Human Rights and Trafficking in Persons

15th Informal ASEM Seminar on Human Rights
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This document has been produced with the financial assistance of the European Union. The contents of this document are the sole responsibility of the rapporteurs and can under no circumstances be regarded as reflecting the position of the European Union or as reflecting the views or opinions of the organisers and the host of the 15th Informal ASEM Seminar on Human Rights, namely the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute, the French Ministry of Foreign Affairs and International Development, the Philippine Department of Foreign Affairs, and the Swiss Federal Department of Foreign Affairs.
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PART 1 - INTRODUCTION: DEFINITIONS, TRENDS AND RESPONSES

Part One seeks to provide an overview of the phenomenon of trafficking in persons, and thereby to establish a solid foundation of knowledge and understanding upon which more detailed discussion of specific issues can be built. It addresses the following:

- How is trafficking understood and defined?
- How does trafficking happen, where and to whom?
- How have the international community, States and civil society responded to trafficking?

Part One concludes by addressing the linkages between human rights and trafficking, outlining a human rights response to trafficking and indicating how it differs from other kinds of responses to trafficking.

1.1. What is trafficking?

‘Trafficking’ in relation to human beings has been referred to in international legal agreements since at least the 1904 Convention against White Slavery. In that context, and up until the end of that century, the term was mostly understood as referring to the movement of women and girls across national borders for purposes of their sexual exploitation.

In December 2000, the international community adopted the United Nations Protocol to Suppress, Prevent and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) as part of a group of treaties dealing with transnational organised crime and its various manifestations. The Trafficking Protocol, as it has come to be known, set out the first-ever international legal definition of trafficking in persons:

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

1 This Part draws on a range of resources including Anne T. Gallagher, The International Law of Human Trafficking (Cambridge University Press, 2010), Chapters 1 and 2; OHCHR, Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking (2011) [hereafter OHCHR, Commentary to the UN Trafficking Principles and Guidelines] and OHCHR, Fact Sheet No. 36 Human Rights and Human Trafficking.

2 It was this conception of trafficking that was enshrined in the 1949 United Nations adopted a Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, which remained the major international legal agreement on this subject up to the adoption of the Trafficking Protocol.
It is important to note that the Trafficking Protocol defines trafficking in children (defined as persons under the age of eighteen years) differently. In such cases, it is not necessary to show that force, deception or any other means were used. All that is required is to show a) an ‘action’ such as recruitment, buying and selling, and b) that this action was for the specific purpose of exploitation. In other words, trafficking in children will exist as a matter of international law in situations where a child is subject to some act such as recruitment or transportation, for the purpose of their exploitation. This simplified definition, that removes the requirement to also show means such as force, fraud or coercion, is intended to make the identification of child victims of trafficking and the identification of their traffickers easier.

### THE ELEMENTS OF TRAFFICKING: DIFFERENCE BETWEEN ADULTS & CHILDREN

<table>
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<tr>
<th>KEY ELEMENT</th>
<th>UN TRAFFICKING PROTOCOL</th>
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<td>Three elements must be present for a situation of trafficking in adults</td>
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<tr>
<th>1. An action: What traffickers do</th>
<th>Recruitment, transportation, transfer, harbouring or receipt of persons</th>
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<tr>
<td>2. By means of: How they do it</td>
<td>Threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or position of vulnerability, giving or receiving payments or benefits to achieve consent of a person having control over another</td>
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<tr>
<td>3. For the purpose of: Why they do it</td>
<td>Exploitation (including, at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs)</td>
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### Key features of the international legal definition

The key features of the international legal definition can be summarised as follows:

- **Internal and cross-border**: Trafficking can take place within a country (internal trafficking) as well as involve the movement of a victim from one country to another. Sometimes migrants who move safely from one country to another are subsequently trafficked within their country of destination.

- **Purposes and profile of victims**: Trafficking can take place for a range of purposes, most often for labour exploitation and sexual exploitation. Women and girls, men and boys, can all be victims of trafficking.

- **Not just about movement**: The concept of trafficking in international law does not just refer to the process by which an individual is moved into a situation of exploitation - it extends to include the maintenance of that person in a situation of exploitation. Accordingly, it is not just the recruiter, broker or transporter who
can be identified as a trafficker, but also the individual or entity involved in initiating or sustaining the exploitation.

- **The role of ‘consent’**: It is sometimes claimed that victims of trafficking consented to their exploitation. However ‘consent’ in such cases is invariably compromised through force, deception or other means. That is reflected in the legal definition of trafficking, which affirms that the “means” of trafficking in adults such as fraud or coercion operate to nullify consent.

**Trafficking and related crimes**

Trafficking has been identified as a crime and is a human rights violation in its own right. However, trafficking often includes, encompasses or overlaps with other crimes such as forced labour, the commercial sexual exploitation of children, or the unlawful removal of organs. Trafficking can also overlap with another transnational crime - smuggling of migrants. This particular issue is subject to detailed examination in Part 2(3), below.

**Distinguishing Trafficking From Other Crimes**

**Indicators of trafficking**

Indicators (or indications) of trafficking are the factors or signs that can be used to identify possible victims of trafficking. It is important to note the following with respect to indicators:

- Indicators are not definitive. Certain indicators may be present in some trafficking situations and not in others. Victims of trafficking cope with their experiences differently and it should not be assumed that any person will behave, appear or react in a particular way.
- Trafficking cases may not be apparent upon first contact. Until it is certain, the suspected or potential trafficked person should be treated as a victim of a crime.
The presence of indicators does not mean that a case of trafficking has been established. If there are indications that someone is in a trafficking situation, this should immediately compel further investigation.

The following “list of indicators”, adapted from a publication produced jointly by the International Labour Organization (ILO) and the European Commission, gives some idea of the signs or ‘clues’ that, on their own or in combination, might point to a situation of trafficking. Ultimately however, establishing whether someone is a victim of trafficking – and indeed, whether a crime of trafficking has occurred – requires application of the definition set out in national law to the facts of a particular situation.

### INDICATORS OF TRAFFICKING IN PERSONS

The following indicators or indications of trafficking in persons have been adapted from the International Labour Organization / European Commission, *Operational indicators of trafficking in human beings* (2009).

<table>
<thead>
<tr>
<th>1. Examples of indicators that may point to deceptive recruitment</th>
<th>The victim may be deceived about:</th>
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<tbody>
<tr>
<td>- The nature of the job, location or employer</td>
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<td>- Working conditions</td>
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<td>- The content or legality of a work contract</td>
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<td>- Family reunification</td>
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<td>- Housing and living conditions</td>
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<td>- Legal documentation or obtaining legal migration status</td>
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<td>- Travel and recruitment conditions</td>
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<td>- Wages/earnings</td>
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<td>- Promises of marriage or adoption</td>
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<td>- Access to education opportunities</td>
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<tr>
<th>2. Examples of indicators that may point to coercive recruitment (including transfer and transportation)</th>
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<tr>
<td>- Violence against victims</td>
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<td>- Abduction, forced marriage, forced adoption or selling of the victim</td>
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<td>- Confiscation of documents</td>
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<td>- Debt bondage</td>
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<td>- Isolation, confinement or surveillance</td>
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<td>- Threats of denunciation to authorities</td>
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<td>- Threats of violence against the victim</td>
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<tr>
<td>- Threats to inform the victim’s family, community or public about the victim’s situation</td>
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<td>- Violence or threat of violence against the victim’s family</td>
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<td>- Withholding of money</td>
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<th>3. Examples of indicators may point to recruitment by abuse of vulnerability</th>
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<tr>
<td>- Abuse of a difficult family situation</td>
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<td>- Abuse of illegal status</td>
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<td>- Abuse of lack of education (or local language)</td>
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<td>- Abuse of lack of information</td>
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<td>- Control by exploiters</td>
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<td>- Economic reasons</td>
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<td>- Inaccurate information about the law and/or attitude of authorities</td>
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<td>- Family situation</td>
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<td>- Personal situation</td>
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<td>- Psychological and emotional dependency</td>
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<td>- Relationship with authorities and/or legal status</td>
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</table>
| 4. Examples of indicators may point to exploitative conditions at work | - Excessive working days or hours  
- Poor living and/or working conditions  
- Hazardous work  
- Low or no salary  
- No respect of labour laws or contract signed  
- No social protection (contract, social insurance, etc.)  
- Wage manipulation |
|---|---|
| 5. Examples of indicators may point to coercion at destination | - Confiscation of documents  
- Debt bondage  
- Isolation, confinement or surveillance  
- Use of violence on victims  
- Forced into illicit/criminal activities  
- Forced tasks or clients  
- Forced to act against peers  
- Forced to lie to authorities, family, etc.  
- Threat of denunciation to authorities  
- Threat to impose even worse working conditions  
- Threats of violence against victim  
- Under strong influence of exploiters / others  
- Violence on family (threats or effective)  
- Withholding of wages  
- Threats to inform family, community or public |
| 6. Examples of indicators may point to abuse of vulnerability at destination | - Dependency on exploiters  
- Difficulty living in an unknown area  
- Economic reasons  
- Family situation  
- Relationship with authorities/legal status  
- Difficulties in the past  
- Personal characteristics |
1.2. How trafficking happens

The indicators set out above outline how trafficking can happen, and how a trafficking situation may be the result of a range of tactics and techniques. At the recruitment stage, traffickers use a variety of recruitment methods. Outright abduction or sale is sometimes reported, especially in situations of conflict, but this is not typical. Often there is deception in recruitment. Victims may be tricked into believing they are being recruited for legitimate employment, for example, or for marriage abroad. Sometimes the deception will not relate to the type of employment but rather to the conditions of work.

Traffickers will often seek to exercise control over a victim’s legal identity by confiscating the victim’s passport or official papers and isolating them physically, culturally and linguistically. Debt bondage and withholding of wages are widely used means of exercising control over trafficked persons and ensuring their continued profitability. Physical restraint, violence, and intimidation aimed at establishing and maintaining control are frequently reported.

Women, men and children are trafficked in and through all regions of the world, though some are certainly more vulnerable than others. While our understanding of trafficking is far from complete, it is clear that certain factors help to shape the vulnerability of an individual, a social group, or a community to trafficking and related exploitation. Specific forms of trafficking-related vulnerabilities may include those related to poverty and inequality; to discrimination and violence against women; and to discrimination on the basis of race, ethnicity and caste. Importantly, factors that shape vulnerability to trafficking tend to have differential and disproportionate impact on groups already lacking power and status in society including women, children (particularly unaccompanied children), migrants (especially irregular migrants), refugees and the internally displaced.

It is widely accepted that human trafficking is an increasingly common feature of modern conflict – whether internal or international. Many of the elements known to increase individual and group vulnerability to trafficking – such as gender-based violence, discrimination and lack of economic opportunity – are exacerbated before, during and after conflict. Furthermore, conflict fuels the impunity, the breakdown of law and order, and the destruction of institutions and communities that foster the conditions within which trafficking will flourish, often well past the point at which hostilities cease.
THE TRAFFICKING PROCESS

Push Factors

*Escape from:*
- Poverty
- Unemployment; underemployment
- Discrimination
- Physical, sexual or psychological violence
- Conflict / displacement

Pull Factors

*Demand for:*
- Unpaid/cheap labour: Mines, agriculture, factories, fishing, domestic work
- Sex industry
- Other: organs, crime, etc.

For the purposes of exploitation:
- Forced labour: mining, agriculture, factories, fishing, hospitality
- Domestic servitude in private residences
- Adult and child prostitution and production of pornography
- Forced marriage or exploitation via adoption
- Street selling, street begging and forced criminality
- Recruitment into conflict (child soldiers, porters, etc.)
- Removal of organs

The ‘means’

- Force / coercion
- Fraud / deception
- Abuse of power
- Abuse of a position of vulnerability

The ‘action’

- Transporting
- Recruiting
- Buying / selling
- Harbouring
1.3. Statistics and case studies

Reliable information on trafficking prevalence is a challenge to obtain, as discussed in more detail in Part 3(4), below. Our understanding of trafficking patterns and trends is relatively stronger, although there remain significant gaps and weaknesses. For example, while the connection between trafficking and conflict is widely acknowledged, the extent to which trafficking forms part of modern conflict is still unclear. Similarly, the link between the two separate offences of migrant smuggling and trafficking in persons has been increasingly noted in the context of the current forced migration crisis affecting Europe. However, definitional ambiguities and a lack of strong information on what is actually happening to migrants makes it difficult to flesh out these connections in detail and with certainty.

