"

Due to the ignorance of the offence or for the reason of easier prosecution, legal qualification of the trafficking offence is still sometimes changed into facilitation of prostitution (Article 184 CCS). In practice this means a lower sentence for the perpetrator, failure to identify a trafficking victim and consequently failure to recognize their rights they have as trafficking victims according to international standards.

According to the analysis, when determining the sentence, the Court usually takes mitigating circumstances into account, concerned with personal situation of the perpetrator (71%), and no criminal record, behavior during the proceeding and confessing the crime (29%). The most common aggravating circumstance regards prior convictions (75%) and seriousness of the crime committed (25%).

Law on Seizure and Confiscation of the Proceeds from Crime (Official Gazette RS, no. 97/2008)

Article 2

Provisions of this Law shall apply to the following criminal offences:

- 1) Organised crime;
- 2) Showing pornographic material and child pornography (Article 185, paragraphs 2 and 3 of the Criminal Code);
- 3) Against economy (Article 223 paragraph 3, Article 224 paragraph 2, Article 225 paragraph 3, Article 226 paragraph 2, Article 229 paragraphs 2 and 3, Article 230 paragraph 2, and Article 231 paragraph 2 of the Criminal Code);
- 4) Unlawful production, keeping and distribution of narcotics (Article 246 paragraphs 1 and 2 of the Criminal Code);
- 5) Against public peace and order (Article 348 paragraph 3, and Article 350 paragraphs 2 and 3 of the Criminal Code);

Trafficking victims may claim compensation in criminal and civil proceedings.

Compensation

Regarding criminal proceedings, following the presentation of the event and testimony about the event, the court shall ask the witness/injured party whether he/she would like to make a compensation claim; if the injured party has an attorney, the attorney shall immediately claim compensation. However, criminal judges are reluctant to make any decision regarding compensation. As a rule, if the accused is found guilty and sentenced in criminal proceedings, the injured party is referred to civil

6) Abuse of office (Article 359 paragraph 3, Article 363 paragraph 3, Article 364 paragraph 3, Article 366 paragraph 5, Article 367 paragraphs 1 through 3, 5 and 6, and Article 368 paragraphs 1 through 3, and 5 of the Criminal Code);
 7) Against humanity and other goods protected by international law (Article 372 paragraph 1, Article 377, Article 378 paragraph 3, Article 379 paragraph 3, Articles 388 through 390, and Article 393 of the Criminal Code).

Provisions of this Law shall apply to criminal offences provided under Article 185 paragraphs 2 and 3, Article 230 paragraph 2, Article 348 paragraph 3, Article 350 paragraphs 2 and 3, Article 366 paragraph 5, Article 367 paragraphs 1 through 3, 5 and 6, Article 368 paragraphs 1 through 3, and 5, Article 372 paragraph 1, Article 377, Article 378 paragraph 3, Articles 388 through 390, and Article 393 of the Criminal Code if the material gain acquired from crime, that is, the value of objects acquired from crime exceeds the amount of one million five hundred thousand dinars.

Law on Public Peace and Order

(Official Gazette RS, no. 51/92, 53/93, 67/93, 48/94, 101/2005 – other law 85/2005 – other law)

Article 14

The one who engages in prostitution or provides premises for the purpose of prostitution, shall be sentenced to imprisonment lasting up to 30 days. The one who provides premises to a minor for the purpose of prostitution, shall be sentenced to imprisonment lasting up to 60 days.

Law on Aliens

**(Official Gazette RS, no. 97/2008)
 Conditions for Issuing the Permit**

Article 28

An alien can be approved a temporary residence permit if together with his/her application the evidence of the following is provided:

- 1) that he/she possesses enough resources for supporting himself/herself;
- 2) of health insurance;
- 3) of the justification of application for temporary stay in accordance with the purpose of temporary residence from the Article 26 paragraph 1 of this Law.

proceedings for compensation. The justification is Article 206 para. 2 of the Criminal Procedure Code, which specifies that "In the judgment in which the defendant is found guilty, the court may award compensation claim, in part or in full, to the authorized person, and refer him/her to civil proceedings for the remaining portion of the claim. If information presented in the criminal proceedings do not provide reliable ground for awarding the compensation either partially or in full, the court shall refer the authorized person to claim for the compensation in full in civil proceedings".

In all cases where ASTRA provided legal assistance to trafficking victims so far, the judges in criminal proceedings have referred the victim to initiate civil proceedings in order to claim compensation. A way to get around this is to make the compensation claim in the criminal proceedings simple and undisputable¹³. See also the tips on page 53.

A full analysis of the practice of the Belgrade misdemeanor authorities pertaining to Article 14 of the Law on Public Peace and Order you can read on:
<http://www.astra.org.rs/sr/pdf/istrazivanje3.pdf>

NGO ASTRA and Jazas are currently implementing a survey which should identify deficiencies in the identification of potential trafficking victims in the sex workers' population and possible violation of their rights. This survey is supported by the Dutch Embassy in Belgrade.

¹³ For more information, please see the practice of the Dutch courts further in the text.

Fulfilment of the conditions from paragraph 1 point 2) of this Article is regulated in detail by the regulations of the Minister competent for internal affairs, with a prior consent of the Minister competent for health. The alien is obliged to attach to the first application an appropriate Certificate attesting that he/she was not convicted. The alien shall not be granted a temporary residence if there are hindrances from the Article 11 paragraph 1 of this Law.

As an exception from the provisions of paragraphs 1, 3 and 4 of this Article, if in the interest of criminal proceedings for the criminal offence of trafficking in human beings, the alien who is a victim of such criminal offence, shall be granted a temporary residence in the Republic of Serbia, except when there are hindrances from the Article 11 paragraph 1 point 6) and 8) of this Law.

For the duration of his/her temporary residence in the Republic of Serbia, the alien from paragraph 5 of this Article with no resources to support himself/herself, shall be provided adequate accommodation, food and basic living conditions.

Civil proceedings are more complicated and more expensive. All legal expenses must be borne by the plaintiff until the enforcement of the judgment in which the claim was granted. In most cases the proceedings last for five or more years. There are two civil cases known in which compensation was granted. However, these judgments have never been enforced, that is, it was not possible to take the money from traffickers.

For these reasons and with the support of the OSCE Mission to Serbia, beginning 2011 an *Expert Group for making recommendations for improving the compensation mechanism* has been formed. The members of the group are judges, prosecutors, lawyers, a law professor and NGO ASTRA.

Apart from drawing up recommendations in regard to compensation procedures, the expert group needed to solve a number of related issues, such as:

1. The scope of the right to compensation (i.e. who would be entitled to such right): all victims of crime, victims of violent crimes or victims of human trafficking? It was decided to include all victims of violent crimes.
2. The definition of the concept of victim, since the Criminal Procedure Code does not recognize the term "victim", but only the injured party.

The Expert Group made a number of recommendations:

- To make the decision about the victim's compensation claim mandatory within criminal proceedings, such compensation should be paid from the state budget.
- To ensure that victims have a legal representative in the process and access to free legal aid.
- To establish a special Compensation Fund for victims.

They also made a number of recommendations on how such a Fund should operate:

1. According to the Law on Seizure and Confiscation of the Proceeds from Crime, **20% of confiscated funds should be used to fund social, health and other institutions**. This means that the Compensation Fund could be financed from this source. It could also be financed from other sources, e.g. funds collected based on the public prosecutor's decision to replace the sentence with some sort of financial contribution by the accused, payment of fines, donations, other budgetary resources, etc. The state

- could use various methods to collect the money used for the compensation of victims from the perpetrators of violent crimes. Such a Compensation Fund should be founded by the Government's Decree, written in accordance with the Warsaw Convention.
2. **The basic function** of the Compensation Fund would be the payment of damages, both material and non-material, to victims of violent crimes. The Fund would act upon the decisions of criminal and/or civil courts. However, it should also be accessible for compensation claims of victims of crimes that are not prosecuted or where the perpetrator is not known or cannot be prosecuted for various reasons.
 3. The Compensation Fund for Victims of Violent Crimes should operate under the **Ministry of Justice of the Republic of Serbia** and for that purpose a special commission would be formed.
 4. Both **direct and indirect** victims should have the right to compensation for damages. Direct victims are persons who suffered severe physical injuries or severe health damage (physical and mental) as a consequence of a violent crime. All persons who suffered violent crime in Serbia regardless of their citizenship should be entitled to this right.
 5. The commission should make a decision within three months from the moment of filing the request. The Ministry of Justice should be obliged to make the payment within a period of no longer than 30 days following the release of the Commission's decision (i.e. six months to one year after the police report has been filed).
 6. The procedure should start through the submission of an application to the Ministry of Justice i.e. the Commission. This should be a sort of **administrative procedure** and no taxes should be paid. The application form would need to be simple and easily accessible to victims and available in various locations: police stations, medical facilities, the prosecution offices, courts, NGOs that provide victim assistance, social welfare centers, etc. Anyone can file the application on the victim's behalf, but the victim must sign it personally. At this moment, the OSCE Mission to Serbia is in the process of conducting a feasibility study.

Social protection services and health care

Another law that explicitly mentions trafficking victims is the Social Protection Law, which was passed within the reform of the social protection system. This Law clearly specifies trafficking victims as direct beneficiaries of social protection services.

Social Protection Law (Official Gazette RS, no. 24/2011) Beneficiaries Article

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The holder of rights or beneficiary of services of social care is a person, or family who face obstacles in satisfying needs, therefore being unable to attain or maintain quality of living, or does not have enough resources to provide for basic living needs, and are unable to provide for them through their work, income from property, or other sources.

Minor person (hereinafter: child) and person of age up to 26 years old (hereinafter: young person, youth) are the beneficiaries pursuant to paragraph 1 of this Article, when, due to family and other life circumstances, they have their health, safety and development at risk, or when evident that without the support of the social care system they could not achieve an optimal developmental level, and especially if/when:

- 1) without parental care, or in risk of losing parental care;
- 2) their parent, guardian, or other person that take immediate care of them, is unable to take care of them without the support of the social care system, due to medical reasons, mental condition, intellectual disability or unfavourable social and economic circumstances;
- 3) have developmental disability (physical, intellectual, mental, sensory, speech/linguistic, social, emotional, complex), and their needs for care and material security exceed capabilities of their family;
- 4) are in conflict with their parents, guardians and community and jeopardize their own wellbeing by their actions;
- 5) face difficulties due to alcohol, drug or other substance abuse;
- 6) there is a risk of them becoming a victim, or already is a victim of abuse, neglect, violence and exploitation, or their physical, psychological, or emotional welfare is jeopardized by actions or neglect of parents, guardians, or other persons that take immediate care of them;
- 7) are victims of human trafficking;**
- 8) are foreign citizens, or a persons without citizenship, unaccompanied;
- 9) their parents are in dispute over the manner of exercising parental rights;
- 10) have other social care needs.

Person of age between 26 and 65 years old (hereinafter: adult(s)) and person of age older than 65 (hereinafter: senior beneficiary) is a beneficiary pursuant to paragraph 1 of this Article, when his/her welfare, safety and productive life are jeopardized by old age, disability, medical condition, family and other life circumstances, and especially if/when:

- 1) has physical, intellectual, sensory or mental difficulties, or difficulties in communication, and when, due to social or other obstacles, faces functional limitations in one or more areas of life;
- 2) is at risk of becoming a victim, or already is a victim of self-neglect, neglect, abuse, exploitation and domestic violence;
- 3) is facing difficulties due to troubled familial relations, alcohol, drug or other substance abuse, or due to other types of socially unacceptable behaviour, or other causes;
- 4) is a victim of human trafficking;**
- 5) is a foreign citizen, or person without citizenship in need of social care;
- 6) is in need of institutional placement and care, or has other social care needs.

A meaningful assistance to victims of trafficking in human beings encompasses health care necessary for their physical and psychological recovery. In most of the cases the necessary assistance does not depend on the state's discretionary powers – on the contrary we speak here about victim's rights in the medical context.

The Health Care Law of 2005 further stipulates conditions upon which foreign nationals can exercise the right to health care and provides for an extensive list of the patients' rights. As to the costs, Serbian citizens are entitled to a free emergency medical treatment, while the law makes some distinctions with regard to foreigners. The most important is that the law explicitly provides free emergency medical treatment if obtained in the state institutions for foreigners who are victims of trafficking in human beings {Article 241 (6) HCL}. The Law however does not refer explicitly to victims of trafficking in human beings in regard with the costs of emergency medical treatment obtained in private institutions. Yet, we assume that in such cases victims would be also exempted

from the payment because Article 242 emphasizes that the costs of emergency medical treatment obtained in private healthcare institutions will be paid from the budget if a foreigner does not have necessary means to pay for the treatment.

Healthcare Law
(Official Gazette RS, no. 107/2005 and 72/2009 - another law)
Article 241

The Republic of Serbia pays from the budget the compensation to health care institutions according to the health care services price list adopted by the organization of obligatory health insurance, for the healthcare services covered by obligatory health insurance, and provided to:

- 1) Foreign citizens to whom healthcare is provided for free under an international treaty on social care, unless the treaty stipulates otherwise;
- 2) Foreign citizens who reside in Serbia due to being summoned by state authorities - during their stay, in accordance with reciprocity principle - yet they do not fulfill the conditions to qualify as persons with obligatory insurance under the law which regulates the area of obligatory health insurance;
- 3) Foreign citizens to whom asylum has been granted in Serbia and Montenegro, in case they are materially unsecured;
- 4) Foreign citizens who have smallpox, plague, cholera, viral hemorrhagic fevers (except hemorrhagic fever with renal syndrome), malaria or yellow fever, as well as other infectious diseases because of which a person must be put under medical supervision in accordance with the provisions that regulate the area of protection of citizens from infectious diseases;
- 5) Foreign citizens - crew members of foreign ships or vessels - who have venereal diseases;
- 6) Foreign citizens who are victims of trafficking in human beings.**

CHAPTER 4. INTERNATIONAL AND EUROPEAN LAW

Introduction

This chapter offers an overview of the existing international and European legal instruments on trafficking in persons. Its main aim is to place the issue of trafficking in the context of international law and human rights and to provide lawyers with useful resources.

It answers the question of how trafficking in persons, forced labour, slavery and slavery-like practices are defined in international law. It also addresses questions like the difference between trafficking and prostitution and between trafficking and smuggling.

International instruments

The core international instrument is the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (also called Palermo Protocol or Trafficking Protocol). The Trafficking Protocol is one of three protocols attached to the UN Convention against Transnational Organized Crime. The Convention, the Trafficking Protocol and a Protocol on smuggling were adopted by the UN General Assembly in November 2000. They are primarily law enforcement instruments to promote cross-border cooperation by governments and to ensure that all countries have adequate laws to address these crimes. The Trafficking Protocol consists of three instruments: the Protocol, relevant sections of the Convention and the Interpretative Notes (*travaux préparatoires*), which are explanations of some of the provisions of the Protocol. Serbia is a party to the Convention and the Trafficking Protocol.

The term “trafficking” was used as early as the end of the 19th century. However, since then there has been persistent confusion about the exact meaning of the term, that is, which practices should be combated. The Protocol, for the first time, contains an internationally agreed legally binding definition of trafficking in persons.

The different human rights violations that occur during the process of trafficking are addressed in various international treaties. The most important are the *International Covenant on Civil and Political Rights* (1966), the *International Covenant on Economic, Social and Cultural Rights* (1966), the *Slavery Convention* (1926), the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery* (1956), the *ILO Forced Labour Conventions* no. 29 (1930) and no. 105 (1957), the *Convention on the Protection of All Migrant Workers and their Families* (1990), the *Convention on the Elimination of All Forms of Discrimination Against Women* (1979) and the *Convention on the Rights of the Child* (1989).

Non-binding international instruments

A crucial human rights-based instrument is the 2002 OHCHR *Recommended Principles and Guidelines on Human Rights and Human Trafficking*¹⁴, which intends to provide a foundation for the development, implementation and evaluation of a rights-based response to trafficking. The Guidelines cover prevention, protection and assistance as well as criminalization, punishment and redress. A

¹⁴ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1, available at <http://www.ohchr.org/Documents/Publications/Traffickingen.pdf>.

Commentary was published by the OHCHR in 2010, which further elaborates on them and provides direction on the legal status of the various aspects of the Principles and Guidelines.¹⁵

Especially in relation to the position of victims, the *UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*¹⁶ and the *Basic Principles and Guidelines on the Right to a Remedy and Reparation* provide further guidance.

European instruments

A more human rights-oriented instrument is the Council of Europe Convention on Action Against Trafficking in Human Beings (hereinafter CoE Trafficking Convention), which was adopted in 2005 and to which Serbia is also a party. The treaty explicitly identifies trafficking as a violation of human rights and covers both cross-border and internal trafficking.

Another core European instrument is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the European Court of Human Rights (ECtHR) trafficking in human beings constitutes a violation of Article 4 of the convention without the need to determine whether it should be qualified as slavery, servitude or forced labour (Rantsev v Cyprus and Russia, Application no. 25965/04, 7 January 2010. See box on p. 30).

KEY RIGHTS ENGAGED IN TRAFFICKING IN HUMAN BEINGS

- **Right to life, liberty and security** (Art. 2 & 6 EU Charter; Art. 2 & 5 ECHR; Art. 6 & 9 ICCPR; Art. 6 & 37 CRC; Art. 5 CERD; Art. 9 & 16 ICRMW)
- **Right to freedom from slavery, servitude, forced labour, or bonded labour** (Art. 5 EU Charter; Art. 4 ECHR; Art. 8 ICCPR; Art. 10 ICESCR; Art. 11 ICRMW; Slavery & Forced Labour conv.)
- **Right not to be sold, traded, promised or forced into marriage** (Art. 16 CEDAW; Art. 1 Conv. on slavery-like practices; Art. 37 CoE Trafficking Conv.)
- **Right not to be subjected to torture, cruel, inhumane and degrading treatment or punishment** (Art. 4 EU Charter; Art. 3 ECHR; Art. 7 ICCPR; Art. 3 CAT; Art. 37 CRC; Art. 10 ICRMW)
- **Right to be free from gender-based violence** (Art. 2 CEDAW)
- **Right to freely choose one's work and to just and favourable conditions of work** (Art. 15 & 31 EU Charter; Art. 6 & 7 ICESCR; Art. 11 CEDAW; Art. 32 CRC; Art. 25 ICRMW, Art. 9 ILO Conv. No. 143 concerning migrations in abusive conditions)
- **Right to freedom of expression and information** (Art. 11 EU Charter; Art. 10 ECHR; Art. 19 ICCPR; Art. 13 ICRMW)
- **Right to property** (Art. 17 EU Charter; Art. 15 ICRMW)
- **Right to keep one's own identity documents** (Art. 21 ICRMW)
- **Right to health** (Art. 12 ICESCR; Art. 5 CERD; Art. 14 CEDAW; Art. 24 & 39 CRC, art. 28 ICRMW)
- **Right to freedom of movement** (Art. 45 EU Charter; Art. 12 ICCPR; Art. 15(4) CEDAW; Art. 5 CERD; Art. 8 ICRMW)

¹⁵ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary*, 2010, available at http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf

¹⁶ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly resolution A/RES/40/34 of 29 November 1985, available at www2.ohchr.org/english/law/victims.htm.