The following case studies, drawn from both Europe and Asia, are intended to give practical insight into the forms and manifestations of trafficking in these parts of the world. The case studies do not represent the full spectrum of trafficking-related harm. Rather, they have been selected for their capacity to illustrate the scope of that harm as well as to flag emerging trends.

### Trafficking in Conflict: The Case of the Rohingya in Southeast Asia

The ethnic Rohingya in Myanmar have long faced discrimination and hardship and many have been displaced to refugee camps within Myanmar. The worsening security situation has compelled large numbers to seek asylum in neighboring countries such as Malaysia and Indonesia. On this often perilous journey, men, women and children are extremely vulnerable to being trafficked. Former trafficking camps have been uncovered along the Thai-Malaysia border, inciting a crackdown on human trafficking in Thailand. Rescued victims reported that camp conditions were dire – torture, sexual assault, and death were routine.

Asylum seekers were deceived by smugglers and held at these trafficking camps while their captors extorted their families. If their families could not pay, they were sold directly into forced labour - primarily on Thai fishing vessels. There were also reports of Rohingya women who were forced to marry to secure their release from these camps, as their families could not afford the exorbitant fees imposed by the traffickers. It is estimated that hundreds of women and girls have been married off in this way to Rohingya men already settled in Malaysia. The extent to which they have consented to these marriages is blurred by their fears of sexual violence and threats of being sold for sex work from their captors.


The trafficking of vulnerable migrant workers onto Thai fishing boats has been documented for at least the past decade, although recent investigative reports have done much to expose the extent to which forced and exploited labour is woven into the fabric of the Thai fishing industry. Workers from Myanmar, Cambodia and Indonesia are typically 'sold' to boat owners by recruiters and brokers. They are then forced to pay off exorbitant debts before being able to keep any money for themselves. Reliable reports have documented horrific working and living conditions, including 20-hour work days, physical and psychological abuse, and lack of food, adequate shelter and medical attention. Exploitation is not limited to fishing boats. Trafficked migrant workers, including children, have been rescued from Thai seafood processing factories. Strong evidence has emerged that the supply chains of major international corporations involved in the buying and selling of Thai seafood, including Costco and Walmart, have been compromised by forced and exploitative labour.

Such exploitation is not confined to Southeast Asia. Fishing is a major industry in New Zealand and a number of regulatory innovations have been developed to optimise harvesting of fish stocks in that country’s richly endowed exclusive economic zone (EEZ). One innovation is the ‘Foreign Charter Vessel’, a system whereby foreign vessels, complete with foreign crew, are chartered by New Zealand companies to fish the EEZ on their behalf, with the catch being transferred onshore for processing. Over the past decade, compelling evidence has emerged of forced and exploitative labour amounting to human trafficking on board Foreign Charter Vessels. While isolated cases dating back to the mid-1990s had previously been reported, the issue first came to international attention in August 2010 when the Republic of Korea-flagged vessel Oyang 70, sank in calm seas 700 km off the New Zealand coast. The rescue exposed horrific living and working conditions for the Indonesian crew, but not before five Indonesia fishermen and the Korean captain had died. Less than a year later, seven Indonesian fishermen abandoned the Korean-flagged fishing vessel Shin Ji and thirty-two abandoned the Oyang 75, another Korean-flagged vessel. All thirty-nine Indonesians alleged abuse and under payment or non-payment of wages. Some also alleged physical abuse and sexual harassment.

**Trafficking in the Australian Sex Industry**

According to the 2015 US Trafficking in Persons Report, women migrants from Asia and—to a lesser extent—Eastern Europe and Africa have been coerced into prostitution under circumstances that meet the national and international definition of trafficking in persons. Cases that have come to trial confirm that migrant women and girls have been held in captivity, subjected to physical and sexual violence, threats and intimidation, and controlled through unfair and illegal debt contracts. Some victims of trafficking for sexual exploitation and others who migrate to Australia for arranged marriages have been subjected to domestic servitude. A 2014 report of the Commonwealth Parliament confirmed the existence of trafficking in the Australian sex industry, noting that while these comprise the majority of cases coming to the attention of criminal justice agencies, there are increasing reports of trafficking for other purposes, including forced labour and forced marriage. Cases of trafficking for sexual exploitation have typically involved small crime groups using ethnic, family and business contacts in the country of origin to facilitate recruitment, movement and visa fraud.


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**Exploitative Recruitment in the Czech Forestry Industry**

According to the ILO, trafficking of vulnerable workers through unscrupulous agents is one of the most common ways in which individuals are brought into a situation of forced labour.

A case that has come to the attention of media, trade unions and governments in Europe often involved large numbers of trafficked workers of different nationalities. In 2009, the media and NGOs in the Czech Republic reported about large-scale exploitation of migrants in the Czech forestry industry. Workers came from a number of countries, including Vietnam, Slovak Republic, Ukraine, Mongolia, Romania and Bulgaria. They performed heavy manual labour in forestry. Lawyers and victim advocates involved in the case estimate that 1,500 – 2,000 trafficked persons were exploited over several years. The company that recruited the workers was a subcontractor of one of the largest forestry companies in the Czech Republic which operated on a contract of the Czech government, the owner of the forests.

Deception was a key factor in this case. For example, Vietnamese workers were compelled by their recruiter to sign a “training contract” in Czech, which they did not understand and were deceived about the content of the contract. As a consequence, they were unaware that instead of a standard employment contract, they had signed a training contract and were “trainees”, not employees. This contract ostensibly entitled the employers to avoid paying workers beyond covering their basic accommodation and food needs. Workers were also subjected to threats, harassment and violence from the recruiters. By concluding “training” contracts that fell within the Ministry of Education, traffickers effectively obstructed investigations by the Ministry responsible for regulation of labour, thereby enabling the situation to continue.

Trafficking for Forced Criminality in the United Kingdom

The principal purpose of trafficking is to generate profits from the exploitation of a person. If the type of activity for which an individual is exploited is itself illegal, then the risks to the victim increases as does the likelihood that perpetrators will not be brought to account for their crimes.

Trafficking for forced criminality has been recognised as a growing problem in Europe. Children and adults are trafficked and coerced into various sorts of criminality, including shoplifting, pickpocketing, and theft of precious metal from railway lines. Some of the crimes that victims are forced commit are serious and attract high prison sentences. Often these ‘crimes’ involve drugs - cannabis cultivation, drug distribution or drug trafficking. Trafficking for forced criminality currently represents 4% of all cases of trafficking reported to Europol.

The most common form of forced criminality relates to cannabis cultivation and victims are typically young Vietnamese men.

Fifteen-year-old Hai* grew up in a village in Vietnam and did not go to school. When his father died, Hai tried to make a living in the capital selling plastic bottles for recycling. A man approached him and said he could earn lots of money in Europe. Hai would have to raise several thousand dollars for an agent to take him. His mother took out a loan against their house and an uncle raised the rest.

After 14 months of travelling, Hai was dumped at a service station in England. He was met by another Vietnamese man called Cuong who drove them to Scotland. Upon arrival, Hai was told that he now owed more money for the trip, plus interest and would have to water cannabis plants to pay off his debt and be able to send money to his family. Hai was arrested and taken to custody. When asked questions, he was confused and too scared to tell them anything. A solicitor advised him to plead guilty. Hai was sentenced to 24 months in an adults’ prison and told he would be deported after he had served his sentence.

Most cases of trafficking for forced criminality are identified only after the victim has been prosecuted, despite European and international law providing for the non-punishment of victims. Both the EU Directive and the Council of Europe Convention contain provisions to prevent the prosecution of victims for crimes they have committed as a consequence of being trafficked. The OSCE also drafted guidance for States on the implementation of non-punishment for victims of trafficking.

1.4. Responses to trafficking

While trafficking has been around for many years, coordinated responses are much more recent. These have largely resulted from an improved understanding of the nature and extent of trafficking and growing consensus around what is required to address trafficking effectively. This section provides a summary overview of responses at the international, regional (Asia and Europe) and national levels. It is not exhaustive, but provides information on – and insight into – key developments and trends.

The emergence of international responses to trafficking

The issue of trafficking in persons only properly arrived on the international agenda in the mid-1990s as information emerged about the cross-border exploitation of girls and young women in Southeast Asia and Eastern Europe. At that time, there was no accepted definition of “trafficking”; no understanding that men and boys could also be victims; and no conception that the purposes of exploitation could be as varied as the potential for profit. While trafficking had been addressed previously in agreements between States, this had always been in the much narrower context of the movement of women and girls across national borders for profit.

By the late 1990s, the international community had commenced work on a new treaty on trafficking with a particular focus on organised criminal aspects that would eventually address these gaps. That work culminated in December 2000 with the adoption of the Convention on Transnational Organized Crime and its Protocols. Critically, the UN Trafficking Protocol also set out the first-ever international legal definition of trafficking in persons - one that, as described above, embodied a much more comprehensive understanding of who can be trafficked, how and why.

Like its parent instrument (the Organized Crime Convention), the Trafficking Protocol was never intended to be a human rights treaty. Its core obligations primarily relate to criminalisation, punishment, border controls, and cooperation in investigations and prosecutions. Human rights and refugee law are affirmed as being applicable, and victims are acknowledged as holders of certain entitlements, but the relevant provisions are vague on details and generally ‘optional’ in the shaping of the obligation. However, as described in more detail in the next part, progress since the Protocol has contributed substantially to filling some of its gaps and fleshing out the substantive content of the most important primary rules, including those that relate to the rights of victims and the assistance and protection they should be provided.

Adoption of the Trafficking Protocol proved to be a critical impetus for other parts of the international system to take up the issue of trafficking in a serious and systematic way. Until then, attention had been piecemeal and sporadic. For example, despite explicit references to trafficking in two of the mainstream human rights treaties (Convention on the Rights of the Child and Convention on the Elimination of all Forms of Discrimination against Women) and highly relevant provisions in others (e.g. the prohibition on slavery, servitude and forced labour in the International Covenant on Civil and Political Rights), trafficking was rarely identified or discussed within the international human rights system. This has changed substantially in recent years; trafficking and related exploitation are issues now commonly raised by UN treaty bodies in their consideration of States parties reports; through the Universal Periodic Review Mechanisms; and by a
number of UN special procedures dealing with issues as diverse as migrants rights, slavery-like practices and violence against women.

Two key developments within the international human rights system that followed the adoption of the Trafficking Protocol deserve special consideration. The first of these was the elaboration of the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking, which emerged from the Office of the United Nations High Commissioner for Human Rights (OHCHR) in 2002. In her report transmitting this document to the Economic and Social Council, the High Commissioner explained that the development of the OHCHR Principles and Guidelines was a direct response to the clear need for practical, rights-based policy guidance on the issue. As shown in the following Part, the Principles and Guidelines have proved to be vital in helping shape understanding of States’ duties with regard to preventing and responding to trafficking.

In 2004, the United Nations Commission on Human Rights (the predecessor to the current Human Rights Council) decided to create a Special Rapporteur “whose mandate will focus on the human rights aspects of the victims of trafficking in persons, especially women and children”. In the same decision, the Commission invited the Special Rapporteur to submit annual reports including recommendations on measures required to uphold and protect the human rights of the victims. The Special Rapporteur was further requested to respond effectively to reliable information on possible human rights violations with a view to protecting the human rights of actual or potential victims of trafficking and to cooperate fully with other relevant special rapporteurs, United Nations bodies, regional organisations and victims and their representatives. In carrying out this mandate, the Special Rapporteurs (there have been three) have visited dozens of countries and conducted in-depth studies of issues ranging from trafficking in supply chains, to the right of victims to access remedies.

In a report marking ten years of the mandate, the-then Special Rapporteur highlighted the role played by this mechanism in ensuring that human rights retain their rightful place at the centre of the international response to trafficking. She noted that the role has been particularly important in light of the fact that the key international treaty on trafficking was established outside the human rights system. States and partners surveyed as part of the preparation for the ten-year report affirmed the mandate’s positive impact on their work as well as on the anti-trafficking sector as a whole. They drew particular attention to the mandate’s contribution to standard setting; to mainstreaming human rights into anti-trafficking discourse; and to drawing attention to emerging and lesser-known forms of trafficking.³

The wider international system has also been a source of important guidance on the legal framework around trafficking, as well as a source of information and insight on specific issues, patterns and trends. For example, the United Nations High Commissioner for Refugees (UNHCR) has developed guidelines on trafficking in the context of asylum seekers and has also published reports on this aspect. The United Nations Children’s Fund (UNICEF) has developed guidelines on the identification and treatment of child victims of trafficking and has undertaken important research into how trafficking affects

children. The United Nations Office on Drugs and Crime (UNODC), the guardians of the Trafficking Protocol, have initiated research into new and less understood forms of trafficking; developed training and resource materials for specialist responders; and also contributed to improved understanding of the legal framework through studies into definitional concepts. The ILO has undertaken critical work on the links between trafficking and forced labour. The ILO has also contributed directly to the legal framework around trafficking through its 2014 adoption of the Protocol to the Forced Labour Convention that explicitly identifies the link between trafficking and forced labour and affirms the obligations of States with regard to prevention, protection and prosecution. (See text box below)

**2014 Protocol to the Forced Labour Convention**

ILO Protocol 29, which was adopted in 2014, updates the widely ratified ILO Forced Labour Convention of 1930 by addressing gaps in its implementation and reaffirming the obligation of States to take effective measures to prevent and eliminate forced labour in all its forms. The new treaty reaffirms the definition of forced labour contained in Convention 29 (“all work or services which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”) and provides specific guidance to States Parties on effective measures to prevent and eliminate all forms of forced labour. It directly addresses trafficking in persons and is intended to reinforce and complement other international instruments such as the UN Trafficking Protocol. Obligations under ILO Protocol 29 include:

- Developing comprehensive national policies and action plans for the effective and sustained suppression of forced labour;
- Providing victims with protection and effective access to remedies, such as compensation, irrespective of their presence or legal status in the territory;
- Sanctioning perpetrators;
- Strengthening and applying labour laws and policies to all sectors, as well as inspection services;
- Supporting due diligence by both the public and private sectors to prevent and respond to risks of forced labour; and
- International cooperation between and among States.

The new Protocol is accompanied by Recommendation 2013, adopted at the same time which, while not a legal instrument, provides detailed technical and practical guidance to States on the effective implementation of the 1930 Forced Labour Convention and ILO Protocol 29 and in the areas of prevention, protection, and access to justice and remedies, such as compensation, enforcement, and international cooperation.

**Regional responses**

The international responses to trafficking in persons outlined above have paved the way – and in turn been influenced by - responses at the regional level. The following short summary focuses on highlights from both Europe and Asia.

**Regional response to trafficking: Europe**

The Trafficking Protocol provided both the impetus and the foundation for a European response to trafficking. While anti-trafficking initiatives, mainly targeted at trafficking in
women for sexual exploitation, date back into the 1990’s, such as the Hague Ministerial Declaration[^4], it was not until the passage of the Protocol that coherent and comprehensive policies and legislation – at both regional and national levels - began to be introduced.

**European Instruments relevant to trafficking**

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<tr>
<td>Council of Europe Convention on Action against Trafficking in Human Beings (2005)</td>
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<tr>
<td>European Union Directive on preventing and Combating Trafficking in Human Beings and Protecting its Victims (2011)</td>
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The three institutions that lead the development of anti-trafficking programmes and legislation in Europe are the European Union (28 Member States), the Council of Europe (47 Member States) and the Organization for Security and Co-operation in Europe – or OSCE (57 participating States).

The **Council of Europe Convention on Action against Trafficking in Human Beings** (CoE Convention) of 2005 was the first international instrument to set binding requirements on States to provide protection and assistance for victims. Using the same definition as the Trafficking Protocol and the prevention-protection-prosecution-partnership framework, the CoE Convention strengthened the impact of the Protocol in the region by reaffirming its key provisions and introducing binding provisions in crucial areas. As of October 2015, 43 countries have ratified the convention and one non-member State country, Belarus, has acceded. The CoE Convention is open to all countries.

Unlike the *Trafficking Protocol*, the CoE Convention is explicitly presented as a human rights instrument that places the rights of the victims at the centre of the anti-trafficking response. The Convention’s binding victim protection provisions include:

- Identification and assistance to victims of trafficking
- Recovery and reflection period
- Residence permit
- Compensation and legal redress

All States parties undertake to introduce legislation to comply with the provisions of the CoE Convention. A group of experts (GRETA) is mandated by the Convention to monitor its implementation in all Member States.

The European Union (EU) has the power to issue legislation that, once passed, creates an obligation on Member States to transpose it into their national laws. EU law is also directly applicable in national courts of all the Member States and supersedes national laws. In the 1990’s and early 2000’s, the EU issued several declarations and recommendations on trafficking, but it was not until 2002 that a first legal instrument – the Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings was passed. This was followed by the developments of legislation and policy and culminated in the passage of the Directive of the European Parliament and the Council 2011/36/EC on preventing and combating trafficking in human beings and protecting its victims. The Directive is a criminal law instrument but strongly emphasises victim protection. It also extended the Trafficking Protocol definition by including, as additional forms of exploitation, forced begging and forced criminal activities: (Art 2.3 “Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs”). As a result of the 2011 Directive, all EU Member States have in place anti-trafficking legislation and systems for protection of victims.

In addition to legislation, the EU has an overarching anti-trafficking policy - the EU Strategy towards the Eradication of Trafficking in Human Beings 2012–2016⁵. EU trafficking policy is led by the EU Anti-Trafficking Coordinator, a position established in 2011. Several funding streams finance projects by NGOs and government authorities across the EU.

The OSCE has been involved in counter-trafficking programmes for over 15 years. Through its regional offices across Europe, including the whole of the former Soviet Union, the OSCE supports and finances work in countries to develop action plans, train police and set up a protection system. The OSCE has also developed the concept of a national referral mechanism⁶, a system through which a State delivers assistance to victims, discharging its obligation to protect trafficked persons. The term “national referral mechanism” is now common across Europe and most countries have set up these systems for victims’ assistance.

Unlike the Council of Europe or the EU, the OSCE does not have the mandate to create laws. However, participating States agree on political commitments in a range of areas including trafficking. A Special Representative and Coordinator for Combatting Trafficking in Human Beings oversees OSCE’s anti-trafficking work.

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⁶ National Referral Mechanism – Joining Efforts to Protect the Rights of Trafficked Persons – A Practical Handbook, OCSE - ODIHR, 2004
European Anti-Trafficking Mechanisms

GRETA - a group of experts on trafficking in human beings formed under the mandate of the CoE Convention. The group is responsible for monitoring the implementation of the Convention by the States and publish regular country reports evaluating the progress in implementation on national level.

OSCE Special Representative – a mandate with the responsibility to assist participating States in their efforts to counter trafficking, in particular the implementation of anti-trafficking policies.

European Union Anti-Trafficking Coordinator - a mandate with the responsibility for co-ordination of anti-trafficking actions across the EU institutions and Member States. The Coordinator oversees implementation of EU policies in this area and leads on development of new responses.

Regional response to trafficking: Asia

In comparison to Europe, the response to trafficking in Asia has been more fragmented, reflecting the scope and diversity of this region and the absence of unifying institutions. Apart from a treaty on trafficking that addresses only the cross-border trafficking of women and girls for sexual exploitation, adopted by the Association of South Asian Nations (SAARC) in 2002, most regional or sub-regional action has taken place within Southeast Asia, principally through the Association of Southeast Asian Nations (ASEAN). However, as the second table below shows, countries of this region have also developed important bilateral agreements aimed at coordinating their responses in relation to critical issues, such as victim identification and repatriation.

ASEAN Instruments relevant to trafficking

| 2004 ASEAN Declaration against Trafficking in Persons Particularly Women and Children |
| 2004 Memorandum of Understanding on Cooperation against Trafficking in Persons in the Greater Mekong Sub-region (COMMIT) |
| ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers 2007 |
| ACWC Gender Sensitive Guidelines For Handling Of Women Victims Of Trafficking In Persons |
| ACWC Guidelines on Victim Protection and Support |
| ASEAN Practitioner Guidelines on an Effective Criminal Justice Response to Trafficking In Persons |

7 This table and the following are both excerpted from the forthcoming publication of the ASEAN Committee on Women and Children (ACWC), Baseline Assessment Report on Laws, Policies and Practices within ASEAN Member States Relating to the identification and Treatment of Victims of Trafficking, Especially Women and Children.
### Bilateral Instruments between ASEAN Member States

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<th>Thailand</th>
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<tr>
<td>Cambodia</td>
<td>MOU on Bilateral Cooperation for Eliminating Trafficking in Children and Women and Assisting Victims of Trafficking (2003)</td>
<td>Agreement on Bilateral Cooperation for Elimination Trafficking in Women and Children and Assisting Victims of Trafficking (2005)</td>
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<tr>
<td>Myanmar</td>
<td>MOU on Cooperation to Combat Trafficking in Persons, Especially Women and Children (2009)</td>
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<tr>
<td>Thailand</td>
<td></td>
<td>Agreement on Bilateral Cooperation for Eliminating Trafficking in Persons, Especially Women and Children, and Assisting Victims of Trafficking (2008)</td>
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</table>

ASEAN, through its Senior Officials Meeting on Transnational Crime (SOMTC), has also undertaken important work in developing model training curricula and other resources aimed primarily at criminal justice professionals including judges, prosecutors, specialist investigators and law enforcement officials. A full description of available resources is provided in the 2011 ASEAN publication, *Progress Report on Criminal Justice Responses to Trafficking in Persons in the ASEAN Region.*

**National responses**

Developments at the international and regional levels have paved the way for comprehensive national responses to trafficking in the form of laws, policies and practices. While it is not possible to provide a full overview of national responses within the scope of this report, the following paragraphs seek to highlight key developments and challenges. Additional information on national responses, including examples of promising practices, is provided in Part 2 below.

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The legal framework: Prior to the adoption of the UN Trafficking Protocol in 2000, very few countries criminalised what is now understood to be ‘trafficking in persons’, although many had prohibited a range of practices associated with trafficking including slavery, enforced prostitution, child sexual exploitation and forced labour. Today, most countries in the world, including most countries of Europe and Asia, now have a specialist trafficking law or detailed provisions within a broader law (such as the national criminal code) defining and criminalising trafficking and providing at least some rights and protections for victims.

The policy framework: Numerous countries have adopted policies, including through national plans of action, aimed at identifying priorities around the trafficking response and allocating responsibilities. Sometimes policy instruments address a specific aspect of the trafficking response: for example, in relation to prevention or victim identification. Some countries have entered into bilateral (non-treaty) agreements with others. These agreements are often concluded between countries of origin and destination and seek to promote coordination and collaboration between the two countries on issues of common concern, such as repatriation.

Identification of victims: Unfortunately, trafficked persons have long been misidentified, as illegal migrants or illegal workers for example, and summarily deported. Many countries have recognised the need to establish protocols and procedures to ensure victims are quickly and accurately identified, leading to a gradual increase in the number of formal identifications. However, the numbers are still very low. For example, it has been reported that in 2014 only 44,462 victims of trafficking were identified worldwide. Approximately 75% of these were victims of trafficking for sexual exploitation, with the remainder being victims of trafficking for forced labour. Given the clandestine and illicit nature of trafficking, this number likely represents only a small fraction of the total number of persons currently in a situation of exploitation that would qualify as ‘trafficking’.

Protection and support for victims: As noted above, the legal framework around trafficking in many countries now includes at least minimum protections for victims. Some countries have made considerable progress in developing the systems and mechanisms – and allocating necessary funding – to ensure that victims do indeed receive appropriate protection and support. However, progress in this area has been uneven. In some countries, victims can benefit from a potentially wide range of entitlements to shelter, psychological support, residence and work rights in the country of destination, and access to compensation. In other countries, such entitlements, even if they exist in law, are not available in practice.

Criminal justice responses: Trafficking has been criminalised in most countries and many have sought to strengthen the criminal justice response through, for example, the training of officials, the establishment of specialist investigative bodies and even the creation of special courts to hear trafficking cases. Despite considerable advances, traffickers continue to operate with impunity in all parts of the world and victims rarely secure the justice they are entitled to. In 2014, there were only 10,051 prosecutions for trafficking offences and a mere 418 of these were for trafficking for forced labour. Considerably less than half of these cases resulted in a conviction.\footnote{US Trafficking in Persons Report (2015)}
PART 2 - THE LEGAL FRAMEWORK: KEY RIGHTS AND OBLIGATIONS

This Part seeks to summarise the main areas of international and regional agreement around important aspects of the response to trafficking with a particular emphasis on rights (the legal entitlements of individuals, most especially trafficked persons) and obligations (the legal requirements of States).