- **Right to privacy and protection of family life** (Art. 7 EU Charter; Art. 8 ECHR; Art. 17 ICCPR; Art. 9 & 10 CRC; Art. 14 ICRMW)
- **Right to protection of personal data** (Art. 8 EU Charter)
- **Right to non-discrimination, equality before the law and equal protection by the law** (Art. 20 & 21 EU Charter; Art. 14 ECHR; Art. 2, 14 & 26 ICCPR; Art. 2 & 3 ICESCR; Art. 2 CEDAW; Art. 2 CRC; Art. 2 & 5 CERD; Art. 1 & 24 ICRMW)
- **Right to an effective remedy** (Art. 47 EU Charter; Art. 13 ECHR; Art. 2 ICCPR; Art. 6 CERD)
- **Right to be protected from *non-refoulement*** (Art. 4 & 19 EU Charter; Art. 3 ECHR; Art. 33 1951 Refugee Conv.; Art. 3 CAT; Art. 7 ICCPR; Art. 22 CRC; Art. 14 UN Trafficking Protocol; Art. 40 CoE Trafficking Conv.; Art. 3(3) Eur. Conv. on Extradition: Preamble 2 EU Directives 2004/83/EC, 2005/85/EC and 2003/9/EC; Preamble 2 EU Directives 2004/83/EC, 2005/85/EC and 2003/9/EC; Preamble 8 EU Directive 2008/115/EC; Preamble 2 Council Regulation (EC) No. 343/2003; Preamble 10 EU Directive 2011/36/EU)
- **Right to seek asylum** (Art. 14 UDHR; 1967 Declaration on Territorial Asylum: Art. 18 EU Charter; Art. 14 UN Trafficking Protocol; Art 40 CoE Trafficking Conv.: 1951 Refugee Conv.; UNHCHR's executive Conclusions on Asylum).

Taken from: Prevent, Combat Protect Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach, p. 23.

See: www.unhcr.org/refworld/docid/4edcbf932.html.

EU instruments

At the EU level *Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims* (hereinafter EU Directive on Trafficking) and the *Directive on sanctions against employers of illegally staying third-country nationals* are the most relevant instruments. Although they are not binding for Serbia, they can be considered as standard-setting documents.

The 2011 EU Directive on Trafficking recognizes trafficking as a gross violation of human rights and aims to take an integrated, holistic and human rights approach. It pays specific attention to the identification, assistance, protection, non-prosecution and compensation of victims, including child victims. The 2011 Joint Commentary of the UN Agencies *Prevent Combat Protect Human Trafficking* provides an extensive human rights-based commentary on the Directive.¹⁷

Next to the Trafficking Directive, a number of other existing and forthcoming EU Directives are relevant:

- The *EU Directive on sanctions against employers of illegally staying third-country nationals*¹⁸ provides for criminal penalties in case of particularly exploitative working conditions, where the employer knows the worker is a victim of trafficking or a minor. It also requires Member States to ensure that employers are liable to make back payments to workers, such as outstanding remuneration.
- The *EU Directive on a temporary residence permit for victims of trafficking who cooperate with the authorities*¹⁹ provides for a reflection period and a temporary residence permit during criminal proceedings for victims who cooperate with the authorities, including material, medical, legal and other assistance, and access to education and the labour market.

¹⁷ *Prevent Combat Protect Human Trafficking, Joint Commentary on the EU Directive - A Human Rights-Based Approach, to be downloaded at: www.unhcr.org/refworld/docid/4edcbf932.html.*

¹⁸ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

¹⁹ Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004/81/EC, 29 April 2004).

- The *EU Directive relating to compensation to crime victims*²⁰ aims to ensure that each Member State has a national scheme in place that guarantees fair and appropriate compensation to victims of crime and which is accessible to victims regardless of where in the EU a person becomes the victim of a crime.
- The forthcoming *EU Directive on combating the sexual abuse, sexual exploitation of children and child pornography*²¹ obliges Member States to criminalize the demand for child prostitution and pornography and the involvement of children in sexual exploitation, including sex tourism and activities like 'grooming' (befriending children with the intention of sexually abusing them). Special attention is paid to prevention, the protection of victims against additional trauma resulting from the criminal proceedings (including access to a free lawyer), and the treatment of offenders, so that they don't abuse again.
- The *Proposal for a Directive on minimum standards on the rights, support and protection of victims of crime*²² is part of the so-called "Victim Package", which aims at strengthening the rights of victims in the EU. It contains a set of measures to ensure a minimum level of rights, support and protection for victims across the EU, no matter where they come from or live or where the crime takes place. The Directive will replace the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings.

What is trafficking in persons?

The definition of trafficking in Article 3 of the UN Trafficking Protocol provides the common ground for the international community to prevent, combat and punish trafficking, as well as to provide assistance and protection to its victims. The definition has three constituent elements:

DEFINITION OF TRAFFICKING		
ACTS	MEANS	PURPOSE
<ul style="list-style-type: none"> • Recruitment • Transportation • Transfer • Harboring • Receipt of persons 	<ul style="list-style-type: none"> • Threat or use of force or other forms of coercion • Abduction • Fraud • Deception • Abuse of power or a position of vulnerability • Giving or receiving payments or benefits to achieve the consent of a person having control over another person 	Exploitation, including: <ul style="list-style-type: none"> • Exploitation of the prostitution of others or other forms of sexual exploitation • Forced labour • Slavery or practices similar to slavery • Servitude • Removal of organs • Other forms of exploitation

Moreover the definition makes clear that:

- The consent of a victim to the intended exploitation is irrelevant if any of the deceptive or coercive means listed in the definition has been used (Art. 3b);

²⁰ Council Directive 2004/80/EC of 29 April 2004 relating to compensation to crime victims.

²¹ Proposal for a Directive on combating the sexual abuse, sexual exploitation of children and child pornography, repealing Framework Decision 2004/68/JHA. Final version is forthcoming.

²² Proposal for a Directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime, Brussels, 18.5.2011 COM(2011) 275 final 2011/0129(COD), 2011.

- Any recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered 'trafficking in persons' even without the use of any of the deceptive or coercive means as listed in the definition (Art. 3c);
- 'Child' means any person under eighteen years of age (Art. 3d).

The core elements of the definition are therefore:

- a. the movement of a person from one place to another
- b. with the use of deception, coercion or abuse of power
- c. into conditions of exploitation.

Movement from one place to another

The recruitment process can take place in formal and informal ways. Many trafficking cases involve registered or illegal recruitment agencies, but also family members, friends or acquaintances can act as recruiter.

Trafficking often occurs between countries, but can also happen without crossing international borders. According to the parent convention on organised crime, domestic law must establish trafficking as an offence "independently of the transnational nature or the involvement of an organized criminal group". The Council of Europe Convention explicitly covers both internal and cross-border trafficking.

Trafficking can happen through legal as well as illegal migration channels. Some migrants enter the country illegally while others enter with legitimate visas or work permits and only become illegal when they remove themselves from the power of an abusive employer.

Fraud, deception or abuse of power or a position of vulnerability

The inclusion of fraud, deception and the abuse of power or a position of vulnerability makes clear that trafficking can occur without any use of (physical) force. Deception can refer to the nature of the work or services, for example when a trafficked person is promised a job as a domestic worker but is forced to work as a prostitute, but in many cases traffickers deceive people about the conditions under which they will be forced to work/live. If a woman is trafficked into prostitution, for example, she may know she is going to work in the sex industry, but not that she will be deprived of her liberty and her earnings.

European Court of Human Rights

Siliadin v France, 26 July 2005

(Application no. 73316/01)

In the case of a girl from Togo who was brought to France, the Court found that she had been subjected to **forced labour** as she had worked for years for a family that exploited her "without respite, against her will, and without being paid", while residing illegally in the country, afraid of being arrested by the police.

While in some cases traffickers use violence, in many cases they abuse the vulnerable situation of the trafficked person. According to the Interpretative Notes to the Protocol, "abuse of a position of vulnerability" refers to

They also found she had been subjected to a modern form of slavery. As relevant factors in assessing whether a situation amounts to a contemporary form of slavery the Court mentioned:

- there is control of a person's movement or physical environment
- there is an element of psychological control
- measures are taken to prevent or deter escape
- there is control of sexuality and forced labour.

According to the Court **servitude** can be defined as "*an obligation to provide one's services that is imposed by the use of coercion, and is linked to the concept of slavery*"

Rantsev v Cyprus & Russia, 7 January 2010

(Application no. 25965/04)

In the case of a Russian victim of trafficking brought to Cyprus, the Court ruled that trafficking in human beings, as defined in the UN Trafficking Protocol and the CoE Trafficking Convention, is prohibited by Article 4 ECHR without the need to determine whether it should be qualified as slavery, servitude or forced labour:

"(Like slavery) trafficking in human beings, by its very nature and aim of exploitation, is based on the exercise of powers attaching to the right of ownership. It treats human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implies close surveillance of the activities of victims, whose movements were often circumscribed. It involves the use of violence and threats against victims, who live and work under poor conditions".

In the same judgment the Court ordered Cyprus and Russia to pay compensation to the family of the victim (who had died during her attempt to escape after having been sent back to her exploiter by the police) for the failure to provide for an appropriate legal and administrative framework to combat trafficking and to properly investigate how and where the victim was recruited.

"any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved" (para 63)²³.

This includes, for example, situations in which the victim does not speak the language, has her or his identity papers taken away, has no legal residence status or working permit, is prohibited to leave the workplace without an escort or to have contacts with her/his family or the outside world, or is threatened with reprisals against her or himself, children or other dear ones. In this way victims are brought to a situation of dependency on their captors with no real and acceptable alternative than to submit.

Into conditions of exploitation

The definition covers all forms of exploitation into which people can be trafficked, including forced begging, illegal adoption, forced or servile marriage and the exploitation of criminal activities.²⁴ While the sex industry is one of the industries into which in particular women are trafficked and exploited under slavery-like conditions, people can be trafficked into a diversity of industries, such as domestic work, sweatshop labour, construction or agricultural work. For the crime, it is not important whether the work is legal or illegal under national laws (e.g. begging, prostitution).²⁵

The Protocol does not give a definition of exploitation. It only states that exploitation should include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or

²³ Crime Prevention and Criminal Justice, report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh session, Addendum, *Interpretative notes for the official records (Travaux Préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN General Assembly, 3 November 2000 (A/55/383/Add.1), to be found at <http://www.odccp.org/crime-cicp-convention-documents.html>.

²⁴ See also EU Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, Art. 2(3).

²⁵ See also: UNHCHR, UNHCR, UNICEF, UNODC, UN Women, ILO, Joint UN agencies, *Prevent Combat Protect Human Trafficking, Joint Commentary on the EU Directive-A human Rights-Based Approach*, 2011, p. 102-104.

practices similar to slavery, servitude or the removal of organs. For the crime to take place, the presence of the purpose (the intention of exploitation) suffices, the actual exploitation does not yet to have taken place.

Children

In regard to children, the *Convention on the Rights of the Child* and the *Convention on the Worst Forms of Child Labour* (ILO C. No. 182) identify specific types of exploitation of children. The engagement of children under 14 (15 in developed countries) in any form of full-time work, or children under 18 in hazardous work such as mining, seafaring or sex work, is always exploitation.

What are exploitation of the prostitution of others and sexual exploitation?

Exploitation of the prostitution of others and sexual exploitation are not defined in the Protocol or in international law. The terms were intentionally left undefined in order to allow all States, independent of their domestic policies on prostitution, to ratify the Protocol.²⁶

According to the definition 'exploitation of prostitution' only amounts to trafficking, when the other two elements are present, i.e. one of the acts and the use of deceptive or coercive means.²⁷ Whether or not a person was formerly engaged in prostitution (or domestic work or any other type of work) or knew s/he would be so, is not relevant if all the elements of the definition are fulfilled: the presence of one of the acts, the use of one of the coercive or deceptive means and the purpose of exploitation.

While the Protocol draws a distinction between trafficking for forced labour and for sexual exploitation, this does not mean that forced prostitution and coercive sexual exploitation do not amount to forced labour. Since the coming into force of the Forced Labour Convention, the ILO Committee of Experts has treated trafficking for the purpose of forced prostitution as a form of forced labour, no matter whether prostitution is illegal under national law.²⁸

The Protocol addresses the exploitation of prostitution of others only in the context of trafficking. It does not imply a specific position on the treatment of (the exploitation of) non-coerced adult prostitution, leaving it to individual States how to address prostitution in their respective laws. Different legal systems, whether decriminalising, legalising or regulating prostitution, can be in compliance with the Protocol.

What are forced labour, slavery, slavery-like practices and servitude?

An integral component of trafficking is usually forced labour or slavery/slavery-like practices. Forced labour or services, slavery or practices similar to slavery and servitude are also not defined in the Trafficking Protocol, but are elaborated in other international conventions, to which regard must be taken in its implementation and interpretation.

The ILO Forced Labour Convention no. 29, to which Serbia is a party, defines forced labour as:

²⁶ Interpretative notes (*Travaux Préparatoires*) (A/55/383/Add.1), available at <http://www.odccp.org/crime-cicp-convention-documents.html>.

²⁷ The same goes for the purpose of 'removal of organs', which also only amounts to trafficking if the other two elements are present.

²⁸ ILO, *Eradication of Forced Labour*, International Labour Conference, 2007, p. 42.

“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.”

'All work or service' encompasses all types of work, employment or occupation, irrespective of the nature of the activity performed, its legality or illegality under national law or its recognition as an economic activity. Forced labour, thus, can apply as much to factory work as to prostitution or begging when performed under conditions of coercion.²⁹

While a worker may have entered an employment contract without any form of deception or coercion, he or she must always be free to revoke a consensually made agreement, that is, any restriction on leaving a job owing to legal, physical or psychological coercion can be considered forced labour. If the employer or recruiter has used deception or coercion, consent becomes irrelevant.³⁰ Experience of the loss of control over one's life is a general indicator of coercion and forced labour. Child prostitution and pornography always constitute forced labour and fall under the worst forms of child labour under ILO Convention No. 182, as does trafficking in children.

INDICATORS OF FORCED LABOUR³⁰

- Threats or actual physical or sexual harm
- Restriction of movement and confinement to the work place or to a limited area
- Debt bondage/bonded labour. This is the case when the person works to pay off a debt or loan and is not paid for his or her services. The employer may provide food and accommodation at such inflated prices that the person cannot escape the debt
- Withholding of wages or excessive wage reductions that violate previously made agreements
- Retention of passport and identity documents, so that the person cannot leave or prove his/her identity and/or status
- Threat of denunciation to the authorities where the worker has an irregular status.

These practices impose a degree of restriction on an individual's freedom, which is often achieved through violent means. However, the definition of forced labour does not incorporate the concept of ownership as is the case for the Slavery Conventions. The League of Nations Slavery Convention (1926) defines slavery as:

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

The definition in the Slavery Convention may cause difficulties today, as legally there can be no rights of ownership of one person over another. A contemporary definition would be “the status or condition of a person over whom control is exercised to the extent that the person is treated like property”, or “reducing a person to a status or condition in which any or all of the powers attached to the right of property are exercised”.³²

The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar Practices prohibits slavery-like practices. These include debt bondage, serfdom, servile forms of marriage and the exploitation of children and

²⁹ ILO, *The Cost of Coercion*, 2009, p. 6.

³⁰ ILO, *Human Trafficking and Forced Labour Exploitation, Guidance for Legislation and Law Enforcement*, 2005; ILO, *Handbook for Labour Inspectors*, 2008, p. 4.

³¹ ILO, *Human Trafficking and Forced Labour Exploitation*, 2005, p. 20-21.

³² UNODC, *Model law on trafficking*, p. 21.

adolescents. Debt bondage and servile forms of marriage (including forced marriages) are particularly relevant in the context of trafficking.

Debt bondage refers to the system by which people are kept in bondage by making it impossible for them to pay off their (real, imposed or imagined) debts. The Supplementary Slavery Convention defines it as:

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

This happens when, for example, the trafficked person is required to pay back a large and ever increasing sum for travel expenses, housing, transportation, clothing, food, etc., making it effectively impossible to pay off the debt. Debt bondage or bonded labour is considered to be a form of forced labour as well as a slavery-like practice.

Servile forms of marriage include all forms of marriage whereby women have no right to refuse, defined as:

"Any institution or practice by which (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; (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; (iii) a woman on the death of her husband is liable to be inherited by another person."

Servitude is prohibited by the ICCPR and the ECHR. Although it is not defined in either instrument, it is identified as a slavery-like practice, covering exploitative conditions of work or service, which one cannot change or from which one cannot escape.³³

The issue of consent

The Trafficking Protocol stipulates that the consent of the victim shall be irrelevant where any of the means listed in the definition is used. This is in line with existing international legal norms and does not take away the right of the accused to a full defence and to the presumption of innocence, as explicitly stated in the Interpretative Notes to the Protocol. It should also not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. However, once the elements of the crime of trafficking are proven, any allegation that the trafficked person 'consented' is irrelevant.

Yet, in practice the issue of consent may cause confusion, because when a person has seemingly consented to what is actually forced labour or slavery-like practices, some may consider that the person is not trafficked. However, when considering the relevance of actual or seeming consent, the following must be taken into account:

- A free decision implies the realistic possibility of not giving consent or, more precisely, of refusing to do or tolerate any individual act. If there is no option to refuse, there is no free decision. The question, whether or not a decision was a free one, has to be asked and answered for each individual act.

³³ Manfred Novak, *UN Covenant on Civil and Political Rights, CCPR Commentary*, 2005. See also: Report of the Special Rapporteur on Contemporary Forms of Slavery, including its Causes and Consequences, Gulnara Shahanian (A/HRC/15/20), 28 June 2010.

- The consent of the victim must have been given with respect to all relevant circumstances of an act. Real consent is only possible and legally recognizable, when all relevant factors are known and a person is free to consent or not.

It should also be kept in mind that while the initial recruitment can be voluntary, the coercive mechanisms to keep a person in an exploitative situation may come into play at a later stage.

Thus although a person can consent to migrate, to carry false papers, to work in prostitution or to work illegally abroad, this does not imply the person's consent to forced labour or slavery-like exploitation, including in the sex industry, and does not exclude the person from being a victim of trafficking.

Relationship between trafficking and smuggling

The Trafficking Protocol makes a clear distinction between human trafficking and human smuggling, which is addressed in another Protocol. Smuggling is a violation of domestic laws that protect the state by regulating who can cross its border and how, whereas trafficking primarily concerns the protection of human beings against human rights abuses and can happen with or without crossing borders.

When people are smuggled, at the end of the journey they are free and not tied to the person who smuggled them. When people are trafficked, at the end of the journey they are not free, but tied to their traffickers for the exploitation of their labour or services. For trafficked persons, it is often only once they arrive at their destination that their real problems begin. They have often been promised a job that does not exist and/or are forced to work in conditions to which they did not agree. In practice, it often only becomes clear at the end of the journey whether a person is trafficked or smuggled.

What makes trafficking identifiable and distinct is not the movement of a person from one place to another or the site of work per se, but the deceitful brokering, the violation of the free will of the person, and the exploitative conditions of work.

Obligations of the State

States have a responsibility under international law to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons, as confirmed by the ECtHR in its judgment on *Rantsev v. Cyprus and Russia*.³⁴ States should therefore take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts relating to human trafficking, including when these are perpetrated by non-state actors.

Moreover, states have the obligation to ensure that anti-trafficking efforts do not affect the rights, obligations and responsibilities of states under international law, including international human rights, humanitarian and refugee law.³⁵ Examples are measures that restrict the freedom of movement of certain categories of people or prevent people from seeking asylum, detention of trafficked people in detention centres or closed shelters³⁶, and compulsory medical examinations, including HIV/AIDS testing.

³⁴ ECtHR, *Rantsev v. Cyprus and Russia*, Application no. 25965/04, 7 January 2010, para 281.

³⁵ OHCHR Recommended Principles & Guidelines, Guideline 1(6) & 1(9)

³⁶ Gallagher, Anne & Pearson, Elaine, Detention of Trafficked Persons in shelters. A legal and policy analysis, 2008, available at [http://lastradainternational.org/lsidocs/781%20Detention%20of%20trafficked%20persons%20\(Pearson&Gallagher\).pdf](http://lastradainternational.org/lsidocs/781%20Detention%20of%20trafficked%20persons%20(Pearson&Gallagher).pdf).

This principle is implicitly recognized in Art. 14 of the UN Trafficking Protocol, which prevents anything in the Protocol to affect the responsibilities of states under international law, including international human rights and humanitarian law. The same article holds that the measures set forth in the Protocol should be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons and that is consistent with internationally recognised principles of non-discrimination. A similar provision is set out in the Council of Europe Convention on Trafficking (Art. 40). The exact content of this obligation will depend on the specific human rights treaties to which the state is a party.

KEY INTERNATIONAL OBLIGATIONS OF STATES

This box lists the main anti-trafficking obligations of states. For each obligation a set of standards is given that states should meet. These standards are drawn from the UN Trafficking Protocol (UN Traf Prot) and its parent convention (UN TOC), the CoE Trafficking Convention (CoE Traf Conv), the major human rights treaties, the Recommended Principles and Guidelines on Human Rights and Human Trafficking from the OHCHR (OHCHR Guidelines), the judgments of the ECtHR, and the EU Directive on Trafficking (EU Dir THB) and on the reflection period & temporary residence rights for victims of trafficking (EU Dir residence).

Obligation to criminalise all forms of trafficking

- Trafficking, as defined in the UN Trafficking Protocol, is a criminal offence under national law (UN Traf Prot Art. 5, CoE Traf Conv, EU Dir THB)
- The component acts, i.e. slavery and servitude, forced labour, the worst forms of child labour, forced marriage, debt bondage, and forced prostitution/sexual servitude, are criminalised under national law (Forced Labour & Slavery Conventions, CRC, ICCPR, ECHR, OHCHR Guidelines Principle 12)
- Proportionate penalties are applicable to these offences and are applied (UN Traf. Prot; CoE Traf Conv.; EU Dir THB)

Obligation to actively identify victims of trafficking

- Guidelines and procedures for the relevant state authorities and officials are in place to permit the rapid and accurate identification of trafficked persons (CoE Traf Conv Art.10; OHCHR Guidelines no. 2.1; EU Dir THB Art.11)
- The relevant state authorities and officials have been trained in correct identification procedures (CoE Traf Conv Art. 10; OHCHR Guidelines no. 2.2; EU Dir THB Art.18)
- Law enforcement officials work together with NGOs to facilitate identification and assistance of trafficked persons (CoE Traf Conv Art.14; OHCHR Guidelines no. 2.3; EU Dir THB Art.10)
- Migrants and other groups that might be vulnerable for trafficking receive information that enables them to seek assistance when needed (OHCHR Guidelines no. 2.4)

Obligation to duly investigate and prosecute cases of trafficking, forced labour and slavery-like practices

- There is an adequate legislative framework in place for the investigation and prosecution of trafficking cases (UN Traf Prot; CoE Traf Conv.; EU Dir THB)
- Law enforcement agencies are provided with training in the investigation and prosecution of trafficking cases (CoE Traf Conv Art. 29; OHCHR Guidelines no. 5)
- Complaints are taken seriously; trafficking cases are duly investigated and prosecuted and trafficked persons are assisted and protected (ECtHR, *Rantsev v. Cyprus and Turkey*)

- Law enforcement agencies, prosecutors and the judiciary demonstrate an understanding of trafficking and its human rights dimensions and an ability to work together on this issue (OHCHR Guidelines no. 5)
- Measures are taken to encourage trafficked persons to seek help, report to the authorities and cooperate in the investigation and prosecution
- Data are available on the number of complaints, arrests, prosecutions and convictions

Obligation to assist and protect victims

- Trafficked persons are not automatically detained or deported (CoE Traf Conv; EU Dir THB)
- Measures are taken to protect trafficked persons from further harm and to protect their safety (UN Traf Prot. Art. 6; CoE Traf Conv Art. 12 & 28; OHCHR Guidelines no. 8; EU Dir Residence Art. 7)
- Trafficked persons have access to (emergency) shelter, medical assistance and legal advice; basic assistance (including housing, material, medical and psychological assistance) is given irrespective of whether the victim agrees to cooperation in the prosecution of the traffickers (CoE Traf Conv Art.10, 12 & 28; OHCHR Guidelines, no. 8)
- Trafficked persons are granted a reflection period and a temporary residence permit. During the reflection period and the temporary residence permit they have access to material, medical, psychological and legal assistance. During the temporary residence permit they have access to the labour market, vocational training and education (CoE Traf Conv Art. 12-14; EU Dir. Residence Art. 6-9)
- The privacy and identity of trafficked persons are protected (UN Traf Prot. Art 6; CoE Traf Conv Art. 11; ICCPR Art. 17; OHCHR Guidelines no. 6)
- Victims are given information on relevant court and administrative proceedings and assistance to enable their views and concerns to be presented (UN Traf Prot. Art. 6; CoE Traf Conv Art. 12)
- Trafficked persons who act as witnesses (and where appropriate their family and others close to them) are provided with effective protection from potential retaliation or intimidation (including possibilities for relocation, giving testimony in a way that ensures their safety, e.g. through video links, etc. (UN TOC Art.25)
- The safety of the trafficked person and his or her family, including safety for re-trafficking, is into account in any decision on repatriation (UN Traf Prot. Art. 8.2; CoE Traf Conv Art. 16)
- Trafficked persons are protected from summary deportation or return when there are reasonable grounds that this would constitute a risk for the person or his or her family (CoE Traf Conv Art. 16; OHCHR Guidelines, no. 4.6)

Obligation of non-detention of trafficked persons and non-prosecution for status-related crimes

- Trafficked persons are not held in immigration detention or other forms of custody (OHCHR Guidelines no. 2.6)
- Trafficked persons are not detained by law enforcement authorities for any reason other than their immediate physical protection (ICCPR Art. 9)
- Trafficked persons are never detained for reasons of collecting evidence including statements (ICCPR Art. 9)
- Trafficked persons are not detained by welfare authorities, unless they are in agreement (in which case they are not detained) or unless i) the detention is for a specific purpose directly related to the immediate needs of that victim and ii) for the shortest possible period of time (ICCPR Art. 9)
- Trafficked persons are not prosecuted for violations of immigration law or for the activities they have been involved in as a direct consequence of their being trafficked (CoE Traf Conv Art. 26; OHCHR Guidelines no. 2.5 & 4.5)

Obligation to provide victims with adequate and appropriate remedies

- Trafficked persons are provided with information on available remedies and with access to legal assistance (UN Traf Prot. Art. 6; CoE Traf Conv Art. 15)

- Trafficked persons are not automatically deported and have a right to remain in the country pending the completion of legal proceedings including proceedings for compensation (OHCHR Guidelines, no. 4.7)
- There is a legislative and practical possibility for trafficked persons to obtain compensation for damages suffered (UN TOC Art. 25, UN Traf Prot. Art. 6; ICRMW Art. 25(3); ILO C no. 97 & 143, CoE Traf Conv Art. 15; EU Dir Comp.)
- Trafficked persons must be enabled to present their views and concerned at appropriate stages of the criminal proceedings (UN TOC Art. 25, UN Traf Prot. Art. 6)
- There is a provision for payment of compensation from the state where such compensation cannot be obtained from the trafficker (CoE Traf Conv Art. 15)

Obligation to prevent trafficking and the related exploitation, while ensuring that measures do not violate established rights

- Policies and practices address the factors that increase vulnerability to trafficking, including poverty, inequality and all forms of discrimination (UN Traf Prot Art. 9; OHCHR Guidelines, no. 7)
- Prevention strategies are evidence based (OHCHR Guidelines, no. 7)
- The state has taken concrete steps to address public sector involvement or complicity in the trafficking process (UN TOC Art. 8; OHCHR Guidelines principle 6)
- The state has taken concrete steps to address the demand for the products of trafficking (e.g. through legislation targeting those who knowingly use or take advantage of the labour and/or services produced through the exploitation of trafficked persons) (UN Traf Prot Art. 9.5 & 19; CoE Traf Conv Art. 6; OHCHR Guidelines no. 7)

General obligations

- No aspect of the state's response to trafficking discriminates on, for example, the basis of race or sex (e.g. there are no gender-based restriction on freedom of movement including emigration) (UN Traf Prot Art. 14; CoE Traf Conv. Art. 3; OHCHR Guidelines no. 1; all major human rights treaties)
- No aspect of the state's response to trafficking violates other established rights (i.e. no compulsory testing, no arbitrary detention) (UN Traf Prot Art. 14; CoE Traf Conv Art. 40; OHCHR Guidelines no. 1; all major human rights treaties).

CHAPTER 5. POSITION OF VICTIMS IN INTERNATIONAL AND EUROPEAN LAW³⁷

Introduction

This chapter offers an overview of the position of victims of trafficking in human beings in international law. It first discusses the right of victims to assistance and protection, and the question of who should be considered a victim with the corresponding rights. This is followed by a discussion of the obligation of States to provide an effective remedy to victims of human rights violations. This chapter's aim is to provide background information to lawyers when representing victims and defending their interests. In the next chapter the rights of victims in criminal proceedings will be discussed in more detail.

Right to assistance and protection

Although trafficking is recognised as a serious crime and a violation of human rights, in many cases trafficked persons, if recognised as such, are primarily seen as witnesses and as tools for law enforcement. In the majority of countries, for example, access to assistance and protection is dependent on the willingness of the victim to cooperate with the authorities and his/her usefulness for the criminal proceedings. Often measures do not respect the basic human rights and dignity of the trafficked person. Examples are mandatory medical check-ups and HIV testing, compulsory counselling, restriction of the victim's freedom of movement, or contacting the victim's family and informing officials in his/her country of origin without their prior consent.³⁸

The willingness of victims to report to the police and cooperate in criminal proceedings is strongly related to their general treatment by the police and judicial authorities, the protection of their safety and privacy, the availability of information and assistance and the risks they incur of being arrested, detained, prosecuted or deported for offences arising out of their status of being trafficked, such as illegal entry or stay, involvement in the sex industry and/or the use of false documents. Research shows that victims who are treated well are more willing to cooperate and that law enforcement officials tend to be most successful in securing convictions when the trafficked person's rights are respected.

Over the last years there has been increasing attention for the needs and rights of victims of trafficking. Whereas most of the victim-related provisions in the UN Protocol are not mandatory, the more recent CoE Trafficking Convention and the 2011 EU Directive on Trafficking establish a set of minimum standards of assistance and protection which State Parties are obliged to provide to victims, regardless of the willingness of the victim to act as witness.

According to both instruments, any assistance should be provided on a consensual and informed basis and should include at least appropriate and secure accommodation, psychological and material assistance, access to emergency medical treatment, translation and interpretation services, counselling and information with regard to their legal rights and the services available to them, assistance to defend their rights and interests during criminal proceedings and, in the case of children, access to education.

³⁷ The boxes with key international standards are taken from *Prevent Combat Protect Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, 2011.

³⁸ Trafficking in Human Beings, Report of the EU, Experts Group, Brussels, 2004.

State Parties must also ensure that trafficked persons have access to compensation for the abuses of their human rights to which they have been subjected. Moreover, due account must be taken of the victim's safety and protection needs before, after and during proceedings.

According to the 2011 EU Directive on Trafficking, assistance should be provided as soon as there is a reasonable ground for believing the person might be a victim of trafficking (Art. 11(2)). In order to avoid secondary victimisation Member States should take measures to avoid unnecessary repetition of interviews during investigation, prosecution or trial; visual contact between victims and defendants, including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies; the giving of evidence in open court; and unnecessary questioning concerning the victim's private life (Art. 12(4)).

Also the OHCHR Recommended Principles and Guidelines contain various recommendations on protection and assistance, among others to ensure that legal proceedings involving trafficked persons are not prejudicial to their rights or wellbeing. The fact that trafficked persons, regardless of their willingness or ability to cooperate in legal proceedings, should have access to help and support has been reconfirmed by the Supervisory Committee of the Women's Treaty (CEDAW) in its Concluding Observations on the Netherlands:

"The Committee also reiterates its concern that victims of trafficking who do not cooperate with the police in the investigation and prosecution of traffickers are excluded from the protection of the so-called B-9 regulation. The Committee considers that by imposing this requirement, the Government of the Netherlands seriously hampers its capacity to reach and support victims of trafficking with adequate help"

The concept of "victim"

DEFINITION OF "VICTIM"

Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

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

2. 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

The term victim in itself is not without problems. Many service providers and people who have been trafficked prefer "trafficked person" or "survivor". They do not want to use or be labelled as "victim", because they feel that its emphasis on vulnerability, passivity and powerlessness fails to recognise the dignity, courage, aims and choices of the individuals concerned.

But even if the term victim is accepted, it is important to keep in mind that the fact that a person is a victim of a crime does not mean that he or she can be completely identified with her/his status of victim or should be patronised in any way.

family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

Council of Europe Trafficking Convention

Victim of trafficking means
"any natural person who is subject to trafficking in human beings [as defined in the convention]".

Proposed EU Victim Directive

Victim means
(i) A natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by a criminal offence.
(ii) the family members of a person whose death has been caused by a criminal offence.

In the framework of legal procedures it is, however, important to discuss the legal definition of victim. According to the *Council of Europe Trafficking Convention* "victim of trafficking" means "any natural person who is subject to trafficking in human beings [as defined in the convention]".

However, some crimes, including trafficking, have an impact that reaches beyond the immediate victim. This problem is addressed by the *Declaration of Basic Principles of Justice for Victims of Crime*, which includes in the definition of victim, where appropriate, the immediate family and dependents of the direct victim. It also explicitly notes that a person may be considered a victim, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted.

Fundamental rights of victims under the Declaration are access to justice, legal redress and compensation. States and their authorities are responsible for minimising the obstacles that victims face in seeking justice and support them through the justice process.

The *EU Framework Decision on the Standing of Victims in Criminal Proceedings*³⁹ defines "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 [of the EU]". In the new proposed Victim Directive⁴⁰ the definition of victim is extended to family members when the victim has died as a result of the crime.

Right to an effective remedy

Under international human rights law States have an obligation to provide victims of human rights violations with adequate and appropriate remedies and to protect them from further harm.⁴¹ The provision of adequate remedies serves multiple purposes. It offers the victim payment or reparation for injury, loss or harm and is an essential element of access to justice. It helps to empower the victim, contributes to their recovery and reduces the risk of re-trafficking. At the same time it serves as punishment and deterrence of traffickers.⁴²

The right to a remedy is a human rights norm widely recognized in the major international and regional human rights instruments. The International Covenant on Civil and Political Rights (ICCPR), for example, requires States Parties to ensure "that any person

³⁹ Council Framework Decision on the Standing of Victims in Criminal Proceedings (2001/220/JHA), Article 1, para 1.

⁴⁰ Proposal for a Directive of the European Parliament and the Council establishing minimum standards on the rights, support and protection of victims of crime, Brussels, 18.5.2011 COM(2011) 275 final 2011/0129(COD), 2011.

⁴¹ Commentary OHCHR Recommended Principles and Guidelines, pp. 141-151.

⁴² Joint UN agencies, *Prevent Combat Protect Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, 2011, p. 86.

whose rights or freedoms as herein recognized are violated shall have an effective remedy" (Art. 2(3)). A similar provision is found in Art. 13 of the European Convention on Human Rights (ECHR).

As stated in Guideline 9 of the OHCHR Recommended Principles and Guidelines:

"Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies."

Key international instruments on the right to an adequate remedy are the 2005 *Basic Principles and Guidelines on Remedy and Reparation*⁴³, and the 1985 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*.⁴⁴ Both are resolutions and not legally binding instruments, yet they are politically binding.

The right to an effective remedy contains both substantive elements and procedural rights needed to be able to access remedies.⁴⁵ According to the *Basic Principles and Guidelines on Remedy and Reparation*, adequate reparations include:

- restitution;
- compensation;
- rehabilitation;
- satisfaction;
- guarantees of non-repetition.

Restitution aims at restoring the situation that existed before the violation. Measures may include release from detention (whether such detention is imposed by the traffickers, the State or another entity⁴⁶), return of property, such as identity and travel documents and other personal belongings, safe and voluntary repatriation to one's place of residence (where applicable and if it is in the interest of the trafficked person), recognition of legal identity and citizenship, and assistance and support to facilitate social integration.

Recovery (rehabilitation)⁴⁷ recognizes the need to ensure that persons who have suffered a violation of their human rights have their status and position "restored" in the eyes of the law and community. It includes medical and psychological care, as well as legal and social services. By definition trafficking involves physical, sexual or psychological violence, coercion, threats and intimidation which may have severe physical and psychological health consequences for trafficked persons.⁴⁸

⁴³ UN General Assembly, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law*, adopted by the General Assembly 21 March 2006, A/RES/60147.