Part Two has two objectives. Firstly, to provide the reader with a solid understanding of victim entitlements and what is required of States under international and regional law - drawing on primary rules as well as supplementary sources. Secondly, to show how the relevant rights and obligations can be / are being implemented in practice.

Following a brief introduction to the legal framework around trafficking, four key areas are considered: victim protection and assistance; legal status and access to justice, including remedies; prevention; and return and reintegration. Examples of positive developments or good practice are included under each sub-heading.

It is essential to note at the outset, the critical importance of international cooperation as a foundational principle for the legal framework - and one that helps in understanding and applying that framework. It is indeed possible for trafficking to take place within the borders of a single country - and for the impact of that trafficking to be limited only to that country. But this is not the usual situation. The impetus for States to work together on the issue of trafficking came from the realisation that in most cases, there is a strong cross-border or international element. Victims are exploited in a country that is not their own; traffickers and their accomplices operate across national borders; witnesses and evidence of trafficking crimes are located in multiple jurisdictions; the impact of a single trafficking situation is felt in different countries. Even in cases of internal trafficking, the products or services produced through exploitation may well benefit the markets and consumers of another. Cooperation between countries in addressing trafficking is therefore much more than a preferred approach: it is an operational necessity.

Another important preliminary point relates to the concept of a human rights-based approach to trafficking. Concerns about the importance of human rights and risks of their marginalisation have led to repeated calls for a ‘human rights-based approach’ to trafficking. The OHCHR Commentary on the Trafficking Principles and Guidelines describe such an approach as a conceptual framework that is normatively based on international human rights standards and that is operationally directed to promoting and protecting human rights. A human rights-based approach to the issue of trafficking requires careful

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consideration of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States’ obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distributions of power that underlie trafficking, that maintain impunity for traffickers, and that deny justice to victims of trafficking.

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

- As policies and programs are formulated, their main objective should be to promote and protect rights;
- A human rights-based approach identifies rights-holders (for example trafficked persons, individuals at risk of being trafficked), their entitlements and the corresponding duty-bearers (usually States) and their obligations;
- A human rights-based approach works towards strengthening the capacities of rights-holders to secure their rights and of duty-bearers to meet their obligations; and
- Core principles and standards derived from international human rights law, (such as equality and non-discrimination, universality of all rights, and the rule of law), should guide all aspects of the response at all stages.

These points provide the foundation for how the legal framework around trafficking is understood and explained below.

2.1. Introduction to the legal framework

The legal framework around trafficking comprises a dense network of international, regional and national instruments. As trafficking is a complex issue that can be (and has been) considered from a number of different perspectives, the range of relevant treaties is very wide.

Specialist trafficking treaties

As noted in Part One, there are now several contemporary treaties adopted in the past fifteen years that deal specifically and exclusively with the issue of trafficking. These are set out in the box below. Provisions of the first three instruments in particular provide critical substance to the international legal framework around trafficking.
Specialist treaties on trafficking in persons


Council of Europe Convention on Action against Trafficking in Persons, 2005 (Council of Europe Trafficking Convention)


South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention)

ASEAN Convention on Trafficking in Persons, Especially Women and Children (expected to be concluded in 2015-2016)

Internationally, the most important instrument is the 2000 United Nations Protocol to Suppress, Prevent and Punish Trafficking in Persons Especially Women and Children, referred to in this report as the Trafficking Protocol. The Protocol’s significance lies in the fact that its structure and substantive provisions (including, critically, the first-ever international legal definition of trafficking) have provided the template for much of what has followed. The following tables summarise that structure and the key provisions.

OUTLINE OF THE TRAFFICKING PROTOCOL

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<td>Relation to Parent Convention (Article 1)</td>
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<th>Part II – Protection of Victims of Trafficking in Persons (articles 6-8)</th>
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<td>Assistance and protection of victims (Article 6)</td>
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<td>Repatriation of victims (Article 8)</td>
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<th>Part III – Prevention, Cooperation and Other Measures</th>
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<td>Prevention of trafficking in persons (Article 9)</td>
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<td>Information exchange and training (Article 10)</td>
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<td>Border measures (Article 11)</td>
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<td>Security and control of documents (Article 12)</td>
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The purposes of the Trafficking Protocol are:
To prevent and combat trafficking in persons, paying particular attention to women and children;
To assist the victims of such trafficking, with full respect for their human rights; and
To promote cooperation among States Parties in order to meet those objectives

The key obligations of States Parties to the Trafficking Protocol are:
To criminalize ‘trafficking in persons’ as defined in the Protocol and to impose penalties which take into account the grave nature of that offence.
To protect, to the extent possible under domestic law, the privacy and identity of victims of trafficking in persons and to consider the provision of a range of social services to enable their recovery from trauma caused by their experiences.
To ensure that the legal system contains measures that offer victims the possibility of obtaining compensation.
To consider allowing victims to remain in their territory, whether permanently or temporarily, taking into account humanitarian and compassionate factors.
To accept the return of any victims of trafficking who are their nationals, or who had permanent residence in their territory at the time of entry to the receiving State. When returning a victim, due regard must be taken of their safety, with the return preferably being voluntary.
To establish policies, programs and other measures to prevent and combat trafficking and protect victims of trafficking from re-victimization.
To provide and/or strengthen training for officials in the recognition and prevention of trafficking, including human rights awareness training.
To strengthen such border controls as might be necessary to prevent trafficking, without prejudice to other international obligations allowing the free movements of people.

Human rights instruments

Trafficking was an issue for human rights well before it became the subject of modern specialist treaties. Two mainstream international human rights treaties make specific reference to trafficking:

- **Convention on the Elimination of All Forms of Discrimination against Women:**
  Article 6 requires States Parties to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of the prostitution of women.
• **Convention on the Rights of the Child**: Article 32 prohibits trafficking in children for any purpose as well as the sexual exploitation of children and forced or exploitative labour. This Convention also contains important protections for children who have been trafficked, including the requirement that the best interests of the child be prioritised in relation to all decisions and actions.

Treaties dealing with slavery and the slave trade, forced labour, child labour, migrant workers and persons with disabilities, as well as more general treaties dealing with civil and political rights or economic, social and cultural rights, are all applicable to trafficking. Major crime control treaties, such as the United Nations Organized Crime Convention and the United Nations Corruption Convention are highly relevant to States’ obligations with regard to trafficking, as is the Statute of the International Criminal Court, which identifies trafficking (and related conduct such as sexual enslavement) directed against a civilian population in situations of international or internal armed conflict as a war crime and a crime against humanity.

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### Rights most relevant to trafficking

- The prohibition of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, disability or other status;
- The right to life;
- The right to liberty and security;
- The right not to be submitted to slavery, servitude, forced labour, or bonded labour;
- The right not to be subjected to torture, and/or cruel, inhuman, degrading treatment or punishment;
- The right to just and favorable conditions of work;
- The right to be free from gender-based violence;
- The right to associate freely;
- The right to freedom of movement;
- The right to the highest attainable standard of physical and mental health;
- The right to an adequate standard of living;
- The right to special protection for children


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‘Soft Law’ relevant to trafficking

The international legal framework around trafficking includes other accepted sources of international law, such as custom, general principles and the decisions of international tribunals. In relation to custom for example, the prohibition on slavery is widely recognised to be a part of customary international law, binding on all States – even those that are not party to one or more of the treaties that specifically prohibit slavery. It is now generally accepted that certain egregious manifestations of trafficking cross the line into slavery – and in such situations, that prohibition will be directly applicable. An example of a judgment of an international tribunal that has helped to establish the international legal framework around trafficking is Rantsev v Cyprus and Russia, which was decided by the European Court of Human Rights in 2009 and which is referred to at various points below.
The legal framework also embraces instruments that are not strictly law – for example guidelines, non-treaty agreements between States, resolutions of international bodies such as the United Nations General Assembly etc. Two important examples are:

**Recommended Principles and Guidelines on Human Rights and Human Trafficking**: The *Trafficking Principles and Guidelines* were developed by the United Nations High Commissioner for Human Rights in 2002 to provide practical, human rights-based policy guidance grounded in established rules of international law. They have exercised a major influence over how the relationship between trafficking and human rights is understood and what a “rights-based approach” to trafficking could look like. A number of important principles first articulated in the *Trafficking Principles and Guidelines* (such as the principle that victims of trafficking should not be detained or prosecuted for status offences) have now become accepted at the national, regional and international levels as forming part of a State’s obligations with regard to their response to trafficking. In 2010, the Office of the UN High Commissioner for Human Rights issued a detailed commentary to the *Trafficking Principles and Guidelines*.

**Commentary to the Council of Europe Convention on Trafficking**: When it was adopted in 2005, the text of the Council of Europe Convention was accompanied by a detailed commentary. This commentary provides valuable insight into the intention of the drafters and also into the substantive content of key obligations set out in the Convention itself.

Other instruments that contribute to our understanding of the legal framework are included in the text box below. Note that these “soft law” sources do not directly impose obligations on States – nor confer rights on individuals or groups. However, some can form part of the international legal framework, for example, by helping to identify or confirm a particular legal trend or even by contributing to the development of customary international law in relation to a particular aspect of trafficking. The example given above in connection to the United Nations Recommended Principles and Guidelines is a case in point. Soft law can also provide insight into the substantive content of more general legal norms that are contained in treaties. For example, the *Trafficking Protocol* requires States to take some measures to provide victims of trafficking with access to remedies. Soft law materials such as the commentary to the Council of Europe Trafficking Convention, as well as reports of the UN Special Rapporteur on Trafficking, are key resources in determining the actions required by States to fulfill this particular obligation.

### Non-treaty instruments relevant to trafficking

**International:**

- 
  - UN Recommended Principles and Guidelines on Human Rights and Human Trafficking (*Trafficking Principles and Guidelines*)
  - Basic Principles and Guidelines on the right to a remedy and reparation for victims of gross violations of international human rights law and serious violations of international humanitarian law (*Basic Principles and Guidelines on the Right to a Remedy*)
  - UNICEF Guidelines for Protection of the Rights of Child Victims of Trafficking (*UNICEF Guidelines*)
  - UNHCR Guidelines on International Protection: the application of the Refugee Convention and/or Protocol to victims of trafficking and persons at risk of being trafficked, (*UNHCR Trafficking Guidelines*)
  - UN Global Plan of Action to Combat Trafficking in Persons
Regional: Asia

- ASEAN Declaration on the Protection and Promotion of the Rights of Migrant Workers (2007)
- ASEAN Committee on Women and Children Gender Sensitive Guidelines For Handling Of Women Victims Of Trafficking In Persons (2014)

Regional: Europe

- OSCE Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (2013)

Understanding and interpreting obligations

Most of the international and regional instruments setting out rights and obligations with regard to trafficking provide broad rules and principles, rather than details. The substantive content of these rights and obligations is therefore not completely settled. For example, as discussed in more detail immediately below, international law clearly imposes on States an obligation to protect and support victims of trafficking. However, the scope and nature of that obligation is still being determined. Important progress has been made: interpretive texts attached to the major trafficking treaties (such as the Legislative Guide to the Organized Crime Convention and its Protocols and the Commentary to the Council of Europe Trafficking Convention) have helped flesh out what the obligation of protection and support actually entails. Other non-treaty sources such as the Trafficking Principles and Guidelines and its Commentary have helped enormously by explaining, in detail, what a particular rule or principle requires in terms of actual practice.

Another important source of guidance and authority with regard to the international legal framework around trafficking, are the bodies that have been established with the express purpose of supporting effective implementation of that framework. At the international level, these include the Working Group on Trafficking in Persons set up under the Conference of Parties to the Organized Crime Convention (the parent instrument of the Trafficking Protocol). Within the international human rights system, the United Nations Special Rapporteur on Trafficking in Persons, established by the predecessor to the Human Rights Council has provided much-needed insight into how particular rules – such as the obligation to provide access to remedies for victims of trafficking – are to be interpreted and applied in practice. The Special Rapporteur on the Rights of Migrants and the Special Rapporteur on Contemporary Forms of Slavery have also made important contributions to our understanding of both rights and obligations. Particularly over the past several years, the international human rights treaty bodies have also begun to
address trafficking more regularly and systematically in their consideration of States Parties reports, thereby helping shed light on how States can best implement their obligations in this area.

At the regional level, implementation of the Council of Europe Trafficking Convention has been strongly supported by the existence of a dedicated group of experts (GRETA) who undertake detailed examination of the situation in each State Party and identify ways in which implementation of the provisions of the Convention can be strengthened. The European Court of Human Rights has also, on occasion, provided judgments that flesh out the substantive content of key provisions of that instrument.

2.2 Victim protection and assistance

The rules around victim protection and assistance cover a wide area and are constantly evolving. This section identifies the most critical issues around victim protection and assistance – noting core standards and highlighting, where possible, national and regional developments or practices that provide insight into how a particular principle or obligation can be pursued or realised.

Victim identification

Too often, victims of trafficking are often not identified and, as a result, are simply invisible. When victims of trafficking do come to official attention, they may be misidentified as illegal or smuggled migrants. This is significant because, as explained in the UN Recommended Principles and Guidelines and the commentary to the Council of Europe Trafficking Convention, if a trafficked person is not identified at all, or is incorrectly identified as a criminal or as an irregular or smuggled migrant, then this will directly affect the ability of that person to access the rights to which she or he is entitled.

The compound harm of identification failure

Failing to recognise a person as a potential victim of trafficking may not only violate that person’s rights and cause harm but also hamper opportunities to deal with trafficking offenders through interdiction, investigation and prosecutions.

The problems are compounded if such a person is treated as a criminal. Building trust is essential to gaining the cooperation of a victim. Arrest and detention will cause serious setback or destroy any chance of building that trust.

Victims are obviously a very significant source of evidence but if their basic needs are not taken care of, they are a source that may quickly disappear. Thus treating a trafficked victim purely as a source of evidence is a short-term approach likely to fail.


States are therefore required to take positive steps to identify victims of trafficking accurately and in a timely manner. That obligation is implied in all legal instruments that provide for victim protection and support. Certain soft law instruments, such as the Trafficking Principles and Guidelines, identify a range of practical steps that should be taken to ensure that victims of trafficking are quickly and accurately identified. These include the preparation of written identification tools such as checklists, guidelines and
procedures that can be used to support identification; and the training of relevant officials (police, border guards, immigration officials, labour inspectors etc.) for the accurate identification and correct application of agreed guidelines and procedures. As noted in the text box below, special and additional considerations apply in respect of the identification of child victims.

**Identifying child victims: presumption of age**

In a case where the age of a victim is uncertain and there are reasons to believe the victim is a child, a State Party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified. (Legislative Guide to the Trafficking Protocol (Part 2, para 65)

States Parties are to presume the victim is a child if there are reasons for believing that is so and if there is uncertainty about their age. The individual presumed to be a child victim of trafficking is to be given special protection measures in accordance with their rights as defined, in particular, in the Convention on the Rights of the Child. (European Trafficking Convention, Article 10. Explanatory Report to the European Trafficking Convention, para. 136)

Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child. Pending verification of the victim’s age, she or he is to be treated as a child and to be accorded all stipulated special protection measures. (UNICEF Guidelines, Guideline 3.1.2)

**Good practice in relation to victim identification**

**Asia - Agreement between Lao PDR and Vietnam on Identification Criteria**

In 2010, the Governments of Lao PDR and Vietnam entered into a Memorandum of Understanding to strengthen bilateral cooperation in combating trafficking in persons and protection of victims. Unlike other bilateral or regional MOUs among ASEAN Member States, this MOU specifically outlines the mutually agreed bases upon which to identify victims of trafficking as well as procedures for the safe and timely repatriation of victims. The MOU provides that victim identification is to be based on the following sources:

- **(a)** Evidence and materials provided by the two Parties;
- **(b)** Statement and evidence provided by the victims;
- **(c)** Screening results gained by Lao Ministry of Public Security and Vietnamese Public Security Forces, Vietnamese Border Guard Force;
- **(d)** Statements given by the person conducting trafficking in persons;
- **(e)** Information provided by relevant international organisations and governmental organisations;
- **(f)** Information from other sources.


**Europe - The Council of the Baltic Sea States Model Memorandum of Understanding (MoU)**

The Council of the Baltic Sea States, a regional organisation formed of 11 States of the Baltic
Sea region, runs a Task Force against Trafficking in Human Beings. In 2011, the Task Force reviewed collaboration procedures among stakeholders addressing trafficking in the member States. Following that review, the Task Force developed a model MoU to assist its member States in improving collaboration between law enforcement and specialised service providers, most particularly in the area of victim identification. The model provides a template agreement that can be adapted for use in the individual member States. The model is designed to:

- Foster common understanding of objectives, procedures and roles;
- Build trust and confidence;
- Improve transparency and reduce bureaucracy;
- Establish recognised limitations;
- Provide an objective frame of reference to measure progress;
- Reinforce accountability on both sides.


**Victim referral**

The identification of victims must be followed by prompt referral to appropriate services. Failure to refer victims quickly and correctly contributes to inappropriate treatment, such as placement in immigration detention or withholding services that victims need and are entitled to receive. Experience has shown that prompt and appropriate referrals do not happen automatically. They require planning, coordination and close cooperation between public and private agencies.

### National referral mechanism (NRM)

A National Referral Mechanism (NRM) is a coordination framework that brings together State and civil society agencies working on trafficking. At the core of every NRM is the process of locating and identifying likely (or ‘presumed’) victims of trafficking. This process includes all the different organisations involved in an NRM, which should cooperate to ensure that victims are offered assistance through referral to specialised services.

The basic aims of an NRM are to ensure that the human rights of trafficked persons are respected and to provide an effective way to refer victims of trafficking to services. In addition, NRMs can work to help improve national policy and procedures on a broad range of victim-related issues such as residence and repatriation regulations, victim compensation, and witness protection. NRMs can establish national plans of action and set benchmarks to assess whether goals are being met.

The structure of an NRM will vary in each country; however, NRMs should be designed to formalise cooperation among government agencies, as well as between government and non-governmental groups dealing with trafficked persons.


**Bulgarian national referral mechanism (NRM) for support of trafficked persons**

In 2011, a Bulgarian NGO *Animus Association* initiated the development of a system for
identification and assistance of trafficked persons. With the Dutch Government, a working group was set up composed of NGOs, the National Commission for Combating Trafficking in Human Beings, police, relevant ministries and international organisations. Using the OSCE/ODIHR NRM model, the working group developed a co-operative framework with clearly assigned roles and responsibilities.

The NRM comprises the following elements:

- “Institutional framework” - all roles and functions of all NRM participants are clearly defined;
- “Key principles” - all NRM participants follow the same rules and principles when working with trafficked persons;
- “Standard operating procedures” - descriptive steps to be followed in facilitating support to trafficked persons.

The NRM also includes common criteria for identification and common standards for service provision that are followed by all participants.


Many countries have experienced problems in their referral systems – both internally and across borders - when referral is required to ensure the safe return and reintegration of a victim. A recent study of practice in Southeast Asia identified the following issues in national referrals:

- Lack of referral and cooperation between anti-trafficking organisations and institutions within a country, which can result in trafficked persons being under-assisted or receiving low-quality services.
- Lack of referral between anti-trafficking organisations and more general assistance organisations within a country, which means alternative assistance options for trafficked persons are not identified, leading to duplication of services and wasting of resources.

Provision of immediate protection

As noted in the Commentary to the Trafficking Principles and Guidelines, victims who break free from their traffickers often find themselves in situations of great insecurity and vulnerability. They may be physically injured as well as physically and/or emotionally traumatised. They may fear retaliation. They are likely to have few, if any, means of subsistence. Furthermore, the harm experienced by victims of trafficking does not necessarily cease when they come to the attention of national authorities. Mistreatment by public officials may result in a continuation of an exploitative situation or the emergence of a new one. The harm already done to victims can be compounded by failures to provide medical and other forms of support – or by linking the provision of such services to an obligation of cooperation that victims may not be willing or able to meet.

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The first and most immediate obligation of the State in which a victim, or suspected victim, of trafficking is located is to ensure that this person is protected from further exploitation and harm. What this actually means in practice will depend on the circumstances of each case. Certainly States are required to take reasonable measures to this end. That obligation will require:

- Moving the trafficked person out of the place of exploitation to a place of safety;
- Attention to the immediate medical needs of the trafficked person;
- Risk assessment to determine whether the trafficked person is under a particular risk of intimidation or retaliation;
- Apply similar measures to others who could potentially be harmed or intimidated by traffickers and their accomplices, such as family members.

### The obligation to remove from risk of harm

In an important judgment, the European Court of Human Rights affirmed that if State authorities were aware, or ought to have been aware, of a risk of trafficking, then a failure to take appropriate measures within the scope of their powers to remove the individual from that situation or risk is a violation of that person’s rights.

**Source:** *Rantsev v Cyprus and Russia*, (para 286).

### Provision of immediate care and support

The State in which a trafficked person is located is also required to provide that person with adequate physical and psychological care to meet at least the individual’s immediate needs. The scope and nature of the obligation on States to provide care and support of victims of trafficking will depend on many factors because the legal basis for such support is very wide. Article 6 of the *Trafficking Protocol*, for example, sets out a range of support measures that States Parties are required to consider implementing including:

- Appropriate housing;
- Counseling and information, particularly regarding their legal rights, in a language that the victims of trafficking can understand;
- Medical, psychological and material assistance; and
- Employment, educational and training opportunities.

The *Council of Europe Trafficking Convention* and the *2011 EU Directive* both specify a number of similar and additional obligatory measures including:

- Attending to victims with special needs (e.g. victims who are pregnant, disabled etc);
- Reflection and recovery period of at least 30 days to enable victims to take an informed decision on whether to cooperate with authorities;
- Renewable residence permit where the victims stay, is necessary: a) owing to their personal circumstances or b) to facilitate their cooperation in criminal proceedings;
• Assistance to have victims’ rights and interests presented and considered in criminal proceedings against offenders.

Human rights law is another important source of obligation in this area, for example by prohibiting discrimination on the basis of sex or national origin in the provision of care and support. Human rights law also provides critical guidance with regard to the treatment of trafficked children, requiring, for example, that the overarching rule of “the best interests of the child”, as protected in the Convention on the Rights of the Child, must guide decision-making about support.

**Key principles and entitlements related to protection and support of trafficked children**

- The trafficked child **should not be criminalized** in any way and should not be liable for prosecution for any status-related offences.
- The trafficked child should **never be placed in a law enforcement detention** facility, such as a police cell, prison or special detention centre for children. Any decision relating to the detention of children should be made **case by case and in their best interests**. Any detention of a child victim of trafficking should, in all cases, be for the shortest possible time and subject to independent oversight and review.
- Care and support should be made available to trafficked children as a right. It should **never be conditional** on their cooperation with criminal justice agencies.
- Children should **not be coerced** into receiving care and protection, including medical assistance and testing, unless it can be demonstrated, case by case, that this is in their best interests.
- Every child under the jurisdiction or control of a State is entitled to **care and protection on an equal basis**. This means that non-national child victims of trafficking are to enjoy the same rights as national or resident children.
- **The views of child victims** of trafficking should be respected and given due weight and they should be **provided with information** about their situation and entitlements.
- There should be **no arbitrary interference with the child’s privacy**. States should ensure that the identity, or details allowing the identification, of a child victim of trafficking are not made public, save in exceptional circumstances.
- States should provide for representation of an identified (or presumed) child victim of trafficking by a **legal guardian**, organization or authority, for example to ensure that the child’s best interests remain the paramount consideration in all actions or decisions; to ensure all necessary assistance, support and protection are provided; to be present during any engagement with criminal justice authorities; to facilitate referral to appropriate services; and to assist in identifying and implementing a durable solution.
- Measures should be in place to assist child victims of trafficking to **participate, safely and meaningfully, in court processes**. These may include regularization of legal status; provision of information, legal assistance and legal representation; and taking steps to minimize any trauma that such participation could cause, for instance by providing alternatives to direct testimony.