⁴⁴ UN General Assembly, *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly, 29 November 1985, available at: www2.ohchr.org/english/law/victims.htm.

⁴⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 13 April 2011 (A/HRC/17/35).

⁴⁶ See for the issue of unlawful detention of trafficked persons in State or private run shelters or rehabilitation centres: Anne Gallagher & Elaine Pearson, *Detention of Trafficked Persons in shelters. A legal and policy analysis*, 2008.

⁴⁷ As the Special Rapporteur notes in her report, the term recovery should be preferred to rehabilitation as to avoid re-victimization of trafficked persons by labeling them as persons in need of 'rehabilitation'.

⁴⁸ See e.g. *Stolen Smiles. The physical and psychological health consequences of women and adolescents trafficked into Europe*, Cathy Zimmerman e.a., the London School of Hygiene and Tropical Medicine, 2006.

Compensation is payable for economically assessable damage to the extent that such damage cannot be made good by restitution. It can cover a wide range of injury, loss or damage caused by the offender.

Satisfaction & guarantees of non-repetition: Satisfaction can be addressed by ensuring that the violations of the victim's rights are properly acknowledged and that 'justice is done'. Guarantees of non-repetition are a particularly important component of the right to a remedy in the case of trafficking, owing to the danger and harm caused by re-trafficking. This includes the obligation of States to take all necessary measures to protect the victim from future trafficking, as well as the effective prosecution and sanctioning of the traffickers.

Procedural rights in order to be able to access remedies are critical pre-conditions in realizing the substantive right to reparations for trafficked persons. These include:

- Access to information about available remedies in a language the victim understands;
- The right to legal assistance, including to pursue compensation;
- The right to remain in the country during legal proceedings, including those for claiming compensation;
- Protection against unlawful interference with the victim's privacy and safety from intimidation and retaliation before, during and after proceedings;
- The right to play a meaningful role in legal proceedings, to being heard and to act;
- In the case of children: the appointment of a guardian.

CHAPTER 6. RIGHTS OF VICTIMS IN CRIMINAL PROCEEDINGS AND BEYOND

Introduction

This chapter discusses the rights of victims before, during and after criminal and other legal proceedings, both in international law and in Serbian law. Lawyers have a crucial role in realising these rights. They can explain the proceedings, prepare the victim for interviews and court hearings, and protect their rights and interests during criminal and other legal proceedings. Even if criminal proceedings are generally extremely painful for victims, a good explanation and preparation can mitigate the harmful effects. In section 2 an overview is given of the key international standards in relation to the treatment of victims and witnesses of trafficking. In section 3 these are explained more in detail. Throughout the chapter a number of boxes provide lawyers with guidelines and tips.

Key international standards on the treatment of victims of trafficking⁴⁹

The following box provides an overview of the key international standards in regard to the treatment of trafficked persons before, during and after criminal proceedings.

KEY INTERNATIONAL STANDARDS ON THE TREATMENT OF VICTIMS OF TRAFFICKING

Information & legal assistance

- Trafficked persons are given information on relevant judicial and administrative proceedings as from their very first contact with the competent authorities (UN Traf Prot Art. 6; CoE Traf Conv. Art. 12 & 15; OHCHR Guidelines no. 6.5; EU Proposal Victim Dir Art. 4)
- Trafficked persons are provided with counseling and information, in particular as to their legal rights, in a language that they can understand (UN Traf Prot Art. 6(3)(b); CoE Traf Conv Art. 12)
- Trafficked persons are provided with information on available remedies (UN Traf Prot. Art. 6; CoE Traf Conv. Art. 15(1); OHCHR Guidelines, Principle 9 & Guideline no. 4(8) & 9(2); Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; EU Dir. THB Art. 12(2); Proposal Victim Dir Art. 12)
- Trafficked persons have access to legal assistance and free legal aid under the conditions provided by domestic law, for the duration of any criminal, civil or other actions against the traffickers, including for the purpose of obtaining compensation (Art. 15(2) CoE Trafficking Conv.; Case law ECrtHR ; Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; OHCHR Guidelines, Principle 9 & Guideline 9(3); 2011 EU Dir. THB Art. 12)

Protection of safety

- Measures are taken to protect trafficked persons from further harm and to protect their safety (UN Traf Prot. Art. 6; CoE Traf Conv Art. 12 & 28; OHCHR Guidelines no. 8; EU Dir 2004/81/EC Art. 7).
- Measures take into account the age, gender and special needs of victims of trafficking (UN Traf Prot Art. 6(4)).
- Child victims are given special protection, taking into account the best interests of the child (CoE Traf Conv Art. 28)

⁴⁹ The box with key international standards are based on the 2011 UN Joint Commentary *Prevent Combat Protect Human Trafficking*.

Protection of privacy

- The privacy and identity of trafficked persons is protected. This includes setting standards for the storage of personal data and encouraging the media to protect the private life and identity of victims (UN Traf Prot Art. 6(1); CoE Traf Conv Art. 11; ICCPR Art. 17; OHCHR Guidelines no. 6 & 5.8)
- The identity of trafficked persons is not publicly disclosed and their privacy is respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons are given full warning, in advance, of the difficulties inherent in protecting identities and are not given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard (OHCHR Guidelines no. 6.6).

Trafficked persons as witnesses

- Trafficked persons are given assistance to enable their views and concerns to be presented and considered at appropriate stages of the criminal proceedings (UN TOC Art. 25, UN Traf Prot Art. 6; CoE Traf Conv Art. 12)
- Trafficked persons who act as witnesses (and where appropriate their family and others close to them) are provided with effective protection from harm, threats, potential retaliation or intimidation by traffickers and associated persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. This may include giving testimony in a way that ensures their safety (e.g. through video links), identification of a safe place in the country of destination; protection of identity during legal proceedings; and identification of options for continued stay, resettlement or repatriation (UN TOC Art. 25; CoE Traf Conv Art. 28 & 30; OHCHR Guidelines no. 6, 4.10 & 5.8; Basic Principles and Guidelines on Remedy and Reparation, para. 12; EU Dir THB Art. 12)
- Legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being (OHCHR Guidelines 6.4)
- Trafficked persons receive specific treatment aimed at preventing secondary victimization by avoiding, as far as possible and in accordance with by national law, the following:
 - › unnecessary repetition of interviews during investigation, prosecution or trial;
 - › visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;
 - › the giving of evidence in open court; and
 - › unnecessary questioning concerning the victim's private life. (2011 EU Dir. THB, Art. 12(4)).

Right to adequate and appropriate remedies

- Trafficked persons have an enforceable right to effective and appropriate remedies. Remedies may be criminal, civil or administrative in nature (ECHR Art. 13; ICCPR Art. 2; CERD Art. 6; CEDAW General Recommendation No. 19; Basic Principles and Guidelines on Remedy and Reparation, para. 12; Declaration of Basic Principles of Justice; OHCHR Guidelines, Principle 17 & Guideline 9(1); EU Charter Art. 47)
- There is a legislative and practical possibility for trafficked persons to obtain compensation for damages suffered. This includes both material and non-material damages (UN TOC Art. 14(2) & 25(2); UN Traf Prot Art. 6(6) ; CoE Traf Conv Art. 15(3); ICRMW Art. 25(3); ILO C 97 & 143; OHCHR Guidelines, Principle 17 & Guideline 4(9)); EU Dir on Compensation)
- There is a provision for payment of compensation from the State where such compensation cannot be obtained from the trafficker, i.e. through a Victim Fund. Such fund may be financed through the use of confiscated assets (CoE Traf Conv Art. 15(4); OHCHR Guidelines 4.4)
- Trafficked persons have a right to be paid for the work they have performed, independent of the lawfulness of their stay (ILO C 97 & 143; ICRMW Art. 25(3); EU Directive on sanctions against employers of illegally staying 3th country nationals)
- There are provisions for confiscation of the proceeds of trafficking. A priority option is to use confiscated assets is to compensate victims (UN TOC Art. 25(2); OHCHR Guidelines, Principle 16 & Guideline 4(4)).

Non-punishment and non-application of penalties

- Trafficked persons are not detained, charged, prosecuted or punished for violations of immigration law or for their involvement in criminal activities they have compelled to commit as a direct consequence of their being trafficked (CoE Traf Conv Art. 26; OHCHR Guidelines, Principle 7, Guideline no. 2.5 & 4.5; 2011 EU Dir. THB, Art. 8).
- States provide for the possibility of not imposing penalties on victims of trafficking (CoE Traf Conv Art. 26)

Non-detention of trafficked persons, including children

- Trafficked persons should not be held in immigration detention centres, other forms of custody or vagrant houses (OHCHR Guidelines 2.6 and 6.1)
- Trafficked persons should not be detained by law enforcement authorities for any reason other than their immediate physical protection. They are never detained for reasons of collecting evidence including statements (ICCPR, Art. 9 & 12)
- Trafficked persons should not be detained by welfare authorities, unless they are in agreement (in which case they are not detained) or unless i) the detention is for a specific purpose directly related to the immediate needs of that victim and ii) for the shortest possible period of time (ICCPR, Art. 9 & 12; ECHR Art. 5)
- Trafficked children should not be placed in closed facilities unless it can be demonstrated that it is in their best interest and there is no reasonable alternative for protection, it is for the shortest possible period of time and is subject to periodic review (CRC Art. 25 and 37(b)).

Reflection period and temporary residence

- Trafficked persons are granted a reflection period of at least 30 days and a temporary residence permit for the duration of criminal and/or other legal procedures. During this period, they have access to material, medical, psychological and legal assistance. If granted a temporary residence permit they also should have access to the labour market, vocational training and education (CoE Traf Conv Art. 12-14; EU Directive on a temp residence permit Art. 6-9; EU Directive THB Art. 11 (1)).

Non-refoulement and the right to seek asylum

- Trafficked persons are not returned to another state where there is a serious risk they will be subjected to persecution, torture or other forms of ill treatment (UN Traf Prot Art. 14; CoE Traf Conv Art. 40(4); Art. 3 ECHR; 1951 Refugee Conv Art. 33; CAT Art. 3(1); ICCPR Art. 7; CRC Art. 22; OHCHR Guidelines no. 2.7; European Conv on Extradition Art. 3(2))
- Trafficked persons have the right to seek and enjoy asylum and have access to fair and efficient asylum procedures, no matter their means of entry, the use of fraudulent travel documents, or their willingness to give evidence against their exploiters (CoE Traf Conv Art. 40(4); UN Traf Prot. Art. 14; 1951 Refugee Conv Art. 31 & 33; CAT Art. 14; OHCHR Guidelines no. 1.6 & .2.7; UNHCR Trafficking Guidelines, para. 45-50; UNHCR 2003 Agenda for Protection)
- States should ensure that procedures are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers (CoE Traff Conv Art. 40(4); UN Traf Prot Art. Art. 14; OHCHR Guidelines no. 1.6 and 2.7)
- Trafficked persons are informed about the possibility of receiving international protection in a language they understand and in an age- and gender-sensitive manner
- Trafficked persons may qualify for international refugee protection if the acts inflicted on them by their traffickers would amount to persecution on a 1951 Refugee Convention ground and in the absence of effective national protection (UNHCR Trafficking Guidelines; OHCHR Guidelines no. 1.6 and 2)
- States use a gender-sensitive interpretation of the 1951 Refugee Convention, in particular the recognition of gender and sex based violence. Women and children trafficked for the purpose of forced prostitution or sexual exploitation are considered refugees when their State is unable or unwilling to provide protection against such harm or threats of harm (UNHCR 2002 Guidelines on Gender-related persecution; CEDAW Gen. Rec. 19 on violence against women)

- Anti-trafficking measures do not interfere with or otherwise negatively affect established rights, including the right of trafficked persons to seek and enjoy asylum and the principle of non-refoulement (CoE TrafConv Art. 40(4); UN Traf Prot. Art. 14; OHCHR Guidelines no. 1.6)

Return of trafficked persons

- Trafficked persons are protected from summary deportation or return when there are reasonable grounds that this would constitute a risk for the person or his or her family (CoE Traf Conv Art. 16; OHCHR Guidelines, Principle 11 & Guideline 4.6)
- The status of any legal proceedings related to that person being a victim of trafficking is taken into account in any decision on repatriation (UN Traf Prot Art. 8(2); CoE Traf Conv Art. 16)
- The safety of the trafficked person and their family, including the risk of re-trafficking, is taken into account in any decision on repatriation (UN Traf Prot Art. 8(2); CoE Traf Conv Art. 16(2); OHCHR Guideline no. 6.7)
- The return of a trafficked person is, where possible, voluntary and takes place with due regard for the rights, safety and dignity of the trafficked person and the status of legal proceedings (UN Traf Prot Art. 8(2); CoE Traf Conv Art. 16(2); OHCHR Rec. Principles, Principle 11 & Guideline 6.7)
- States ensure, in partnership with non-governmental organizations, that trafficked persons who return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social reintegration and prevent their re-trafficking (CoE Traf Conv Art. 16(5); OHCHR Guidelines no. 6.8)
- Repatriation programmes avoid re-victimization and respect the right to privacy of the victim (CoE Traf Conv Art. 16(5))
- Victims who wish to return are permitted to do so without undue or unreasonable delay (UN TrafProt Art.8(3)-(4) and Art.9(1)(b); CoE Traf Conv Art.16(1) and (3)).

Victims' rights one by one

Core victims' rights include the right to give and receive information and the right to protection of their privacy and safety. **In particular it should be ensured that the victim is protected from risks of reprisals and/or intrusion of his or her privacy.**

A crucial question concerns the implementation of victims' rights, the role and responsibility of the various actors in the criminal justice process and obstacles faced. Some challenges faced in Serbia are the lack of access to a free and qualified lawyer, the lack of trust of victims in the criminal justice system, the general attitude towards prostitutes, the limitations in the protection that victims can be offered, the need to repeatedly interrogate the victim, the lack of protection against direct confrontation with the suspect(s), the length of the criminal proceedings and the need to ensure closed-door trials for all trafficking cases.

Right to legal representation

Victims have the right to a lawyer to protect their rights, to inform them about their role in the proceedings, to defend their interests and to have their views heard and considered in the criminal proceedings. This includes civil or other proceedings to claim compensation for the damage suffered.

Most trafficked persons are not legally trained and have no experience with legal proceedings. In order for them to be able to actually exercise their rights, access to legal aid is crucial. A lawyer should be appointed from the very first contact with the authorities (and preferably even before that point). It is recommended that the victim has one and the same lawyer during the entire proceedings.

The need to provide legal and other assistance to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers is stressed in Principle 9 of the OHCHR Recommended Principles. An underlying assumption is that trafficked persons have an important role to play – and a legitimate interest – in legal proceedings against their exploiters.

Both the UN Trafficking Protocol and the CoE Convention on Trafficking contain provisions on legal assistance and representation. The Explanatory Memorandum of the latter refers to the ECtHR, which held that in certain circumstances there is a right to free legal assistance under art. 6(1) ECHR (*Airey v. Ireland*, 9 October 1979). Effective access to a court may necessitate free legal assistance if someone is not in a position to present her or his case properly and satisfactorily without the assistance of a lawyer (*Golder v. UK*, 21 February 1975).

The EU Directive on Trafficking requires Member States to provide victims, without delay, with legal counselling and legal representation, which should be free from charge if the victim does not have sufficient financial resources (Art. 12(2)).

Right to information

Victims have the right to information about their status, their rights and the relevant judicial and administrative procedures, including information on available remedies.

Transparency of procedures and honesty of information is paramount. Trafficked persons will have been frequently deceived and used. It is important that the victim is given full and accurate information to enable her/him to take informed decisions. Information provision should take into account the possible effects of psychological trauma and/or the person's cognitive abilities. For example, victims who are traumatised may find it difficult to adequately process information.

If the victim has expressed his or her wish to keep informed about the proceedings following charges being brought, the police should, to the best of their abilities, inform the victim about the progress and disposition of the case up till the moment the file is sent to the prosecutor. From that moment on the prosecutor should be responsible for informing the victim about the progress of the proceedings. Lawyers can have an important role as “watchdog” in this respect.

Right not to cooperate with law enforcement

Victims have the right to refuse cooperation with the prosecution authorities.

Pressing charges and/or acting as witness can have far-reaching consequences for victims. It may expose them, their children and other loved ones to intimidation and reprisals from the offenders and increases the risk that their situation becomes publicly known, with all consequences entailed. Moreover, the court case itself is extremely burdening and risks re-traumatising the victim. These concerns need to be fully understood and respected. Victims may also need time before they can fully consider their position and options. If the victim needs more time to make an informed decision about pressing charges and/or act as a witness, this time should be given. This lessens the likelihood of re-victimisation of the victim and is likely to lead to better evidence and a stronger witness in the long run. If the victim, for whatever reason, decides not to press charges or act as witness, this decision should be respected and no undue influence should be exerted on her or him.

Right to protection of privacy

Victims have the right to protection of their private lives and identities. They have the right to request that their lives and identities are protected during criminal proceedings and that the press and public are excluded from the court room.

A major fear among many victims, in particular when they have been trafficked in the sex industry, is that what happened to them becomes publicly known. Public exposure may lead to stigmatisation and social rejection and may effectively prevent the victim from restoring her life. Protection from intrusion on her/his privacy is important in any stage of the proceedings. If the victim, for example, chooses not to inform her/his direct surroundings (family, partner, friends, neighbourhood, village) about her/his predicament, this wish should be respected at all times. Contacts with the victim should be made in a way that respects this wish, for example through the services of a victim support organisation.

It is generally preferable to have the trial take place behind closed doors, in particular in cases of trafficking for prostitution and/or cases involving sexual offences. This serves to protect the privacy of the victims and, *in some cases*, to prevent public exposure of intimate details of the personal life of the victim, as well as the safety of the victim.

The OHCHR Recommended Principles and Guidelines call on States to ensure:

...that trafficked persons are effectively protected from harm, threats or intimidation by traffickers and associated persons. To this end, there should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons should be given full warning, in advance, of the difficulties inherent in protecting identities and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard (Guideline 6).

Right to protection of physical integrity and safety

Victims have the right to protection of their safety. The police should examine whether the safety and security of the victim is ensured.

The right to integrity refers to the protection of the safety of the victim, but also to, for example, medical examinations. The victim must give her/his informed consent to any medical or other examination. To be able to do so, s/he must in any case be informed about the very limited possibilities to keep the medical data confidential if the case goes to court. In particular in the light of these limited possibilities, refusal to consent should not be seen as a failure to cooperate with the authorities.

Right to witness protection

If victims testify in criminal proceedings, they have the right to witness protection and to be treated with respect and dignity. They have the right to be protected from threats, insults, intimidation and any other assault before, during and after the investigation and prosecution.