**Sources:** Convention on the Rights of the Child, European Trafficking Convention, Recommended Principles and Guidelines, and UNICEF Guidelines. Table adapted from OHCHR, Human Rights and Human Trafficking, Fact Sheet #36 (2014)
No conditions or coercion in the provision of protection and support

The provision of protection and support has been widely acknowledged to be a non-negotiable right of the victim, meaning that it is a right that should be recognised and implemented irrespective of that person’s capacity or willingness to cooperate with criminal justice authorities. Unfortunately, the linking of assistance and protection to cooperation with criminal justice agencies is prevalent in all regions of the world. In some countries, the legal and regulatory frameworks explicitly condition any form of support on cooperation. But even where non-conditional assistance is guaranteed in law, victims still tend to be pressured into providing information and testimony in this way. There is growing recognition that separating protection and support from victim cooperation is a fundamental part of a human rights-based approach to trafficking.

A human rights-based approach further requires that the provision of care and support be both informed and non-coercive. For example, victims of trafficking should receive information on their entitlements so they can make an informed decision about what to do. Victims should also be able to refuse care and support. They should not be forced into accepting or receiving assistance.

Consensual provision of protection and assistance to victims

Consensual provision of protection and assistance to victims

In relation to all assistance measures provided for in that instrument, States Parties are required to ensure the relevant services “are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and rights of children in terms of accommodation, education and appropriate health care”.
(European Trafficking Convention, Article 12. (2011 EU Trafficking Directive, Article 11.5)

In relation to health care and counseling, “trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases including HIV/AIDS”.
(Trafficking Principles and Guidelines, Guideline 6)

Protection of the right to privacy

The right to privacy is an important aspect of protecting victims from further harm. Failure to protect privacy can increase the danger of intimidation and retaliation by traffickers or their accomplices. It can cause humiliation and hurt to victims and compromise their recovery. The key provisions relating to the right to privacy for victims of trafficking are set out in the text box below. These provisions confirm that protection of privacy should be extended to all trafficked persons unless there are reasonable grounds justifying interference with such privacy – such as consideration of the rights of accused persons to a fair trial.
The right to privacy

A State Party is to protect the privacy and identity of victims of trafficking “in appropriate cases and to the extent possible under its domestic law”.

(Trafficking Protocol, Article 6)

States Parties are required to “protect the private life and identity of victims”.

(European Trafficking Convention, Article 11)

“There should be no public disclosure of the identity of trafficking victims and their privacy should be respected to the extent possible, while taking into account the right of an accused person to a fair trial.”

(Trafficking Principles and Guidelines, Guideline 6)

2.3. Legal status and access to justice including remedies

The needs of victims of trafficking extend well beyond immediate protection and support. Many victims will lack the status to be able to stay legally in the country in which they have been identified; many will not be in a position to make difficult decisions – for example, about whether they will participate in the prosecution of their exploiters. Often, victims of trafficking will require legal and other assistance to ensure that they can access justice – for example, to enable them to make good decisions about participating in prosecutions and to realise their right to a remedy. (Note that remedies are only briefly dealt with below as they are subject to more detailed consideration in the following Part). Ensuring victims’ access to justice also extends to include ensuring that they are not penalised for their trafficking – for example, by being prosecuted for illegal entry or illegal work or detained in shelters.

Temporary residence permits and reflection periods

Victims of trafficking who are unlawfully within a country face special dangers and vulnerabilities as a result of their legal status. For example, they may be unable to access important sources of subsistence and support including housing and work opportunities. They may be vulnerable to further exploitation as well as intimidation and retaliation. They risk being prevented from participating effectively and meaningfully in legal proceedings against traffickers. Without regularisation of their status, victims also risk being detained in immigration facilities or shelters. In addition, they are liable to deportation at any time. Victims who are deported often face the risk of being re-trafficked by the same traffickers or others. The International Organization for Migration (IOM) has estimated that at least 20% of returned victims are re-trafficked.13

International law and policy recognises that victims of trafficking may receive regularisation for a number of reasons and in a number of different ways, including through:

- Granting of a *reflection and recovery period* during which non-conditional support is given with the aim of providing victims with time and space to decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters;
- Granting of a temporary residence permit linked to (usually criminal) proceedings against traffickers; such visas usually require victim cooperation and terminate once legal proceedings are completed; and
- Granting of a temporary residence permit on social or humanitarian grounds that may be related to, for example, respect for the principle of *non-refoulement* (discussed further below), inability to guarantee a secure return, and risk of re-trafficking;
- Granting of *international protection or refugee status* in situations where victims meet the conditions of international refugee law, for example in cases where female victims of trafficking for sexual exploitation from a country X can be recognised as a member of a particular social group under the 1951 *Refugee Convention* who, if returned, faces the risk of persecution on the basis of her membership of that group.

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### Granting Temporary Stay for Victims of Trafficking

*Council of Europe Trafficking Convention*

- Art. 13 requires Member States to grant victims, at minimum, a 30-day reflection and recovery period, during which the victim cannot be forcibly removed from the territory of the State and take an informed decision whether or not to cooperate with competent authorities.
- Art. 14 requires member States to grant victims a renewable residence permit if their stay is necessary owing to their personal circumstances or because of their participation in criminal proceedings.


- Provides for the possibility of third country nationals who are victims of trafficking and who are cooperating with national authorities to receive a temporary residence permit.

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### Good practice in Europe: Duration of reflection period

European legislation (EU Council Directive 2004/81/EC) stipulates a reflection period of 30 days. However, practice has established that a reflection period of 30 days is not a sufficient recovery period for the person to sufficiently make important decisions about what to do next.

In 2004, the EU Group of Experts on Human Trafficking recommended in their report that “the reflection period should be for not less than three months.” Following the recommendation, a number of European countries have legislated for a reflection period longer than the minimum required period of 30 days:

- United Kingdom – 45 days
- Czech Republic – 60 days
Legal assistance and involvement

Trafficked persons have an important role to play, and a legitimate interest, in legal proceedings against their exploiters. A human rights-based approach to trafficking requires that all efforts be made to ensure victims are able to participate in legal proceedings freely, safely, and on the basis of full information. Victim involvement in legal proceedings can take a number of different forms. Individuals who have been trafficked may provide evidence against their exploiters, either through written statements or in person, as part of a trial. Trafficked persons may also be called upon to provide a victim statement about the impact of the offence that could become part of a sentencing hearing. In civil proceedings against their exploiters, trafficked persons may be applicants and/or witnesses. Even for a trafficked person who is unwilling or unable to testify, she or he still has a legitimate interest in relevant legal proceedings.

Victims of trafficking who are involved – or potentially involved – in legal proceedings have special needs and vulnerabilities that must be addressed. Obligations that flow from this are in addition to the protection, assistance and support obligations mandated for all trafficked persons as discussed above. For example:

- Trafficked persons should be provided with legal and other assistance in relation to any court or administrative proceedings in a language they understand. This should include keeping victims informed as to the scope, timing and progress of proceedings and the outcome of their cases.
- Trafficked persons have a right to be present and have their views known during any legal proceedings.

### Trafficked persons as victims of crime and as witnesses

The responsiveness of judicial and administrative processes to the needs of victims should be facilitated by:

(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;
(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;
(c) Providing proper assistance to victims throughout the legal process;
(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation; and
(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.

Source: Declaration of basic principles of justice for victims of crime and abuse of power, para. 6.
Access to remedies

Remedies play a critical role in the international legal response to trafficking by confirming trafficked persons as victims of crime and of human rights abuse. In the context of trafficking, the obligation to provide remedies and the right to access remedies normally arise from a State’s obligations under human rights law or under one or more of the specialist trafficking treaties.

The right to a remedy is affirmed in treaties and other legal and non-legal instruments that deal specifically with trafficking. For example, the Trafficking Protocol requires States Parties to ensure that their domestic legal systems contain measures that offer victims of trafficking the possibility of obtaining compensation for damage suffered. As shown in the text box below, the Council of Europe Trafficking Convention is much more explicit and detailed on the issue.

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**Remedies in the Council of Europe Trafficking Convention**

The Council of Europe Convention on Action against Trafficking in Human Beings (European Trafficking Convention) takes a much more comprehensive approach than the Trafficking Protocol regarding victim compensation and legal redress. The provision on remedies commences with a requirement that victims be provided with information on relevant judicial and administrative proceedings (Article 15(1), relating, inter alia, to possibilities for obtaining compensation and regularization of immigration status) as well as access to legal assistance (Article 15(2)). The Explanatory Report that accompanies the Convention highlights the crucial link between legal status and remedies, noting that: “it would be very difficult for [victims] to obtain compensation if they were unable to remain in the country where the proceedings take place.”

The Convention confirms that victims have a right to monetary compensation from convicted traffickers in respect of both material injury (such as the cost of medical treatment) and non-material injury (such as emotional suffering) (Article 15(3)). The Explanatory Report notes that a victim’s right to compensation consists in a claim against the perpetrator of harm. If criminal courts are not empowered to determine civil liability towards victims, “it must be possible for victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.”

The Convention confronts the reality that the State will not always be able to enforce compensation orders against traffickers. It thereby requires States Parties to take steps to guarantee the compensation of victims. The means of guaranteeing compensation are not mandated, although the Convention suggests several examples including the establishment of a special fund or initiatives aimed at social assistance or reintegration of victims (Article 15(4)). The possibility of State compensation schemes being funded by the seized proceeds of trafficking is specifically noted.

Specialist trafficking treaties do not specifically identify the standard of remedy to be provided although the requirement in the Trafficking Principles and Guidelines that victims be given access to “adequate and appropriate” remedies is widely accepted. The Trafficking Principles and Guidelines also provide limited guidance on what the standard might mean in practice – referring to “fair and adequate remedies”, which may be criminal, civil or administrative in nature and which “include the means for as full rehabilitation as possible.” The Basic Principles and Guidelines on the Right to a Remedy
(an important soft law instrument that applies to victims of crime and serious violations of human rights) are clear that remedies or reparation should be proportionate to the gravity of harm suffered.

Both the form and extent of remedies required will depend on the nature and circumstances of the violation as well as the content of the relevant primary obligation (the rule that was breached and that gave rise to the right to a remedy in the first place). However, in all cases, international law dictates that the form of remedy should reflect and advance the obligation on the offending State to, as far as possible, wipe out the consequences of the breach and re-establish the situation that existed prior to its occurrence. Remedies can involve a range of measures including:

- **Restitution** which includes material, judicial or other measures aimed at restoring the situation that existed prior to the violation, such as releasing a victim from detention or returning their stolen property.
- **Rehabilitation** which recognises a need to ensure that the person who has suffered violation of their human rights has his or her status and position “restored” in the eyes of the law as well as of the wider community. Rehabilitation can include the provision of medical and psychological care as well as legal and social services.
- **Compensation** - discussed further below - is the most common form of remedy and is payable for damage caused by an internationally wrongful act to the extent that such damage is economically assessable and not able to be made good by restitution. In the case of trafficking, an adequate and appropriate remedy under this heading could include: compensation payable for physical and psychological harm; lost opportunities; loss of earnings; moral damage; and medical, legal or other costs incurred as a result of the violation.

The right to a remedy is often not effectively available to trafficked persons because they frequently lack information on the possibilities and processes for obtaining remedies. A right of access to effective remedies means that, in addition to making such remedies available under criminal or civil law, States should ensure that victims are provided with information and assistance that will enable them to actually secure the compensation or restitution to which they are entitled. In the context of trafficking, an additional and important co-requisite for realising the right to a remedy is the presence of the victim in the country where the remedy is being sought. This may require the regularisation of their legal status. The non-criminalisation of victims and non-detention, both considered below, are also critical in terms of ensuring victims can access their right to a remedy promptly and effectively.

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**Compensation for trafficked persons**

Compensation is one form of effective remedy that trafficked persons are entitled to. Compensation serves a multitude of purposes in anti-trafficking measures: restorative, punitive, and preventative.

The restorative function of compensation lies in its contribution to victims’ recovery. The restorative function of justice is to assist victims to overcome what they have been through. Enabling victims to access compensation recognizes their right to a remedy, acknowledges their suffering and makes them the subject of justice rather than an object of it. Furthermore, victims who receive financial compensation and thus achieve financial autonomy are in a stronger position to support themselves, stay safe and contribute to preventing their re-trafficking.
Requirement to pay compensation to victims as a part of the **punishment** of traffickers ordered by a court carries more than just a punitive value. Depriving traffickers of assets obtained through trafficking and exploitation constitutes a deterrent, which can **prevent** others from engaging in trafficking in first place.

Compensation for trafficked persons can be sought for:

- General damages – these include non-material aspects of the harm a victim has suffered, such as physical or emotional pain and suffering;
- Special damages – compensation for the material losses that are quantifiable, such as medical expenses, monetary losses, lost earnings and unpaid wages.

In cases of trafficking for sexual exploitation, physical injuries and losses are clear and well understood. Consequently, most cases in which victims were able to obtain compensation involved trafficking for sexual exploitation.

The abuse that those trafficked for forced labour suffered is often more subtle, involving psychological coercion, threats and deception. Yet, the damaging effect and trauma that arises from this sort of treatment, such as the loss of dignity or mental health illnesses as a result of pressure and fear, can be equally debilitating.

It is important to emphasise that all trafficked persons, regardless of the form of exploitation they were subject to, or the length of their trafficking experience, are entitled to access compensation under international law.


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**No criminalisation of trafficked persons**

In countries of transit and destination, trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering and/or working illegally or engaging in prostitution. For example, they may not have the correct immigration or work papers; their identity documents may be forged or confiscated; and the exploitative activities demanded of a trafficked person, such as prostitution, soliciting or begging may be illegal within the country of destination. Criminalisation of trafficked persons is commonplace, even in situations where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalisation is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers. Countries of origin sometimes directly criminalise victims upon their return, penalising them for unlawful or unauthorised departure. Criminalisation and detention of victims of trafficking is often linked to a denial of victims’ rights, for example, through premature deportation that denies victims their right to participate in legal proceedings or their right of access to an effective remedy.

There is a growing international agreement that, in the words of the *Trafficking Principles and Guidelines*, “trafficked persons [should not be] prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons”. For example, Article 26 of the *European Trafficking*
Convention requires States Parties, in accordance with the basic principles of their legal systems, to “provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so”. While the Trafficking Protocol does not specifically address the issue of prosecution for status-related offences, the CTOC Working Group on Trafficking (the body established to provide recommendations on the effective implementation of the Protocol) has affirmed that “States parties should ... [c]onsider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons, or where they were compelled to commit such unlawful acts.” Human rights treaty bodies as well as resolutions of both the General Assembly and the Human Rights Council have confirmed the importance of the non-criminalisation principle.

Note that the principle of non-criminalisation of victims of trafficking for status offences can also be relevant to the separate issue of victims being trafficked for purposes of committing criminal activities, such as petty theft or cannabis cultivation. That form of trafficking-related exploitation is considered in more detail in Part 3, below.

No detention of trafficked persons

International law defines detention as the condition of “any person deprived of personal liberty except as a result of conviction for an offence” (UNGA Res. 43/173). The term can therefore cover a wide range of situations in which victims of trafficking are held in prisons, police lock-ups, immigration detention facilities, shelters, child welfare facilities, and hospitals.

In the context of trafficking, detention most commonly occurs under the following circumstances:

- The victim is not correctly identified and is detained as an irregular/undocumented migrant pending deportation;
- The victim is identified correctly but is unwilling or unable to cooperate in criminal investigations (or her/his cooperation is not considered useful) and is sent to immigration detention pending deportation;
- The victim, correctly or incorrectly identified, is detained as a result of her or his engagement in illegal activities, such as prostitution or unauthorised work;
- The victim is identified correctly and is placed in a shelter or other welfare facility from which she or he is unable to leave. Common justifications offered for this form of detention include the need to provide shelter and support; the need to protect victims from further harm; and the need to secure victim cooperation in investigation and prosecution of traffickers.

The UN Trafficking Protocol and the Council of Europe Trafficking Convention do not refer specifically to the issue of detention of victims of trafficking. However, the UN Trafficking Principles and Guidelines confirm that the detention of victims without clear and individualised justification is inappropriate and possibly also illegal. Under their provisions, States are required to ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody (Guidelines 2.6, 6.1). The Commentary to this instrument (pp 135-136) confirms that under international human rights law, the risk of detention being characterised as unlawful or arbitrary detention is high if it can be shown that such detention meets one or more of the following criteria:
• The detention is not specifically provided for in law or is imposed contrary to law;
• The detention is provided for - or imposed in - a discriminatory manner (e.g. only applicable to women and girls / children);
• The detention is imposed for a prolonged, unspecified or indefinite period;
• The detention is unjust, unpredictable and / or disproportionate;
• The detention is not subject to judicial or administrative review which can confirm its legality and that it continues to be necessary in the circumstances, allowing the possibility for release where no grounds for its continuation exist.

2.4. Prevention of trafficking

In the context of trafficking in persons, prevention refers to positive measures to stop future acts of trafficking from occurring. Policies and activities identified as “prevention” are generally those considered to be addressing the causes of trafficking. These are generally agreed to be the factors that (i) increase vulnerability of victims and potential victims; (ii) create or sustain demand for the goods and services produced by trafficked persons; and (iii) create or sustain an environment within which traffickers and their accomplices can operate with impunity. Each of these prevention goals is considered separately below.

International and regional standards around prevention

In relation to all violations of human rights, international law confirms that States bear responsibility for taking action to prevent the occurrence of such a violation. The standard implied in this obligation is one of due diligence: the State is required to take “all reasonable and necessary measures” to prevent a given event from occurring. A decision on what is “reasonable and necessary” in this context will require consideration of the facts of the case and surrounding circumstances, including the capacities of the State. For example, the obligations of a country of origin with respect to preventing trafficking will be qualitatively different to those of a country of destination. The key trafficking treaties confirm an obligation of prevention, as do “soft law” sources including resolutions and policy documents of UN bodies and regional intergovernmental organisations and the work of the human rights treaty bodies and special procedures.

Prevention obligations in the specialist trafficking treaties

The UN Trafficking Protocol (Article 9) requires States Parties to establish comprehensive policies, programs and other measures to prevent and combat trafficking in persons. States Parties are further required to:

- Endeavour to undertake measures such as research, research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons. (Art. 9(2))
- To cooperate with non-governmental organizations and other elements of civil society on prevention policies and programmes. (Art. 9(3))
- Take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity. (Art. 9(4))
- Adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to
discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking. (Art. 9(5))

The Council of Europe Trafficking Convention and the 2011 EU Directive, in addition to the measures contained in the UN Trafficking Protocol, require States Parties to:

- Take measures to enable migration to take place legally, in particular through dissemination of information. (Art. 5(4) Council of Europe Convention).
- Take measures to reduce children’s vulnerability to trafficking (Art. 5(5) Council of Europe Convention)
- Promote regular training for officials likely to come into contact with victims and potential victims, including frontline police officers. (Art. 18(3) EU Directive)

The following summary of prevention approaches and strategies is drawn directly from the OHCHR Fact Sheet No 36: Human Rights and Human Trafficking, supplemented by additional information of particular relevance to the practice of preventing trafficking in Asia and Europe. It follows the typology identified in the UN Trafficking Principles and Guidelines: preventing trafficking through addressing vulnerability; preventing trafficking through addressing demand; and preventing trafficking through addressing corruption and complicity.

Prevention through addressing vulnerability to trafficking

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

Vulnerabilities to trafficking can be short or long-term, specific or general, procedural, political, economic, or structural. Understanding the nature of particular vulnerabilities can help to ensure that responses are targeted, appropriate, and effective. An example of a short-term, specific vulnerability that has been repeatedly recognised, including by several human rights treaty bodies, is one caused by a lack of information about safe migration options and the dangers associated with trafficking. This vulnerability could be addressed through initiatives aimed at raising awareness of potential migrants including those who could be trafficked, with appropriate precautions and advice on how to avoid falling under the control of traffickers. Poverty and lack of access to avenues for safe, legal, and non-exploitative migration are much more complex contributions to vulnerability, that will require long-term and more comprehensive approaches to their effective resolution.

A human rights-based approach to trafficking recognises that empowering vulnerable people through guaranteeing their human rights will reduce their susceptibility to being trafficked and exploited. Such an approach requires consideration of the reasons why some people are trafficked and others are not; why some people are prepared to take dangerous migration decisions and others are not; why some people are more readily exploited than others and in different ways. An understanding of vulnerability to trafficking should result in prevention measures that are realistic, effective and respectful
of human rights. It should also contribute to more effective treatment of victims through, for example, better-informed support measures and reintegration programs.

**Vulnerability related to poverty and inequality:** The limits that poverty places on life choices can lead to individuals taking risks and making decisions about their life and their future in a way that they would never have done if their basic capabilities were being met. Inequality is an additional factor contributing to vulnerability. Inequality can relate to wealth, income and opportunity. Inequalities that impact upon trafficking exist within as well as between countries. In short, trafficking inevitably involves the movement of individuals from regions and countries of relatively less wealth, income and opportunity to regions and countries of relatively greater wealth, income and opportunities.

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**Poverty and vulnerability to trafficking**

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

**Source:** Explanatory Report to the *European Trafficking Convention*

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

- improved education opportunities, especially for women and children;
- improved access to credit, finance, and productive resources, especially for women; and,
- legal and social measures to ensure rights in employment, including a minimum wage that enables an adequate standard of living.

**Vulnerability related to discrimination and violence against women:** Major human rights instruments, both international and regional, prohibit discrimination on a number of grounds including race, sex, language, religion, property, birth, nationality, ethnic or social origin, or other status. Discrimination can be linked to trafficking in a number of ways. It is no coincidence that those most likely to be trafficked (irregular migrants, stateless persons, non-citizens and asylum seekers, members of minority groups) are especially susceptible to discrimination and intolerance, based on their race, ethnicity, religion and other distinguishing factors. Some groups, such as migrant women and girls, are vulnerable to intersectional and multiple discriminations. In addition to increasing the risk of trafficking, discriminatory attitudes, perceptions and practices contribute to shaping and fueling the demand for trafficking.

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

Importantly, while trafficking itself is a form of violence against women, violence directed against, or primarily affecting, women can also be a factor increasing vulnerability to trafficking. For example, women may accept dangerous migration arrangements in order to escape the consequences of entrenched gender discrimination including family violence and lack of security against such violence. Women may also be more vulnerable than men to coercion and force at the recruitment stage, increasing their susceptibility to being trafficked in the first place. States, particularly countries of origin, can address increases in vulnerability to trafficking-related to discrimination and violence against women through a range of practical measures that could include provision of safe shelter for women experiencing violence including medical, psychological and legal facilities. Longer-term measures that seek to address the social, cultural and structural causes of violence are also important. These may include: reforming legislation that either discriminates against women or fails to address violence against women; ensuring the prompt investigation and prosecution of complaints related to violence against women; providing access to effective remedies for gender-based violence; and implementing education initiatives aimed at educating the public and relevant officials about violence against women.

**Special vulnerabilities of children, including unaccompanied and separated children:**
International law recognises that children, because of their reliance on others for security and wellbeing, are vulnerable to trafficking and related exploitation. In recognition of this vulnerability, international law accords children special rights of care and protection. Appropriate responses to child vulnerability must be built on a genuine understanding of that vulnerability – specifically, why some children are trafficked and others are not.

All measures taken to reduce the vulnerability of children to trafficking should aim to improve their situation – rather than to just prevent children from taking decisions such as migration for work which, while undesirable, especially for young children, may not necessarily be exploitative or lead to trafficking. It is also important to accept that children are not a homogenous group: older children have different needs, expectations and vulnerabilities than younger children; girls and boys can be similarly disaggregated.

### Actions to reduce the vulnerability of children to trafficking

- Ensure that appropriate legal documentation (including for birth, citizenship and marriage) is in place and available;
- Tighten passport and visa regulations in relation to children, particularly unaccompanied minors and minors accompanied but not by an immediate family member;
- Improve children’s access to educational opportunities and increase the level of school attendance, in particular by girls;
- Protect children from violence including family and sexual violence;
- Combat discrimination against girls;
- Raise public awareness of the unlawful nature and effects of child trafficking and exploitation.