Many victims have a well-founded fear for reprisals against themselves, their children or other persons close to them. In most cases

they have been threatened by the suspects with reprisals against them and their loved ones if they would dare to report to the police. Often they have personal experience with the violence the suspects are able to exercise. In many cases traffickers or their associates (which can include family members) will try to intimidate the victim in order to keep them silent. They may put the victim under pressure and harass or abuse them to prevent them from testifying or to withdraw their statement. This is often worse if there is a close relationship between the victim and the trafficker, for instance because they come from the same community or family. The safety of the victim and her/his family and friends should therefore always be a paramount consideration.

For trafficked persons the fear of being directly confronted with the accused (suspect) may be significant. Wherever possible, direct confrontation between the victim/witness and the accused during the criminal investigation and trial should be avoided in order to avoid putting victims under unnecessary pressure and protect them from intimidation by the accused. Though it is good to have specific witness protection programmes, these generally do not offer a real option, as they require the victim to change her/his identity, sever all ties with their family and friends and essentially wipe out their former existence.

Secondary victimisation

Key factors for preventing secondary victimisation are proper information so the victim knows what to expect and can make informed decisions, avoidance of unnecessary repetition of interviews during investigation, prosecution and trial, protection against unnecessary confrontation with the suspect or family members of the suspect, avoidance of visual contact between the victim and the suspect during the giving of evidence such as interviews and cross-examination, e.g. by the use of communication technologies, and protection against inappropriate and unnecessary questions about their private life or sexual history, in particular for victims of trafficking into the sex industry. See also Chapter 7.

Right to compensation

Trafficked persons have a right to adequate and effective remedies. This includes the right to compensation for damages suffered.

The right to compensation is an important element of access to justice for trafficked persons. Victims of trafficking generally have suffered serious damages, both material damages (financial and pecuniary losses: unpaid wages, medical, funeral or hospital and other costs, costs of relocation, loss of future earnings, costs of damage to property etc.) and immaterial or moral damages (psychological and emotional suffering and injury, loss of reputation, pain and suffering, loss of society and companionship).

Redress of wrongs is a fundamental legal principle that constitutes both a general principle of law and a customary rule of law.⁵⁰ As stated in the OHCHR Recommended Principles:

*Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.*⁵¹

⁵⁰ OHCHR, *Commentary on the Recommended Principles*, p. 223.

⁵¹ OHCHR, *Recommended Principles*, guideline 9.

TIPS

In the Netherlands lawyers have been quite successful in claiming compensation for the money victims of trafficking into the sex industry earned for their traffickers by calculating the number of days the victim worked and the amount of money she earned per day. As explained by Annet Koopsen, a Dutch lawyer:

If you want to claim compensation for the money the trafficker took from the victim and it is hard to prove how much money she earned per day and how much she gave to the trafficker, I make a calculation that avoids any discussion. For instance, if my client tells me that she earned about €500 to €1,000 a day, I have asked the courts to grant her compensation for €100 a day, 5 days a week and 4 weeks per month, that is € 2,000 per month. If I have pleaded that with a calculation like this, there won't be any dispute whether she was allowed to keep any money for herself, whether she had to buy food, clothes, rent etc, since the amount of money that she gave to the trafficker was so much more, that this calculation is a minimum estimate. The courts have accepted this and the highest amount that has been granted to one of my clients has been €100,000. This was in criminal proceedings.

In case of violations by non-State actors, that actor will in principle be individually liable for reparation to the victim. However, under certain conditions, State responsibility can arise, e.g. when State actors are complicit to trafficking or where a State has failed to duly prevent, investigate and punish trafficking and/or its forced labour outcomes, as confirmed by the ECtHR in *Rantsev v. Russia* and *Cyprus and Siliadin v. France*.⁵⁶

TIPS**Collecting information about the damages suffered by the victim**

The start for collecting information about the damages suffered by the victim lies with the police. To this aim the police should include in the record of the statement of the victim, or in an annex to the record, relevant information about the material and immaterial damages the victim suffered. The lawyer should check if the police have done so. The lawyer can also collect information about the damages and submit these as part of the file.

⁵² *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violation of International Humanitarian Law* (hereinafter: Basic Principles and Guidelines on Remedy and Reparation), UN General Assembly, 16 December 2005.

⁵³ *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN General Assembly, 29 November 1985.

⁵⁴ *Guidelines on Justice for Child Victims and Witnesses of Crime* (ECOSOC Res. 2005/20).

⁵⁵ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals.

⁵⁶ ECtHR, *Rantsev v. Cyprus and Russia*, no. 25965/04, 7 January 2010; ECtHR, *Siliadin v. France*, no. 73316/01, 26 July 2005. For a more extensive discussion on state responsibility: OHCHR, *Commentary on the Recommended Principles*, p. 224-225; Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 13 April 2011 (A/HRC/17/35), p. 4-5.

According to the UNODC *Model Law against Trafficking in Persons*, compensation may include payment for or towards:

- Costs of medical, physical, psychological or psychiatric treatment required by the victim;
- Costs of physical and occupational therapy or rehabilitation required by the victim;
- Costs of necessary transportation, temporary childcare, temporary housing or the movement of the victim to a place of temporary safe residence;
- Lost income and due wages according to national law and regulations regarding wages;
- Legal fees and other costs or expenses incurred, including costs incurred related to the participation of the victim in the criminal investigation and prosecution process;
- Payment for non-material damages, resulting from moral, physical or psychological injury, emotional distress, pain and suffering suffered by the victim as a result of the crime committed against him or her;
- Any other costs or losses incurred by the victim as a direct result.

Non-prosecution and non-punishment of trafficked persons

Victims of trafficking should not be charged or prosecuted for prostitution or other illegal acts they were compelled to commit

Victims may have committed offences as a result of their being trafficked, such as illegal border crossing, begging or prostitution. Especially in the case of trafficking into the sex industry, the victim can get caught in the firing line: if she does not report the crime or facilitates the arrest of the offenders she can be prosecuted by the authorities for prostitution, but if she does so, she risks intimidation and reprisals from the side of the perpetrators.

It is a widely accepted principle that one should not be held responsible for a crime he or she was compelled to commit. Whereas the UN Trafficking in Persons Protocol does not specifically address the issue, the Working Group on Trafficking in Persons, the body established to make recommendations on the effective implementation of the Protocol, noted that State Parties should consider

*...not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.*⁵⁷

The CoE Convention on Trafficking explicitly provides for the possibility of not imposing penalties on victims for their involvement in unlawful activities if they were compelled to do so by their situation (Art. 26). This is further explained in the Explanatory Report.⁵⁸ The EU Directive on Trafficking contains a similar article (Art. 8).

Non-detention of trafficked persons

Trafficked persons should not be detained or held in closed shelters or other welfare centres.

The detention of (presumed) trafficked persons (including children) in public detention facilities, or public or private shelters violates a number of fundamental principles of international law, such as the right to freedom of movement, the prohibition on unlawful

⁵⁷ UN, Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Report on the meeting of the Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, (CTOC/COP/WG.4/2009/2, para. 12).

⁵⁸ CoE, *Explanatory Report – Action against Trafficking in Human Beings*, 16.V.2005, para. 272-274.

deprivation of liberty, arbitrary arrest and detention, and the prohibition of discrimination on ground of sex; it should therefore be considered as unlawful.⁵⁹

Detention of trafficked persons, defined as “the condition of any person deprived of personal liberty except as a result of conviction for an offence”,⁶⁰ can cover a wide range of situations. Victims may be detained as irregular/undocumented migrants, as a result of their engagement in illegal activities, such as prostitution or unauthorized work (even if correctly identified as victims), because they are unwilling or unable to cooperate in criminal investigations or because their cooperation is not considered useful.

Another form of detention is the placement of trafficked persons in closed shelters or other welfare facilities in conditions akin to detention. Common justifications for this form of detention are the need to provide shelter and support, the need to protect victims from further harm and the need to secure the victim’s cooperation in the investigation and prosecution of traffickers. The practice of victim detention in shelters and other welfare institutions is often highly gendered. The majority of trafficked persons detained in closed shelters are women and girls.

The OHCHR Recommended Principles and Guidelines are clear that detention of trafficked persons is inappropriate and (implicitly) illegal. They call upon States to ensure that trafficked persons are not held in immigration detention centres or any other form of custody (Guidelines 2(6) & 6(1)).

On a case-by-case basis victim detention may only be justified if it meets the requirements of necessity, legality and proportionality. This implies that victims cannot be detained, either in law enforcement or welfare institutions, for any reason other than their immediate safety and only for the shortest period possible. They can never be detained for reasons of collecting evidence.

In the case of child victims, Article 37(b) CRC states that

“...[no] child shall be deprived of his or her liberty unlawfully or arbitrarily.⁶¹ The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.”

The detention of children in need of protection has been explicitly rejected by the Committee on the Rights of the Child:

“Such deprivation of liberty for children who have been abandoned or abused equates to punishment for children who are victims of crimes, not the offenders.”⁶²

⁵⁹ Anne Gallagher & Elaine Pearson, *Detention of Trafficked Persons in shelters. A legal and policy analysis*, 2008. See also Joint UN Commentary, *Prevent Combat Protect*, p. 38.

⁶⁰ Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN General Assembly Resolution 43/173, annex.

⁶¹ See also CRC General Comment No. 6 on unaccompanied and separated children.

⁶² Committee on the Rights of the Child, General Comment no. 10 on children’s rights in juvenile justice.

Temporary, permanent and humanitarian residence permit

Victims have the right to a reflection period of 3 months. Undocumented/migrant victims have the right to a temporary residence permit for the duration of the criminal and other proceedings when, at the end of the reflection period, they decide to cooperate with the authorities. If return would compromise their life and safety, trafficked persons have the right to apply for asylum or a residence permit on humanitarian grounds.

Reflection period and temporary residence permit

The reflection and recovery period allows trafficked persons to start recovering and make informed and thoughtful decisions about the options available. The reflection period is not tied to cooperation with the authorities and should not be used to compel trafficked persons to cooperate. The reflection period is equally important for national as non-national victims, whether they are trafficked within or across borders. According to the Council of Europe Convention on Trafficking the reflection period should be at least 30 days when there are reasonable grounds to believe that the person is a victim of trafficking. Empirical evidence suggests that a minimum period of 90 days is necessary for the cognitive functioning and emotional strength of a trafficked person to increase to a level at which they are able to make well-considered decisions about their safety and cooperation with the authorities against the traffickers, as well as to offer detailed evidence about past events.⁶³

International protection⁶⁴

While not all victims are refugees, some trafficked persons may be in need of international protection. Trafficked persons may be unable to return to their home country for fear of re-victimisation or re-trafficking at the hands of the traffickers. They may also fear ostracism, stigmatisation and punishment at the hands of their family, community and sometimes the authorities. This fear may be well-founded and may amount to persecution triggering international protection under refugee law.

The obligation to provide protection, including protection against *refoulement* and the granting of refugee status or subsidiary protection is enshrined in several international and regional treaties. The Council of Europe Trafficking Convention explicitly states that trafficked person should not be returned to another State when there is a serious risk that they will be subjected to persecution, torture or other forms of ill-treatment. It also reinforces the right of trafficked persons to seek and enjoy asylum.

The UNHCR Guidelines on victims of trafficking and persons at risk of being trafficked provide guidance on the adjudication of asylum applications presented by (potential) victims of trafficking as well as procedural guidance.⁶⁵ In addition, the UNHCR *Guidance Note on Refugee Claims Relating to Victims of Organized Gangs*⁶⁶ clarifies that, in the absence of effective State protection, victims of gang violence – who may include victims of trafficking – may also qualify for international protection.

⁶³ Cathy Zimmermann et al., *Stolen Smiles. The physical and psychological health consequences of women and adolescents trafficked into Europe*, London School of Hygiene and Tropical Medicine, 2006, p. 3.

⁶⁴ See for a more extensive discussion: Joint UN Commentary, *Prevent Combat Protect*, p. 56-63.

⁶⁵ UNHCR, Guidelines on International Protection No.7: *The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006.

⁶⁶ UNHCR, *Guidance on Refugee Claims Relating to Victims of Organized Gangs*, 2010.

The principle of non-refoulement

The principle of *non-refoulement* prohibits States from returning a person to a territory where there is a risk that his or her life or freedom would be threatened and the person would be subjected to persecution. It is enshrined in the 1951 Refugee Convention and incorporated in a range of international and regional treaties, among which the ICCPR and the 1984 Convention against Torture.⁶⁷ Although the principle of *non-refoulement* does not, as such, entail a right of the individual to be granted asylum in a particular State, it does mean, that for the removal of the individual to be lawful, States need to examine whether such removal would result in a breach of the States' *non-refoulement* obligations.⁶⁸

Repatriation and guarantees of non-repetition

Victims have the right to return to their home country without unnecessary or unjustified delay. The safety of the trafficked person and their family should be taken into account in any decision on repatriation.

Both the UN Trafficking Protocol and the Council of Europe Trafficking Convention contain the obligation to provide safe and, as far as possible, voluntary return. A critical aspect of safe repatriation is supported reintegration. Victims who are provided with assistance and support on their return are less likely to be re-trafficked and are less vulnerable to intimidation, retaliation, social isolation and stigmatization.⁶⁹ Return and reintegration programmes should respect the right to privacy of the victim and take due consideration of the safety, dignity and health of the trafficked person. They should also seek to secure the safety and well-being of returned victims, enable them to find viable means to prevent re-victimization and reduce the risk of re-trafficking.

The right to return also implies the obligation to permit victims who wish to return to do so without undue or unreasonable delay. Detention of trafficked persons in shelters, prisons or immigration detention centres, or compelling victims to remain for the duration of criminal proceedings, is clearly in contradiction with this right.⁷⁰

Guarantees of non-repetition

An important component of the right to an adequate remedy is the guarantee of non-repetition (see also Chapter 6). According to the UN Special Rapporteur on trafficking in particular guarantees of non-repetition, which include measures to prevent trafficking, constitute an important form of remedy in view of the risks of re-trafficking that trafficked persons may be exposed to.⁷¹ The guarantee of non-repetition encompasses the right to be protected from re-victimization by not being sent back to a place of trafficking or where traffickers operate. The UN Trafficking Protocol requires all States parties "to protect victims of trafficking [...] especially women and children, from re-victimization".⁷²

⁶⁷ See UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 14-16; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, paragraph 15; UNHCR, *Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol adopted at the Ministerial Meeting of States Parties of 12-13 December 2001*, HCR/MMSP/2001/09, 16 January 2002, at preamble para. 4; and E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of *non-refoulement*: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection*, Cambridge University Press, Cambridge (2003), pages 149-164.

⁶⁸ UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, para. 8.

⁶⁹ OHCHR, *Commentary on the Recommended Principles*, p. 181-182.

⁷⁰ OHCHR, *Commentary on the Recommended Principles*, p. 178.

⁷¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, 13 April 2011 (A/HRC/17/35). Para. 41.

⁷² UN Trafficking Protocol, Art. 9(1)(b).

The guarantee of non-repetition involves a guarantee of safe return. A determining factor is therefore the actual capacity of the State to effectively protect victims of trafficking upon their return. For this reason an individual risk assessment should be carried out before any decision on return, deportation or repatriation is made.⁷³

In practice this means that (potential) victims of trafficking may not be turned back at the border. The CoE Trafficking Convention requires that States do not remove a person from their territory until the identification process of the victim has been concluded,⁷⁴ as the rights afforded by the Convention would be theoretical and illusory if such persons were removed before their identification as victims was completed. According to the UN Protocol and the Council of Europe Trafficking Convention, the safety of the trafficked person and their family should be taken into account in any decision on repatriation.

Risk assessment

Factors to be taken into account in a risk assessment

- The way the person was trafficked
- The way the recruiter and/or trafficker may be part of a wider ring or network, and the workings of the ring
- The risk of reprisals on the part of the traffickers, including whether or not the victims owe money to the traffickers
- The risk of being harassed, arrested, detained or prosecuted by the authorities, e.g. for immigration violations or for involvement in prostitution
- The risk of social exclusion, taking into account the age, gender, social position and family situation of the trafficked person
- Access to assistance, education and sustainable means of existence
- The capacity and willingness of the country of return to provide adequate assistance, support and protection

From: Report EU Experts Group on Trafficking in Human Beings, 2004

in the best interests of the child". Also, the Legislative Guide to the Trafficking Protocol stresses the need for special care in the repatriation of child victims:

In cases where child victims are involved, legislators may also wish to consider not returning those child victims unless doing so is in their best interest and, prior to the return, a suitable caregiver such as a parent, another relative, another adult caregiver, a government agency or a child-care agency in the country of origin has agreed and is able to take responsibility for the child and to provide him or her with appropriate care and protection. Relevant ... authorities ... should be responsible for establishing whether or not the repatriation of

⁷³ Experts Group on Trafficking in Human Beings of the European Commission, Opinion of 11 October 2005 in connection with the conference *Tackling Human Trafficking: Policy and best practices in Europe*, p.2.

⁷⁴ CoE Trafficking Convention, Art. 10(2).

Before returning a trafficked person, a risk assessment of whether a victim of trafficking could be at risk of re-trafficking, re-victimization and/or further harm should be carried out. The purpose of a risk assessment is to assess the safety of the trafficked person upon his or her return, the perspectives of his or her social and professional inclusion and the risks of re-trafficking. When the trafficked person has children, the best interest of each child should be taken into account, and whether they will have the opportunity to go to school and to receive medical, social and other necessary care and protection.

Children

Article 16(7) of the CoE Trafficking Convention states that "child victims shall not be returned to a State, if there is an indication, following a risk and security assessment, that such return would not be

*a child victim is safe and should ensure that the process takes place in a dignified manner and is in the best interest of the child... In those cases where the return is voluntary or in the best interest of the child, each State party is encouraged to ensure that the child returns to his or her home country in a speedy and safe manner.*⁷⁵

Any decision to return a child should be based on a formal Best Interests Determination.⁷⁶ Factors that should be taken into account are:

- The safety, security and other conditions, including socio-economic conditions, awaiting the child upon return;
- The availability of care arrangements for that particular child;
- The views of the child expressed in exercise of his or her right to do so under Article 12 CRC and those of the caretakers;
- The child's level of integration in the host country and the duration of absence from the home country;
- The child's right "to preserve his or her identity, including nationality, name and family relations" (Article 8 CRC); and
- The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background" (Article 20 CRC).⁷⁷

Victims' rights in criminal proceedings in Serbian law and practice

Victims are entitled to the protection of their dignity, as well as to the respect for their person.

Article 109 of the Criminal Procedure Code (Official Gazette RS, no. 58/2004) stipulates the explicit obligation of the court to protect the injured party from insults, threats and any other assault. This is not a possibility but the court's duty. The court would warn or fine a proceedings party, or other person who insults, threatens or jeopardizes the safety of the injured party before the court. However, there are no cases known of parties to the proceedings (especially defendants or their attorneys) being fined for insulting a victim.

Victims have the right to be questioned in a manner respectful to their person. However, cases in which judges disrespectfully address the victim by his/her first name are common, while simultaneously being respectful in addressing the others – defendants, prosecutors, attorneys. Victims are posed inappropriate questions concerning their lifestyle, and the reasons for such. This problem is especially evident during investigation, and investigating judges are usually the ones that act like this.

Victims have the right to actively participate in the criminal proceedings, as provided for in Article 60 of the Criminal Procedure Code. The victim has the right to indicate the facts and suggest pieces of evidence relevant for the criminal proceedings, as well as to make compensation claims during the investigation. At the main hearing he/she has a right to suggest relevant pieces of evidence, pose questions to the accused, witnesses and expert witnesses, and to examine the records.

⁷⁵ UNODC, *Legislative guide to the Trafficking Protocol*, para. 66 and 67.

⁷⁶ A Best Interest Determination (BID) describes the formal process with strict procedural safeguards designed to determine the child's best interests for particularly important decisions affecting the child. It should facilitate adequate child participation without discrimination, involve decisions-makers with relevant areas of expertise, and balance all relevant factors in order to assess the best option. UNHCR, *Guidelines on Determining the Best Interests of the Child*, 2008, and UNHCR *Best Interests Determination Children – Protection and Care Information Sheet*, 2008.

⁷⁷ Committee on the Rights of the Child, General comment No. 6, para. 84.

Victims have the right to be heard in a way that does not jeopardize their safety and security. A good example is the decision of a court for the victim to be heard in accordance with the provisions of Article 324 of the Criminal Procedure Code. The defendants were temporarily removed from the courtroom, since the victim had refused to testify in their presence. This was supported by the report of a psychologist, stating that the victim was in a poor psychological state, together with the recommendation for the victim to testify without the presence of the defendants. The victim testified freely and without psychological pressure. The problem with the application of this legal provision was that upon the defendant's return into the courtroom, the victim's testimony was read, and the defendant was entitled to pose questions to the victim. However, the victim had already given a detailed testimony, so she was able to give short replies to the defendant's questions, or to say that she would stick to what she had already said.
(Zrenjanin Higher Court K.238/2010)

According to Article 206(2) Criminal Procedure Code victims have the right to make a compensation claim, to specify the requested amount of compensation and to demand that the claims are decided upon in the course of criminal proceedings. However, up to now no court decision included the decision on compensation claims made by the victims, even though the conditions were present in the majority of cases.

The Criminal Procedure Code from 2011 (Official Gazette of RS no. 72/2011, 101/11 and 121/12)⁷⁸ introduced the institution of "especially vulnerable witness" in Articles 103 and 104.

This provision was applied by the Special Department for Organized Crime of the Higher Court in Belgrade in regard to one of the victims in a trafficking case. Even though her testimony was recorded on video during the investigation, the court decided that she should testify on the main hearing. The victim asked to testify as an especially vulnerable witness. The prosecutor supported this request, among others based on the report of a psychologist the victim had previously submitted. The victim testified alone in the room, without the presence of other parties or participants. In her testimony, she was clear, assured, sincere and convincing.
(Belgrade Higher Court, Special Organized Crime Department K-Po1 no. 14/12)

⁷⁸ This Code came into force on January 15, 2012 for the criminal acts of organized crime and war crimes. It shall be valid for all other criminal acts as of October 1, 2013.

CHAPTER 7. PHYSICAL AND PSYCHOLOGICAL HEALTH CONSEQUENCES OF HUMAN TRAFFICKING

Introduction

Trafficking in human beings may have severe physical and psychological health consequences for the victim, which may also influence their ability to act as witness. These are discussed in section 1. On top of the harm caused by the crime, many victims suffer from secondary victimization as a result of the trial, e.g. by unnecessary repetition of interviews, forced direct contact with the suspect, the giving of evidence in open court and unnecessary questioning concerning the victim's private life.⁷⁹ Though judges and the prosecutor play an important role in preventing secondary victimization, lawyers can also help prevent this. The better the victim knows what she or he can expect, the more realistic their expectations are, the safer they feel and the more they can trust on somebody who speaks their language and defends their interests, the less is the risk on secondary victimization. This is discussed in section 2.

Health Consequences of Human Trafficking

The health consequences of human trafficking are manifold, often extremely serious and long lasting. Health of trafficked persons is at risk in each of the human trafficking phases (recruitment, transport, exploitation), as well as during their subsequent keeping in institutions and (re)integration process.

Loss of personal liberty and possibility to decide about their own life, long-lasting forced and poorly paid, or unpaid labour in bad conditions accompanied by various risks, physical and/or mental violence of varying intensity, up to the extent where it can be qualified as torture, poor nutrition, inadequate housing, poor hygiene and lack of any kind of support, including medical support, are the most frequent factors that jeopardize the health of trafficked persons. Low levels of safety and poor health conditions while working in different branches of industry lead to illness, including those caused by pesticide poisoning while working in agriculture, or frequent injuries with grave complications, including death, while working long hours without protective equipment on building sites, etc.

The most extensive studies by now have been made pertaining to the health of women trafficked for sexual exploitation. In 2006, Cathy Zimmerman et al.⁸⁰ published their first study made in cooperation with seven different organizations that supported trafficked women and girls in different parts of Europe: in Moldova, Ukraine, Bulgaria, Czech Republic, Britain, Italy and Belgium. Two hundred and seven women were interviewed, using the WHO Ethical and Safety Recommendations for Interviewing Trafficked Women⁸¹, which resulted in extensive data on, among other things, physical, reproductive and mental problems experienced by trafficking victims. The interviews were conducted based on a scientifically designed questionnaire during the three time intervals: within a fortnight from a woman's inclusion into the support programme, during the second month of support and after 90 or more days, which enabled the researchers to have insight into the duration of the problems. The majority of women complained about fatigue (82%), headache (81%), dizziness (71%), back pain (69%), different gynaecological problems (60-70%), memory problems

⁷⁹ See also Art. 12(4) EU Directive on Trafficking, which obliges Member States to ensure that victims of trafficking receive special treatment to prevent secondary victimization by avoiding the above mentioned practices.

⁸⁰ ¹ Zimmerman, C. et al. 2006 *Stolen Smiles: The physical and psychological health consequences of women and adolescents trafficked in Europe*, London School of Hygiene and Tropical Medicine, London, 2006.

⁸¹ Zimmerman, C. and C. Watts, *WHO Ethical and Safety Recommendations for Interviewing Trafficked Women*, World Health Organization, Geneva, 2003.

(63%) and physical injuries (57%). Stomach ache, dental problems, weight loss, eating disorders, as well as sleep disorders and insomnia were also among the frequent and long-lasting symptoms. A very important piece of data for the condition of trafficked women's health is that as much as 60% of them had been exposed to violence before they were trafficked. The health of these women was jeopardized to a higher degree due to the accumulative effect of trauma⁸². The study did not include medical exams and health checks.

ASTRA'S FINDINGS:

- **38%** of clients (out of 29) had serious health problems directly related to the judicial process
- **14%** of victims, to whom legal assistance was provided by other institutions, also had deterioration in their health
- In **17%** of clients, deterioration of health was not documented
- **31%** of clients did not participate in judicial processes

In 2012, ASTRA conducted an analysis of the health condition of women and men trafficked for sexual exploitation. The analysis was done based on medical records and the "personal stories" of 29 persons who were assisted by ASTRA and who were in need of medical exams. It was not possible to include more cases because of insufficient medical documentation necessary for the analysis.

Eighteen of them required a gynaecological exam, and 12 were diagnosed with inflammation of reproductive organs. Dealing with their gynaecological problems is important, since it can be relatively quick to calm women down, to make them feel safer and more functional, both generally and in the course of judicial process.

When physical problems were concerned, the majority of the women had headache – seven of them – six had dental problems, and six had eating-related problems such as loss of appetite, malnutrition and/or substantial weight loss.

Mental problems, such as depression, anxiety, hostility and post-traumatic stress disorder present a major obstacle for communication. In their personal stories, 10 women were speaking about depression, which was affirmed by psychiatric checks. Ten of them were diagnosed with anxiety, while six of them had symptoms of hostility and rage.

PRACTICAL FINDINGS

The most frequent health problems

- Eating disorders
- Flashbacks
- Panic attacks
- Nightmares
- Fears
- Suicide attempts
- Anxiety

SYMPTOMS OF PTSD

Sleeping disorders	90%
Nightmares	70%
Recurrence of thoughts and memories related to traumatic events	50%
Concentration problems	40%
Feeling as if traumatic events are being repeated	30%

⁸² Green, B.L., Goodman, L.A., Krupnick, J.L., Corcoran, C.B., Pettz, R.M., Stockton, P., and Stern, N.M., Outcomes of single versus multiple trauma exposure in a screening sample. *Journal of Traumatic Stress*, 2000. 13(2): p.271-286, citirano iz Zimmerman, C. et al. 2006 *Stolen Smiles: The physical and psychological health consequences of women and adolescents trafficked in Europe*, London School of Hygiene and Tropical Medicine, London, 2006.

SYMPTOMS OF PTSD

Inability to remember parts of traumatic events	20%
Avoidance of thoughts and feelings related to traumatic events	20%
Avoidance of activities that remind one of traumatic events	20%
Extreme wariness	20%
Abrupt physical and emotional reactions when traumatic event is remembered	20%

All these mental states present obstacles in the optimal functioning of a person, even when adequately treated. Particular attention has to be paid when a person cannot recall some parts of traumatic events, because it can be interpreted as hesitancy or fabrication, while it is actually the case of peritraumatic dissociation.

Secondary victimisation

Secondary victimisation can be defined as 'the aggravation of the suffering or harm to the victim caused by the initial crime as a result of the criminal process'. Research⁸³ identifies four different types of secondary victimisation:

1. Negative psychological effects on the victim's self-esteem, faith in the future, trust in the legal system, and faith in a just world;
2. An increase in the frequency of post traumatic stress reactions to the original trauma caused by the crime (re-traumatisation);
3. The hindering of the process of recovery; and
4. The experience of a second, new trauma, resulting from the trial.

The two forms that research identifies to occur most often are negative effects on the victim's self-esteem and their faith in the future, the legal system and a just world (1), and, for those victims who were already traumatised by the crime, the increase of post traumatic stress reactions to the initial trauma (2). The latter we understand under the term re-traumatisation. These two forms of secondary victimisation should be distinguished from each other. The first relates to all victims of crime, while the second impacts only those victims already traumatised by the crime.

Secondary victimisation may not only be experienced by the victim/witness during questioning by the investigating judge or by the trial judge in court. Other factors may also play a role, such as the general imbalance between the position of the accused and that of the victim, a lack of information provided to the victim, the interaction between criminal justice officials and the victim, the long duration of the trial and discontent about the outcomes of the trial.

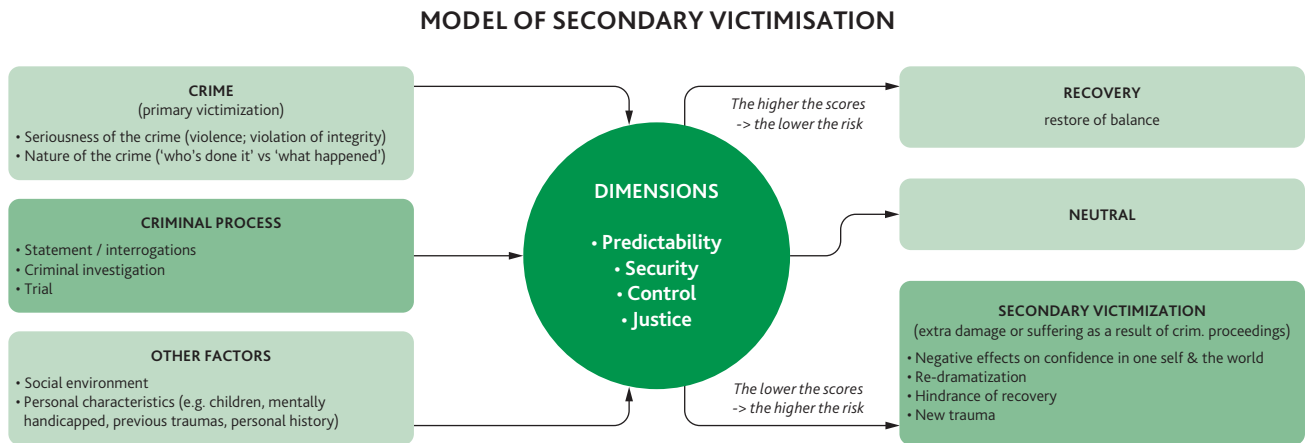
ADVICE:

Your client would appreciate:

- If you would make explanations related to the process itself, the appearance of courtroom, where the accused would sit, where the client should look during the hearing, whom she should address
- Understanding and appreciation of her reactions and needs
- If you talk to her after the session about further steps

⁸³ Marjan Wijers & Margreet de Boer, *Een keer is genoeg. Verkennend onderzoek naar secundaire victimisatie van slachtoffers als getuigen in het strafproces* (One time is enough. Exploratory research into secondary victimisation of victims as witnesses in the criminal process), The Hague: WODC 2010.

Key concepts in the prevention of secondary victimisation are predictability, security, control and justice. The model below pictures the various factors and their relationship to secondary victimisation.



@ Marjan Wijers & Margreet de Boer, 2009

The more positive the criminal proceedings 'score' on the dimensions of predictability, security, control and justice, the better the chances of recovery and the lower the risk of secondary victimisation. This means that the risk of secondary victimisation is smaller if the victim/witness knows what he or she can expect throughout the criminal proceedings, has a sense of control over what is happening, feels secure and protected, and is satisfied with the outcomes of the criminal process. In regard to the latter, it should be noted that satisfaction with the outcomes of the criminal case is not only defined by the severity of the punishment of the perpetrator(s). Most of the victims interviewed in the research mentioned prevention of further crimes as an important element of the outcome.

However, the risk of secondary victimisation not only depends on factors related to the criminal process, but also on factors related to

- the severity and nature of the crime (e.g. 'what happened' types of crimes may directly put the credibility of the victim at stake, contrary to 'who's done it' crimes)
- the personal characteristics of the victim such as gender, age, previous experiences and personal resilience, and
- the social context in particular the presence of a supportive environment.

These factors also 'score' along the dimensions of predictable/unpredictable or safe/unsafe, etc. For example, factors stemming from the personal characteristics of the victim that tend to increase the need for predictability and security are previous traumatic experiences (especially domestic and/or partner violence), an intellectual disability or belonging to a minority, e.g. Roma minority. This is relevant for the trial process, because it means that some victims (given the nature of the crime, their personal characteristics and/or environmental factors) are particularly vulnerable or susceptible to secondary victimisation.

The table below presents an overview of the factors before, during and after the criminal proceedings that are of influence on the basic dimensions of predictability, security, control and justice.

CRITICAL FACTORS IN THE CRIMINAL PROCESS TO PREVENT SECONDARY VICTIMISATION	
<p>Predictability</p> <p>The extent to which the victim/witness knows what to expect.</p> <ul style="list-style-type: none"> the provision of information to the victim before, during and after the criminal process so he or she knows what to expect. This includes information on the position of the victim/witness, the various stages of the criminal process, the progress of the case (incl. a decision to dismiss the case), detention and release of the accused, and the fact that all information is recorded and available to the accused. Information should be repeated and by preference given both oral and in writing information about the interrogation by the police and/or the court (including an explanation of the reasons why detailed and critical questions are asked) (lack of) clarity about the procedures around the interrogation by the investigating judge or in court the duration of the criminal process, insecurity about the length of the criminal process and lack of clarity why proceedings take so long. The longer the criminal process takes and the more difficult it is for the victim to predict its duration and the reasons why, the greater is the risk on secondary victimisation. 	<p>Physical, emotional and social security</p> <p>Physical safety relates to fear for reprisals or direct confrontation with the suspect. Emotional and social security relates to the personal integrity of the victim (protection of privacy, fair treatment, being taken seriously).</p> <ul style="list-style-type: none"> the choice of the location where the victim's statement is recorded confidentiality of the address and personal data of the victim (e.g. using the address of the lawyer instead of the victim in the criminal file). diligence in obtaining information from third parties, e.g. medical practitioners, family, friends and service providers. Victims should be asked permission beforehand and should be aware of the fact that all information is recorded in the criminal file and thus available to the accused the manner of interrogation by the investigating and/or trial judge, in particular the treatment of the victim by the lawyer of the accused and the protection of the victim against intimidation by the suspect and/or intimidating or unjust questions proper preparation for the interrogation seating arrangements, in particular avoiding that victims and suspects are seated together in the waiting room or next to each other or that the suspects sit behind victim's back in the courtroom the presence of a person of his or her own choice whom the victim/witness trusts during interrogations (this can be the lawyer, but also a friend or NGO counsellor) safety arrangements before, during and after the trial
<p>Sense of (lack of) control</p> <p>The extent to which the victim/witness feels that he/she can influence the criminal process, that it is 'his or her case', that he/she is taken seriously and matters.</p> <ul style="list-style-type: none"> decisions relating to the prosecution, pre-trial detention of the suspect(s), and the manner of settlement of the case the (in)ability of victims to obtain or access a copy of their own testimony and the case file, whether through their lawyer or otherwise. Lack of access to the criminal file places the victim 'outside' the criminal process: it is about them but they are not allowed to read the case file, contrary to the accused having their own lawyer: somebody who speaks their language and protects and defends their interests <p>From the perspective of avoiding secondary victimisation, the first factor is problematic, as generally the wishes and interests of the victim play only a very limited role in decisions relating to the prosecution, the detention of suspects and the way the case is settled.</p>	<p>Sense of justice</p> <p>The extent to which the victim/witness feels that he or she is treated fair and that justice.</p> <ul style="list-style-type: none"> 'management' of expectations: the victim/witness has a realistic picture about the criminal process, the feasibility of the case and the expected outcome the imbalance between the position of the defendant and the victim. Many victims feel as if the accused has all the rights while they have none. This includes the fact that the accused has access to the entire case file, including information about the victim, while often victims do not even get a copy of their own statement acknowledgement of the consequences of the crime for the victim by the judicial system (police, prosecutor, court, lawyer) the provision of a copy of the verdict to the victim adequate motivation of the judgment by the court final outcome of the proceedings (severity of the punishment, but also whether the verdict helps to prevent new victims)

CHAPTER 8. FIRST INTERVIEW AND COMMUNICATION WITH THE VICTIM

Introduction

This chapter deals with the communication between the lawyer and victims of trafficking. It discusses the basic attitude required of the lawyer and potential communication barriers. It specifically pays attention to the first interview and the method of open communication.

Communication between the lawyer and the victim

A core right of victims is the right to be treated with respect and recognition. This also applies to lawyers. This is the basis for good communication and building cooperation.

Show respect

- Treat your client with respect and listen carefully. Do not make judgments about what they have done or their views
- Your client may have been through traumatic events that may be difficult and upsetting for them to recount. Recognize that some things may be difficult to tell, take time and don't ask more than necessary
- Help your client to regain control over her/his situation by explaining step-by-step what you can do and what will happen. Ensure that future actions and steps are understood and agreed upon by the victim
- Avoid any kind of stigmatization and be non-judgmental. Be aware of your own prejudices: if your client has worked as a prostitute, ask yourself first what your own opinion is about that. Non-verbal communication speaks louder than words!
- See yourself and your client as equal human beings
- Act with consideration to the values and beliefs of your client

Be clear

- Tell the most important information early on and be clear about what is possible or not. Never make unrealistic, false promises or promises that you cannot keep
- Explain what is going to happen and what you can do and cannot do
- Check whether your client has understood you correctly, summarize the most important points at the end of the conversation. If needed, encourage your client to write down the most important information or the next steps. Before closing the conversation ask if she or he still has questions that she or he would like to discuss. Tell your client that she or he can always call you if she or he has questions.

Before having your first meeting with the trafficked person it is good to be aware of potential communication barriers. Understanding what role different factors can play, such as gender, shame for what has happened to them, fear of reprisals, immigration status, fear of being judged or punished for having worked in prostitution, the relation to the trafficker, post traumatic stress disorder, cultural background and individual circumstances and reactions will help you to successfully communicate with your client.

Gender

The lack of control is a general characteristic of trafficking situations. For women this may be intensified by the weak social status they held in their home community or the fact that the crime committed against them may be considered as their own fault or as a crime against the family honour (especially in patriarchal communities).

Shame

Many victims feel ashamed for what has happened to them and blame themselves. They may also feel ashamed for how they have survived or that they were not 'strong' enough to resist or escape.

Fear of reprisals

Most victims have been threatened with reprisals against themselves or their families to deter them from contacting the authorities or asking others for help. Research shows that in many cases threats and intimidation continue also when the victim is no longer in the direct trafficking situation. Even if the victim is in a safe situation or one or more of the offenders are arrested, his or her family can still be at risk.

Immigration status

One of the major barriers for migrant victims to turn to the authorities is the fear of detention and/or deportation. Deportation may not only expose them to the risk of reprisals or re-trafficking upon return, but also to harassment or prosecution by the authorities in their home country, for example for having crossed the border illegally or for having worked as a prostitute. In some cases they made debts in order to pay their recruiters. Deportation means returning home empty-handed with no perspective of being able to repay their debts.

Stigma and social exclusion

Women trafficked into the sex industry, within or across borders, will be very aware of the stigma of prostitution and the common prejudice that once a prostitute, a woman loses her rights and is no longer entitled to respect and protection against violence and abuse, as it is "her own fault". This certainly applies if they have worked in prostitution before or knew they would work in the sex industry. They may not trust that they will be believed or be afraid that they will be punished themselves, in particular in countries where prostitutes are penalised like Serbia. Many justifiably fear stigmatisation and rejection by their family or community if it becomes known they have worked as a prostitute.

Lack of trust in the police and the legal system

Many victims have little confidence in the police and the legal system, especially if they are undocumented migrants, come from minority communities or have worked as prostitutes. Often they have previous negative experiences with the police. In many cases the trafficker(s) have told them that they cannot trust the police, that the police cooperates with the trafficker(s) or that the victim her or himself will be arrested if the police finds her or him.

Relation with the trafficker

The relationship between the trafficker(s) and the victim may be very complex. Many victims have been forced to survive in a

situation of extreme dependency of their captors, which was unpredictable and life-threatening. The effects thereof are comparable to responses of hostages or victims of kidnappings. Victims may, for example, identify themselves with their captor or protect him or her (Stockholm syndrome). Some victims will protect the trafficker as they believe he (or she) is the only person that can help them. The situation is especially delicate when the trafficker is a member of the victim's family or is her or his current or ex-partner.

Generally traffickers weave a web of disinformation, insecurity and fear around trafficked persons through a combination of threats, violence, psychological manipulation and isolation. A common strategy of traffickers is 'divide and rule': one victim, for example, is used to control other victims in exchange for privileges or a bit more freedom. Or one member of the criminal network has the role of executing punishments (e.g. for disobedience), while another helps them to take care of their bruises and wounds. Other strategies are degrading, ridiculing, humiliating or dehumanising the victim by depriving them of their names, identifying details and/or personal possessions. Victims may also be given false information about each other in order to play them off against each other. If the victim is a woman, traffickers may become "romantically involved" with them as a strategy.

Sometimes victims will try to contact their traffickers again, for example in an attempt to ensure the safety of their family or themselves. Victims can also have the feeling that one of the members of the criminal network was actually on their side, for example the person who comforted them if they were beaten up. In some cases a friend or a sister they want to protect is still in the power of the criminal network. All these factors can make the relationship with the traffickers very complex.

Trauma

Some victims may suffer from severe post-traumatic stress disorder (PTSD), which may affect their ability to remember details or to provide a consistent and complete statement. This can lead to the victim being seen as unreliable, not credible or not convincing. A trauma basically means that something has happened to a person that he or she is unable to process, because the event is incompatible with the most basic and unquestionable concepts with regard to one's "self" and "others" and to the environment.

Survival and coping strategies

People have diverse ways of surviving and coping with the trafficking situation. Some of the most common are:

- Obedience in the hope that the trafficker will keep his or her promises or refrain from violence against them or their dear ones if they are obedient enough
- Utter compliance in the hope to mislead their guards and find an opportunity to escape
- Trying to appease their captor by pretending to like him, anticipating his wishes and adopting more of his perspective. They may literally "understand" their captor, sympathize, feel compassion or even fall in love with him.
- Trying to find and influence sympathetic individuals within the network
- Switching off emotionally.

General characteristics of survival strategies are that they are very difficult to abandon, even if the situation has changed, and can lead to a feeling of shame, guilt, complicity and having lost oneself. Moreover it is important to realise that the same strategies that helped the victim to survive can be used against him or her in the criminal case. In some cases survival strategies may lead law enforcement to see the victim as a perpetrator or as having voluntarily complied.

Individual circumstances and reactions

There are no givens how a trafficked person will react. This will depend on the circumstances, their previous experiences, their background and their personality. Each individual will react in his or her own way. Some may be cooperative, others numb, distrustful or not willing to communicate at all. Reactions will also strongly depend on the behaviour, attitude, body language and tone of voice of the person they are speaking to.

It is important to remember that there is no single right or bad way to respond to trafficking. It is equally important to remember that many victims are also strong and active, and are persons with a remarkable resilience, trying to deal with an extreme, potentially life-threatening experience.

The first interview

The aim of the **first interview** is:

- to start **building trust with the client** (victim) and forming an **operational alliance**
- to obtain the necessary concrete **information**

STEPS IN THE FIRST CONTACT

STEP 1: Opening

- Introduce yourself. Be very careful with possible physical contact (shaking hands, tapping on the shoulder etc.). Avoid physical contact with the victim, as the physical and sexual violence the victim survived requires additional caution and respect for his/her physical (and psychological) boundaries.
- Explain what is happening here and now (e.g. how the person was referred to you and what you know of the person and his/her situation)
- Offer coffee, water, a cigarette, something to eat
- Talk with the victim without the presence of any other persons but those providing support – helpers who the victims considers that she/he would need during the conversation.
- Do not interrupt the conversation, for example to answer a phone call.

STEP 2: Providing information

- Explain what your role is and what he/she can expect you to do
- Explain how the meeting will proceed so that the person knows what to expect and what you are going to do

STEP 3: Gathering information

- Explain what kind of information you need and why you need this information
- Find out who the person is: let him or her tell you who he/she is and how he/she ended up here. If necessary, help the person to clarify his/her story by asking questions
- Pay attention to the person and show true interest in their story. If necessary name the emotions you observe if you think they may stand in the way, for example "I feel that this is very difficult for you". In this way you can acknowledge and validate the emotions of your client
- Find out what the situation of your client is now and what he/she wants and expects. What are his or her main worries at the moment?
- Explain what you can do to help as well as what you cannot do

- When asking questions always consider how much information you need in this stage
- Don't ask more information than you need at that moment.

STEP 4: Updating the information

- Explain to the person what his/her actual situation is. After having heard their story you are in a better position to offer more precise information about the options available to them
- Explain the relevant policies (e.g. criminal law, immigration law, civil law). Make sure that you explain the relevant policies in simple and understandable words
- Explain how the criminal law works. Mention the possibilities, but also the risks, of a criminal procedure
- Explain the options the person has: be honest and realistic as to what the options may involve. Don't make promises you cannot keep!
- If applicable, explain options for assistance (shelter, psychological assistance, safety arrangements, etc.)

STEP 5: Jointly deciding what further steps to take

- Consider if you need to find out more information or if this is sufficient for this stage. Clarify possible questions you have
- Discuss possibilities and consequences and let the person decide what you are going to do. This can also mean that he/she does not want to press charges or cooperate in criminal proceedings or that the person needs more time to make a decision
- Repeat the information about available options and what you can do
- Develop a concrete plan
- Agree on a timeline and next steps

STEP 6: Closing the interview

- Before you close the meeting, gather feedback from the victim: how does he/she feel, is there anything that should have been said but has not
- Come to an agreement how you will stay in contact: how can he/she contact you and what can they expect from you? How can you contact him/her?
- Set a specific date for a next appointment or call
- Agree on the next steps
- Make clear and specific agreements on any other relevant matters
- Support the victim to write down certain information or steps because she/he may have difficulties to focus and to remember.

It is important to realize that making contact with a lawyer is a major step for the client (victim), and that he or she has a need to feel accepted. **Patience, benevolence and respect** are key. In particular during the first contact the lawyer needs to be cautious to prevent re-traumatisation of the victim. Re-traumatisation may occur when the victim feels fear, distrust and insecurity, when asked to tell you his or her experiences. Asking the victim to repeatedly tell what happened includes a **high risk of re-traumatisation**.

Re-traumatisation of clients (victims) may occur during the initial contacts when the lawyer does not communicate openly, but rather from a position of power or when he or she behaves judgmentally. This makes it impossible to create a working relation based on trust. **Meetings between victim and lawyer must never include the presence of the offender/trafficker.** In principle only the lawyer and the client should be present, or possibly, another person of the victim's choice who makes her or him feel secure.

Open communication and active listening

Open communication means that we actively listen to one another and openly express our thoughts and feelings, which contributes to the building of a relationship based on trust. This increases the probability of achieving the common goal.

Open communication makes the client/victim feel less upset, decreases the unpleasant feeling of vulnerability during the exposure to the painful experience and creates a feeling of being accepted. When they feel that they are trusted, they can talk more accurately about their experience, and any other things that are relevant for their future representation.

Active listening

Active listening is the best way to start a conversation with a victim/client. Active listening is the technique that helps a person to express his or her needs, emotions and thoughts. It creates a safe space to express oneself, based on respect and benevolence. In order to be able to actively listen, you need to accept your interlocutor and **enter the conversation without the intention to judge, assess, direct or advise. Be careful not to interrupt your clients as they speak and give your full concentration on the conversation (no phone calls during the conversation, no interruptions by third parties, etc.).**

Active listening as a technique involves a **number of different phases**. We will discuss the four phases that are most important in working with victims. Victims may suffer from the consequences of trauma and often have emotional and cognitive difficulties. These are particularly activated when they have to re-tell their traumatic experience in an environment that has an inadequate attitude towards victims (read more in the paper "Trafficking in persons – complex trauma experienced: The necessity to protect survivors from being retraumatised by institutions, professionals and procedures", *Combating Trafficking in Human Beings – Good Practices / Manual for Institutions*, ASTRA, Belgrade, 2009).

Phase 1: Acceptance

Open yourself up for communication without judgment, without giving a positive or negative critique or advice in this phase. Accept your client with all his or her thoughts and feelings. Be neutral and listen without interrupting.

Phase 2: Decoding and open-ended questions

When you fully accept your client, you will be able to accurately "decode" a message, i.e. guess what is the real topic or feeling behind a certain message, sentence or something unspoken, perhaps suggested by non-verbal communication of the victim (insecure bodily posture, arms crossed at one's breasts, the lack of eye contact, etc.). **This is particularly important in regard to the victim's feeling of safety, as well as for an understanding of the difficulties in talking about traumatic experiences.**

During the conversation it is important to pay attention to non-verbal communication and ask open-ended questions. Open-ended questions stimulate your interlocutor to express him or herself.

Open-ended questions start with: how, when, where, in what way, what...

"How did you make contact with ASTRA?"

"In what way did the trafficker contact you?"

"What was the most difficult thing for you during the torture, that you could now share with me?"

"How do you understand this situation?"

"What do you believe can help you?"

Avoid questions starting with "why" because they suggest blame and responsibility, the very things that the traffickers implant into their victims when they blame them for the situation they are in (as part of the complex mechanism of violence).

Questions like "Why did you cross the border with him?", or "Why did you believe that he loved you?" might psychologically trigger the feeling in the victim that he or she is responsible for the torture they had to endure, and will prevent them from being active and constructive in the process of representation and from fighting for themselves.

Phase 3: Paraphrasing (feedback and checking the decoding)

During the conversation, one should periodically repeat parts of what the client said, exactly in the way in which the listener/lawyer understood it. The aim of providing feedback by the listener/lawyer to the client is to **check whether the client was understood correctly**, and to encourage the client in further expressing him/herself. At the same time, it is **an affirmation of active listening and serves to avoid misunderstandings**.

When paraphrasing what the client says, one can use, for example, the following language:

"If I understand you properly..... (then repeating what the client said)"

"If I get it right..... (then repeating what the client said)"

Paraphrasing sentences moreover provides a chance for the client to hear in what way they expressed themselves, to check if they were clear, and if they were understood properly. At the same time it enables them to correct themselves and add something in order to clarify ambiguities.

Phase 4: Resume (Summary)

Making a summary is a highly important phase, usually used **at the end of a conversation**, or at the conclusion of an important topic and **serves as a check for the client to see whether they were correctly understood. Through this technique, clarity in communication is achieved.**

The following things may be summarized at the end of the conversation: enumeration of the key points, summarizing the general ideas in a shorter form, listing the agreements and/or instructions, making arrangements for the future.

Summarizing is important because it enables clients/victims to achieve a clearer understanding of the general situation, to set goals and to make an agreement with the lawyer, thus being more focused, which is often hard for them due to the experienced trauma.

CHAPTER 9. SPECIFIC PROBLEMS RELATED TO CHILD VICTIMS OF TRAFFICKING

Position of Minors as Injured Parties in Criminal Proceedings and Position and Role of Attorney (with special reference to the protection of minor victims and minors testifying as witnesses, injured by a crime under Art. 150 para. 1 of the Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles (hereinafter: Law on Juveniles))

By PhD Ivana Stevanović⁸⁴

When a police officer determines that a crime against sexual freedom, human trafficking, trafficking in minors for the purpose of adoption, or a crime with an element of violence was committed against a minor, the officer informs the authorized public prosecutor (who obtained specific knowledge in the area of child's rights and legal protection of juveniles) and files criminal charges or a report.

Gathering information from a minor as a citizen, pertaining to a crime which must be prosecuted *ex officio* – including the crime of human trafficking – **is performed exclusively by an authorized police officer, i.e. a specialised officer who obtained specific knowledge in the area of child's rights and legal protection of juveniles**, in the presence of a parent or adoptive parent, or in the presence of the guardian, if the minor is under guardianship. In exceptional cases, authorized officials may gather information without the presence of a parent, adoptive parent or guardian, with the obligatory presence of a guardianship authority representative or representative of a juvenile care institution, or a trusted person (chosen by the minor in agreement with the guardianship authority), in cases where the parents, adoptive parents, or guardians are prevented from attending the hearing (unavailable or under a reasonable suspicion of committing a crime against the minor), or when this is in the minor's best interest.⁸⁵

The competence and composition of the court that tries adult perpetrators of crimes against minors is determined in accordance with the general provisions of the *Criminal Proceedings Code*.

In cases pertaining to adult perpetrators of 27 crimes specified in Article 150(1) of the Law on Juveniles, notably:

aggravated murder (article 114. *the Criminal Code* – hereinafter: CCS), *incitement to suicide and aid in suicide* (article 119. CCS), *serious bodily harm* (article 121. CCS), *abduction* (article 134. CCS), *rape* (article 178. CCS), *sexual intercourse with a helpless person* (article 179. CCS), *sexual intercourse with a child* (article 180. CCS), *sexual intercourse through the abuse of authority* (article 181. CCS), *prohibited sexual acts* (article 182. CCS), *procuring and facilitating sexual intercourse* (article 183. CCS), *mediation in prostitution* (article 184. CCS), *presentation of pornographic material and using children in pornography* (article 185. CCS), *cohabiting with a minor* (article 190. CCS), *abduction of minor* (article 191. CCS), *change of family status* (article 192. CCS), *neglecting and abusing minor* (article 193. CCS), *domestic violence* (article 194. CCS), *denying one's right to expression* (article 195. CCS), *incest* (article 197. CCS), *aggravated theft* (article 205. CCS), *robbery* (article 206. CCS), *extortion* (article 214. CCS), *facilitating the use of narcotics* (article 247. CCS), *war crimes against civilians* (article 372. CCS),

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⁸⁵ Read more: *Special Protocol for the Conduct of Police Officers in the Protection of Minors against Abuse and Neglect* (revised edition from 2012.).

human trafficking (article 388. CCS), trafficking in children for adoption (article 389. CCS), holding in slavery and transportation of enslaved persons (article 390. CCS)

and if the injured party is a minor, with the aim of his/her special protection, it is expressly envisaged that the action has to be taken by a specialized (with a special knowledge in the area of child's rights and legal protection of juveniles):

- Presiding judge
- Public prosecutor
- Investigating judge
- Injured party's attorney (in case he/she is appointed by the president of the court).

The specialized public prosecutor may bring action against adult perpetrators of crimes envisaged by the CCS, in accordance with the provisions of the third part of the Law on Juveniles, if he/she assesses that this is necessary for the purpose of the special protection of the minor injured party.

The **judge** who presides the panel in cases when adult perpetrators are prosecuted for one or more of the 27 aforementioned criminal acts from Article 150 (1) of the *Law on Juveniles* **must** possess specific knowledge in the area of child's rights and legal protection of juveniles, which is proved by his/her possession of the special certificate issued by the Judicial Academy.⁸⁶ If the presiding judge lacks this knowledge, it constitutes a substantial violation of the provisions of the *Criminal Proceedings Code*.

Criminal proceedings for the criminal acts under Article 150 (1) of the Law on Juveniles is an urgent one (Art. 157).

It is particularly important to bear the following in mind:

Minor person as an injured party must have an attorney since the first hearing of the person accused of one of the 27 criminal acts listed in Art. 150 (1) of the *Law on Juveniles*, including the crime of human trafficking. If the minor does not have an attorney, the attorney is appointed by decision of the president of the court and is a lawyer who obtained specific knowledge in the area of child's right and legal protection of juveniles. The minor and his/her legal representative have to be informed of this right. The costs of representation in these cases are paid from the budget, as stipulated by the *Law on Juveniles*.

Upon the first contact with the minor person, it is important to be introduced to him/her in a manner they find comprehensible. The minor has to be informed on what is going to happen, i.e. what is expected of him/her. Inform the minor and his/her parent, adoptive parent or guardian of their rights and the services that are at their disposal

When the interests of an underage injured party are in collision with the interests of his/her legal representative, the guardianship authority shall appoint temporary guardian to such child (collision guardian) in accordance with Article 132, Para. 2 Item 3 of the Family Law. In such an event the child shall be heard in the presence of his/her collision guardian and not of his/her legal representative.

⁸⁶ The Judicial Academy is authorized for the issues of acquisition of specific titles and professional trainings of the holders of judiciary positions, and of the judicial and prosecutor's assistants, both in general and specifically in the area of protection of minors against abuse and neglect. The Judicial Academy performs this task in cooperation with scientific institutions, expert and professional associations and organizations, and civil society organizations. The Judicial Academy keeps records on professional trainings and evaluates the knowledge for application of the *Special Protocol for the Conduct of Judicial Authorities in Protecting Minors against Abuse and Neglect*, and may issue corresponding certificates.

to provide help and/or support. Secure that the minor is provided information in a way adjusted to his/her age and maturity, and in a language that he/she understands.

The *Law on Juveniles* also contains provisions on the prohibition of a confrontation between a juvenile injured party and the defendant in the legally prescribed conditions. Unfortunately, the *Law on Juveniles* does not expressly prohibit the possibility of a confrontation between the juvenile injured party and the defendant (the provisions of Article 153 of the *Law on Juveniles* envisage that: "If a juvenile is questioned as witness, who due to the nature of the criminal offence, consequences or other circumstances is particularly vulnerable or is in a particularly difficult mental state, confrontation between him/her and the defendant is prohibited"). It is important, especially in case of crimes against sexual freedom and crimes involving human trafficking, to insist on the prohibition of a confrontation. Furthermore, the lawyer should make an effort to secure with the judicial authorities that contact between the minor testifying and the defendant is prevented, whenever possible.

Hearing of a minor person is always conducted with the help of a psychologist, pedagogue or other professional, and in cases when the minor injured by a crime listed in Article 150 (1) of the *Law on Juveniles* is being heard, the hearing may be conducted two times at the most. More than two times is only allowed in exceptional cases, when additional hearings are necessary for the criminal proceedings to be fulfilled, in which case the judge is obliged to pay particular attention to the protection of the minor's personality (Art. 152 (2)). **The lawyer should insist on the consistent application of these provisions,** as well as those pertaining to identification of the defendant by the minor, meaning that the identification will be performed only in a manner that prevents the defendant to see the minor, as well as insist that particular attention will be paid in all phases of the proceedings (Article 155).

The provisions of the Law on Juveniles provide, among other things, for the audio and video testimony of a minor to be used as evidence, since they can be used more than once, and avoid additional testimony that may further contribute to stigmatization (Article 152 (3 and 4)). It is important that minors, especially those younger than 14, to witness proceedings in an environment they are comfortable with. Moreover, whenever possible, insist on the usage of special hearing techniques (joint interview), and hearing via audio or video link. When a minor has given his/her testimony in this way, the record of his/her testimony will always be read on the main hearing, or the recording will be played.

It is highly important that the **claim for damages,** especially when a minor is the injured party in a human trafficking trial, **is made during the criminal proceedings,** i.e. for this claim to be processed by the criminal court. Ask for the help of the police and prosecutor's office in this matter.

Do your best to protect the minor and his/her family from potential media abuse. If you give public announcements, they must not include the names of the minor and his/her family members, or any other data that might lead to the exposure of their identity. The announcement may include a short account of the event (date, time and the approximate place, as well as details about the age and sex of the minor).

Specific Position of Children and Adolescents as Victims or Witnesses

By: Vukašin Čobeljić⁸⁷

Specific Needs of Children and Adolescents

In order to understand the specific needs of children and adolescents who survived traumatic experiences, it is necessary to remind ourselves of some important facts.

One should always bear in mind that every critical condition for a person, next to being a potential danger or risk, also represents a potential chance or opportunity. One situation may be perceived in many ways, which is the result of differences between people. It is thus important to try and understand their different positions, that is, to constantly insist on trying to understand the way in which a child or adolescent perceives certain events.

On the other hand, it should be kept in mind that every reaction of a child after traumatic experiences represents a normal reaction to abnormal events or circumstances. Feelings of uncertainty, loss of control, helplessness, desperation, loneliness, intense rage, guilt, over-sensitivity, fear and withdrawal are only some of the reactions that might occur in such circumstances (position of direct victim, or that of an eyewitness).

In order to understand the behaviour of children and youth, it is important to understand that their reactions depend on their age, specific characteristics or personal traits (self-respect, image of oneself, introversion), as well as on the specific experiences gained in their primary families (the importance of early interaction).

Age and Reactions

1. Preschool children (0-6 years old)

Children at an early age are completely dependent on their parents. Their reactions to stress usually include crying, despair and helplessness. The most prominent fear is that of separation. At this age, it is usual for a child, while experiencing a difficult period, to start re-using modes of behaviour that he/she had grown out of a long time ago (thumb sucking, bedwetting – regressive behaviour).

Some children will recount their experiences (always only partially, since the vocabulary for the expression of one's feelings is not fully developed at this age), while the majority of children would use non-verbal modes of communication, such as playing, and imitating in order to channel their emotions. The preschool child is in the egocentric phase, which implies that he/she believes that his/her interpretation of the world is the only one accurate and universally shared by everybody, thus believing that grown-ups know exactly what he/she thinks or feels.

⁸⁷ Institut and NGO ASTRA associate

At this age, children cannot fully comprehend the idea of death. Death is something reversible, i.e. a person who has passed away can be brought back to life.

2. School children (6-11 years old)

Children at this age will be able to understand the meaning of what had happened to them to a greater extent, due to their cognitive abilities and emotional capacities. They are extremely prone to fantasizing, i.e. to processing a traumatic event into fantasy. This contributes to the feeling of regained control ("I prevented the aggression of that person in my imagination"), but can also lead to the feeling of guilt ("Did everything happen because I misbehaved?").

Due to traumatic experiences, some regressive behaviour might occur (bedwetting, insisting on sleeping in one's parents' bed), as well as psychosomatic reactions (upset stomach, headaches), as well as changes in one's behaviour in two directions (withdrawing and passivity, or aggression and impulsivity directed outwards).

When the child is approximately 10, the idea of death is formed, i.e. the finality of the phenomenon is realized.

3. Adolescents (12-18 years old)

Adolescents are less and less dependent on their parents. Peer groups become a source of security and support. Due to the achieved cognitive and emotional maturity, they are fully aware of the traumatic event's meaning. They use their imagination less, while they are more willing to talk about their experience. Intense reactions might be directed outwards (anger and impulsive reactions towards others), or to oneself (over-sensitivity, fears and withdrawing). Psychosomatic reactions are often present, as well as the need for one's demands to be met instantly ("I want it all, and I want it now!").

In some situations, adolescents are forced to take on the roles of a grown up and mature person, which has a certain impact on them, for their identity was not established in an adequate and timely manner.

The First Interview and Recommendations for Communication with Child and Adolescent Victims of Human Trafficking

It is highly important to adequately prepare oneself for a conversation with a child or adolescent. Initially, one should preferably inform him/herself as much as possible on the characteristics of the interviewee. This includes his/her age, as well as the data received from the professionals (reports) pertaining to the characteristics of the incident and personality (type of trauma, mode of reacting and facing difficulties).

As for the first interview and its initial phase (phase of child preparation), it is important to introduce oneself, and explain one's roles and tasks (always in a manner comprehensible to a child or adolescent), as well as to specify the duration of communication. It is important to emphasize your wish to help him/her and that the main goal is to achieve understanding.

If the child is younger, you might offer that the conversation is attended by a person that makes the child feel more secure. Furthermore, if at the given moment the child refuses to speak, this should be accepted, i.e. you should respect his/her willingness to speak and offer to leave the communication for some other time.

In order for the communication to be successful, it is necessary to establish a trusting relationship between the two parties. Therefore, it is important to act from the position of equality (where the other person's opinion is valued and respected), not from the position of authority, i.e. as an expert who is in a specific position of power (where the expert's opinion is the only one that is correct). The task is to understand the child, in order for him/her to feel accepted, not to assess, judge or justify him/her.

Understanding is achieved through conversation in which the child has a right to express his/her opinion or feelings openly, while the other party should actively listen and provide reliable information. Upon the intimate and painful emotional content's exposure, it is desirable to absorb the child's emotions and to accept the child. It sometimes happens that adolescents speak about sensitive issues as if recounting someone else's experiences (without emotions), which is expected, since being attached to one's feelings might be more painful. Furthermore, it is unwelcome to give advice or assess the person's reactions.

Recommendations for Communication with Child and Adolescent Victims of Human Trafficking

On the concrete level, it is important to:

1. Listen to the child in order to hear him/her.

This implies that the child receives maximum attention, i.e. to look at him/her attentively, eye to eye, to make it clear that you have heard him/her (active listening), as well as to occasionally repeat, in your own words, what was told to you (paraphrasing). It is advised to use the following phrasing at the beginning of a sentence: "If I understand well..." and then to repeat what the child had said.

2. Show the child that you believe him/her.

Accept the story that the child is telling with the utmost trust, i.e. as the truth. Avoid questions starting with "why", and instead make an effort to make open-ended questions starting with "what", "how", "when", or "where". Questions starting with "why" may instigate the feeling of guilt more easily and lead to making excuses (they activate more complex psychological processes), while other questions put stronger emphasis on informing the other party.

Open-ended questions do not imply a future answer. For example, an open-ended question would be "How did you feel at that moment?", while a closed question would be "Did you feel frightened or confused?".

3. Allow for feelings to be expressed.

Different reactions should be accepted (crying, grief and fits of anger or hate). One should preferably refrain from assessing the child's feelings. It is important that the child can feel that you appreciate and accept his/her feelings (show compassion). For example, it is possible to suggest that other persons in their position had similar reactions, so it is alright for them to feel that way (process of normalization of certain actions).

4. Draw the conversation to a logical conclusion or summarize it.

Check with the child how they feel and whether they are under the impression that they were understood or supported by the interviewer. Also reaffirm what was the main goal of the conversation, repeat key points (conclusions) that you have reached and agree on the further cooperation.

5. Listen to your feelings.

It happens during the communication that the interviewer experiences oppressive feelings, which is a normal reaction, but one should preferably control them, in order to help the child in the right way. After the conversation, one might discuss the feelings raised in a different context, with one's colleagues or professionals (psychologists, psychiatrists).

CHAPTER 10. SUPPORT MECHANISMS FOR TRAFFICKING VICTIMS IN SERBIA

The adoption of the new Social Protection Law⁸⁸ in April 2011 set the conditions for the establishment of a special institution that would exclusively provide support and protection to human trafficking victims. Article 42 of this Law moreover defines that trafficking victims are beneficiaries of the social security and protection services. Consequently, on 13 April 2012, the Centre for the Protection of Trafficking Victims was established. The Centre consists of two organizational units: the Shelter and the Agency.

The operation of the Centre is based on the amendments to the existing rulebooks⁸⁹ on minimum standards in the social care system. These will be additionally widened in scope by the adoption of the Rulebook on the minimum standards of protection for human trafficking victims in social care. The Rulebook shall establish structural minimum standards for the material and human resources and the management process in the Centre, and will set functional standards for admission, ways and methods of assessment, planning and activities during the service provision, and the termination of services.

The Centre follows up the Agency for Coordination of Protection of Trafficking Victims, which was founded as part of the Institute for Education and Upbringing of Children and Youth in Belgrade in March 2004, as a result of the joint effort of the Ministry of Social Policy and the OSCE Mission to the Republic of Serbia. The main task of the Agency was to organise and coordinate support and protection of victims, i.e. to inform them about the available types of support.

During 2011, the functioning of the Agency was evaluated. The main recommendation was to establish the new Centre as a separate entity, an institution founded by the State, and to ensure stable funding from the State budget for the operation of its services, as well as for an emergency sheltering. Furthermore, the need for the short-term placement services was noted.

The most important tasks of the Agency, as an organizational unit of the Centre for the Protection of Trafficking Victims, include:

- **the final identification of human trafficking victims,**
- carrying out a **risk assessment** in regard to the victim,
- making an **assessment of the condition, needs and strengths** of the victim as well as of important characteristics in their environment,
- drafting an **individual service provision and protection plan,**
- coordination of assistance and protection to victims with the aim of their **re-integration,**
- coordination of the **voluntary return** of the victim to the country of origin, where applicable, etc.

⁸⁸ Official Gazette RS, no. 24/2011.

⁸⁹ Specific points that are not included in the Draft of the Rulebook on the minimum service provision standard in social care, nor in the Rulebook on counseling/therapeutic and socio-educational services.

Records and documentation

The Agency, social welfare centres and other care service providers should keep records and documentation about their activities in regard to the protection of victims, in accordance with the special act. However, this new Act has not yet been adopted, nor is it to our knowledge in the process of being drafted.

The Agency manages databases on identified trafficking victims and the provided support and protection services, in accordance with the Act on the protection of personal data.

Identification and coordination

The identification and coordination of assistance and protection of **adult victims with legal capacity**, is performed by the Agency, if the victim agrees to it.

The identification and coordination of assistance and protection of **child victims of human trafficking and victims without legal capacity**, is performed by the authorized social welfare centre, with the mandatory participation of the Agency.

According to the aforementioned Rulebook, the identification and coordination of support services starts with the preliminary identification of the victim, which may be performed by a wide range of actors, including, non-governmental organizations, police, service providers and diplomatic and consular missions. After the Centre for the Protection of Trafficking Victims is informed, representatives of the Agency are obliged to directly contact the person presumed to be a trafficking victim within 24 hours, and to initiate an admission assessment. This process may last up to seven days after the initial reporting, and is followed by the drafting of an individual protection and support. The final identification of the person as trafficking victim is based on information provided by all authorities, institutions and organizations involved, within **three months** after the first direct contact with the victim.

Procedure of identification and coordination of assistance to human trafficking victims in the Republic of Serbia:**PRELIMINARY IDENTIFICATION**

* Non-governmental organizations – SOS hotlines and other service providers, police, social welfare centres, diplomatic and consular missions, lawyers, etc.

Deadline 6h

CENTRE FOR THE PROTECTION OF TRAFFICKING VICTIMS

Agency for Coordination of Assistance

I step: Visiting the location – first direct contact with the victim within 24 hours

II step: Admission assessment – starts within 24 hours and is finalized within 7 days after the reporting (based on results of the admission assessment, information necessary for identification of the person as victim is gathered.)

II step: Planning and protection – within 10 days after finalization of the admission assessment. Referring to other service providers, NGOs (SOS hotlines, day centres, shelters, etc.)

III step: repeated examination (the first repeated examination is performed within 30 days from the adoption of individual plan of service provision, and every examination that follows is performed within 3 months from the previous).

Identification of a person as human trafficking victim

(it is based on the information of all involved authorities, institutions and organizations, within three months from establishing the first direct contact)

TIPS**Pay attention!**

Human trafficking victims cease to have the status of active beneficiary when the targets identified in the individual plan of service provision are achieved, and no longer than three years from the establishment of the first direct contact with a person presumed to be a human trafficking victim. The beneficiary may be referred to other services with other authorities and agencies in order to realize corresponding rights.

The provision of support may be continued to be provided for the duration of participation in the court proceedings even after this deadline has expired, until the court process against the persons accused for human trafficking is finalized.

In the Figure above other service providers in the domain of social care are mentioned. What follows are the contact details of institutions and organizations that are, besides ASTRA, most frequently involved in the provision of direct support to human trafficking victims:

Center for the Protection of Trafficking Victims – 063-610-590

List of social welfare centres in the Republic of Serbia together with their contact information can be found on the website of the Ministry of Labour and Social Policy <http://www.minrzs.gov.rs/cms/sr/adresar/275-adrese-centara-za-socijalni-rad>

Novi Sad Humanitarian Center – e-mail: nshc@eunet.rs; www.nshc.org.rs

Temporary Home Atina – e-mail: atinango@eunet.rs ; www.atina.org.rs

The services offered within the programme **ASTRA SOS Hotline and Direct Victim Assistance** to human trafficking and their families include: **counselling and support through the process of search, identification, recovery and (re)integration; psychological assistance** (individual and group therapy, groups of self-help, etc.); **legal assistance** (legal counsel and court representation in criminal and civil proceedings); **medical help** (general and specialist examinations, medication therapy, laboratory tests, HIV and STD tests, dental treatment, etc.); **technical support** (interpretation services, transportation, help with finding accommodation, hygiene packages, accompaniment through institutions in order to realize concrete rights, field visits made by ASTRA mobile team).

In the process of (re)integration, the activities aiming to promote economic potential and employability of clients are also majorly important, ranging from support and help in starting or continuing schooling, i.e. selection of alternative educational programmes for acquiring specific knowledge and skills, to help in searching for employment. Furthermore, the ASTRA Day Centre is a safe place in which clients spend their free time and participate in various creative, sport, recreational and other activities, often co-created by them.

ASTRA SOS Hotline + 381 11 785 0000 (24/7)

Strategic level

In the previous article we have presented the operational part of the national referral mechanism. Aside from the operational part, there is also the strategic level, less relevant when we address direct support to victims. On the strategic level, there used to be the Council of Ministers for combating trafficking in human beings, together with the National Team coordinated by the Coordinator for combating trafficking in human beings. At the time when this Manual for Lawyers is published, the institutional framework of the Republic of Serbia for combating human trafficking was in a phase of transformation.

In the previous period, the two basic strategic documents in this area were the Strategy to Combat Trafficking in Human Beings in the Republic of Serbia adopted in December 2006, and the National Plan of Action to Combat Trafficking in Human Beings 2009-2011, adopted in May 2009. The new Strategy, which will be complemented with the new National Plan of Action, is currently in the making.