Adapted from: *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010)*
Vulnerability in conflict and post-conflict situations: Trafficking is a feature of armed conflict as well as of post-conflict situations. During conflict, individuals may be abducted or otherwise trafficked by military or armed groups to provide labour, military and sexual services. Even after a cessation of hostilities, civilian populations may be under extreme economic or other pressure to move and thereby are particularly vulnerable to threats, coercion and deception. War and post-war economies are often built on criminal activities, which can quickly be expanded to include trafficking. Weak or dysfunctional criminal justice systems ensure that traffickers and their accomplices can operate with impunity. Violent and lawless war zones often become source, transit or destination points for victims of trafficking. The presence of international military or peacekeeping forces can present an additional threat of trafficking and related exploitation, with women and girls being at particular risk. International law and policy requires action to address the particular vulnerabilities of individuals caught up in conflict. To the extent that the situation, its cause or its consequences has a gender dimension, it is essential to ensure that responses integrate an appropriate gender perspective.

Prevention through addressing demand

Trafficking feeds into a global market that seeks cheap, unregulated and exploitable labour and the goods and services that such labour can produce. It is this realisation that has prompted calls for States and others to consider demand as part of the problem of trafficking and to acknowledge demand reduction as an important part of any comprehensive approach to prevention.

When considering the issue of demand, it is important to acknowledge that this issue is a difficult and sometimes controversial one. The lack of common understanding about what “demand” actually means, further complicates matters. For example, when used in connection with trafficking, demand can refer to quite different things: for example, employer demand for cheap and exploitable labour; consumer demand for the goods or services produced or provided by trafficked persons; and even demand generated by exploiters and others involved in the trafficking process such as recruiters, brokers and transporters who rely on trafficking and victims of trafficking to generate income. A distinction can also be made between the demand itself, and the causes and factors that can shape demand. Of course, demand cannot be considered separately from supply – not least because supply may well generate its own demand. For example, the availability of a cheap and exploitable domestic labour force can itself contribute to generating demand for exploitative domestic labour at a level that may not otherwise have existed. Similarly, some argue that demand for prostitution fuels the market for persons trafficked into prostitution.

International treaty law requires States to take at least some measures to discourage the demand that fosters trafficking-related exploitation. However, it does not provide a great deal of specific guidance about how this should be done. Provisions relating to demand are very general and it is difficult to isolate specific actions. For example, the Trafficking Protocol requires States Parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking”. A similar provision is contained in the European Trafficking Convention, along with a list of minimum measures that are to be taken by States Parties to that instrument.
Several of the UN human rights treaty bodies and Special Procedures have taken up this issue, in particular on the need to raise public awareness of the unlawful and exploitative nature of human trafficking. International and regional policy documents provide further confirmation of a growing understanding of the need for States to consider demand as a root cause of trafficking and a key factor in any effective prevention strategy. However, once again, there is a lack of specificity about how demand can or should actually be addressed in practice.

It is helpful to consider how human rights can contribute to fleshing out the substantive content of the obligation to address demand. Certainly, a human rights-based approach to demand must meet the generally accepted requirements of such an approach: it must be normatively based on international human rights standards and operationally directed to promoting and protecting human rights. The following text box provides guidance on the various rights-based considerations that should underpin such an approach to addressing demand.

### Considerations for a human rights-based approach to addressing demand

**Focus and Scope**
- The obligation to address demand rests primarily with country within which the exploitation takes place because it is within these countries that both consumer and employer demand is principally generated.
- The links between demand and supply noted above also imply certain obligations on countries of origin.
- Demand reduction required under international is not restricted to demand for exploitative sexual services but encompasses demand for the full range of exploitative practices identified in the international definition of trafficking.
- States are not precluded by international law from regulating prostitution as they consider appropriate subject, of course, to their obligation to protect and promote the human rights of all persons within their jurisdiction.

**Demand and discrimination**
- Demand in the context of trafficking is often shaped by discriminatory attitudes (including cultural attitudes) and beliefs. Women may be preferred for certain forms of exploitation because they are perceived as weak and less likely to assert themselves or claim the rights to which they are entitled. Certain ethnic or racial groups may be targeted for trafficking-related exploitation on the basis of racist or culturally discriminatory assumptions relating to, for example, their sexuality, servility or work capacities.
- Demand for prostitution supplied through trafficking may reflect discriminatory attitudes and beliefs based on both race and gender.
- Rights-based strategies to address demand should focus on addressing discriminatory attitudes and beliefs; particularly those directed against women and migrants.

**The role of the State**
- States are able to shape demand for the goods and services produced by trafficking through laws and policies on a range of matters including immigration, employment, welfare and economic development. For example, failure to provide legislative protection to certain individuals such as domestic workers, “entertainers”, or migrant workers creates an environment that encourages demand.
- Laws and policies that institutionalise discrimination can also shape demand as can a failure on the part of the State to effectively challenge discriminatory social attitudes, practices and beliefs.
- A failure on the part of the State to effectively investigate, prosecute and punish trafficking and related exploitation can contribute to demand generated by traffickers.
and exploiters by maintaining trafficking as a low-risk, high-profit crime.  
- State failure to protect the rights of certain persons including women, children, and migrants can further contribute to constructing demand by exacerbating vulnerability, and thereby, exploitability.  
- Poor or inadequately implemented labour standards are a major incentive for trafficking.

The importance of labour protection

- Poor or inadequately enforced labour standards in countries of destination sustain a demand for trafficked labour. Demand for trafficked persons’ labour or services is absent or markedly less where workers are organised and where labour standards regarding wages, working hours and conditions, and health and safety are monitored and enforced.  
- Rights-based strategies to address demand for cheap and controllable labour should therefore aim to secure adequate labour protection, including through properly monitored regulatory frameworks, for all persons including migrants and those working in the informal economy.

Non-violation of established rights

- Human rights-based strategies to address trafficking-related demand must not compromise established rights, in particular, the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum seekers.

Adapted from: Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (2010)

Prevention through addressing corruption in trafficking

In many situations of trafficking, particularly those that are widespread and serious, there will be some level of direct or indirect involvement of public officials. Direct involvement refers to situations whereby public officials are directly engaged as part of the trafficking process - as recruiters, brokers or exploiters, for example. There are also many types of less direct official involvement (some examples are provided in the text box below). Public sector complicity in trafficking, whether direct or indirect, undermines confidence in the rule of law and the fair operation of the criminal justice process. It fuels demand for illegal markets such as trafficking and facilitates the efforts of organised criminal groups to obstruct justice; exacerbates victim vulnerability; and renders almost impossible the full discharge of a State’s obligation to investigate and prosecute trafficking cases with due diligence.

Examples of trafficking-related corruption and complicity

- Law enforcement officials accepting favours in exchange for protection from investigation or prosecution or otherwise using the services of victims of trafficking;  
- Border officials accepting bribes or inducements to permit the passage of persons who may be trafficked;  
- Labour inspectorates or health and safety officials accepting bribes to certify dangerous or illegal workplaces;  
- Law enforcement or other public officials (including international peacekeeping or international military personnel) maintaining commercial interests in businesses using the services of trafficked persons such as brothels; and  
- Criminal justice officials, including prosecutors and judges, accepting bribes to dispose of trafficking cases in a particular way.
States have an obligation to identify and respond adequately to trafficking-related corruption and complicity – an obligation that should be seen as part of the broader duty to prevent trafficking. The Organized Crime Convention, for example, acknowledges the strong link between organised criminal activities such as trafficking and corruption. It requires States to take strong measures to criminalise all forms of corrupt practices and ensure their laws are harmonised so as to facilitate cooperation. States Parties are required to adopt measures designed to promote integrity and to prevent and punish corruption of public officials. They must also take measures to ensure effective action by domestic authorities in the prevention, detection and punishment of corruption of public officials including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions. The provisions of this Convention affirm the much more specific obligations of the UN Convention against Corruption.

Other specialist trafficking treaties, including the European Trafficking Convention and the EU Trafficking Directive recognise public sector complicity in trafficking as an aggravated offence warranting relatively harsher penalties. Many international and regional policy documents confirm the link between trafficking and corruption and the need for States to respond effectively. For example, the General Assembly has sought to protect trafficked persons against further harm by calling upon governments to penalise persons in authority found guilty of sexually assaulting victims of trafficking in their custody. This issue has also been addressed in the recent OECD publication: Principles for Combating Corruption Related to Trafficking in Persons (2015).

What does the duty to respond to trafficking-related corruption and complicity actually mean in practice? The relevant legal standard in this case, as in all others, is due diligence: the State must be able to show that it has taken, and is continuing to take, every reasonable step to prevent, identify and respond to such practices. The UN Human Rights Committee has usefully spelled out the steps that should be taken to deal with violations of human rights involving public officials that are highly relevant to trafficking-related violations:

*In order to combat impunity, stringent measures should be adopted to ensure that all allegations of human rights violations are promptly and impartially investigated, that the perpetrators are prosecuted, that appropriate punishment is imposed on those convicted and that the victims are adequately compensated. The permanent removal of officials convicted of serious offences and the suspension of those against whom allegations of such offences are being investigated should be ensured.*

Additional actions that may be required of States to meet the due diligence standard include:

- Ensuring that the legal framework provides appropriate measures for the identification, investigation and prosecution of trafficking-related offences including those committed by or with the complicity of public officials;

- Ensuring that the involvement of public officials in trafficking or related offences is grounds for an aggravated offence attracting relatively harsh penalties;

- Ensuring that procedures are in place for the effective investigation of complaints of trafficking involving or implicating public officials. These procedures should aim to ensure accountability, maintain public confidence and alleviate legitimate concerns. Accordingly, the investigation should commence promptly and be
2.5. Return and reintegration

In addition to being arrested and detained, trafficked persons are routinely deported from countries of transit and destination. Deportation to the country of origin or to a third country can have serious consequences for victims - they may be subject to punishment from national authorities for unauthorised departure or other alleged offences; they may face social isolation or stigmatisation and be rejected by their families and communities; they may be subject to violence and intimidation from traffickers – particularly if they have cooperated with criminal justice agencies or owe money that cannot be repaid. Those who are forcibly repatriated, particularly without the benefit of supported reintegration, may be at significant risk of re-trafficking.

Safe and preferably voluntary return

International law supports a standard of ‘safe and preferably voluntary return’ for trafficked persons, supplemented by a number of important additional obligations on countries of destination and countries of origin respectively.

**Treaty provisions on return of trafficked persons**

- All States Parties to conduct return: “with due regard for the safety of the person and for the status of any related legal proceedings” (*Trafficking Protocol*) or “with due regard for the rights, safety and dignity” of the victim and for the status of any related legal proceedings (*European Trafficking Convention*);
- Countries of destination to ensure that such return “shall preferably be voluntary” (*Trafficking Protocol*, *European Trafficking Convention*);
- Countries of origin to accept the return of a trafficked national or resident without undue delay and with due regard for their safety (*Trafficking Protocol*) or to facilitate and accept the return of a trafficked national or resident “with due regard for the rights, safety and dignity” of the victim and without undue delay (*European Trafficking Convention*);
- Countries of origin to cooperate in return, including through verification of victim nationality or residence and issuing of necessary travel documents (*Trafficking Protocol*, *European Trafficking Convention*) and
- All States Parties “to protect victims of trafficking ... especially women and children, from re-victimization” (Article 9(1)(b)).
- Countries of destination not to return child victims of trafficking “if there is an indication, following a risk and security assessment, that such return would not be in the best interests of the child” (*European Trafficking Convention*).

The obligation to provide safe and, as far as possible, voluntary return implies that the repatriating State will conduct pre-return risk assessments. Such assessments are especially important in the case of children. Risk assessments must be conducted by
trained professionals. They should preferably be undertaken on an individual basis and take into account the particular circumstances of each case. The way in which a person was trafficked; the extent to which they have cooperated in the prosecution of their exploiters; whether or not they owe money to traffickers; their age; their gender and their family situation; their physical and psychological condition; and the capacity of the country of return to provide effective protection are all important factors that should contribute to a consideration of whether safe return is possible. In conducting pre-return risk assessments, it is important to consider whether internal re-location is a viable and realistic option in the country or region of origin. Decisions around return should not be based on unverifiable or highly generalised situation reports produced by governments, intergovernmental bodies or non-governmental organisations.

An entitlement to return

International human rights law is clear on the point that all victims of trafficking, whether children and adults, who are not residents of the country in which they find themselves, are entitled to return to their country of origin. This right places an obligation on the part of the country of origin to receive its returning nationals without undue or unreasonable delay. In the case of trafficking, this is likely to involve the country of origin quickly conducting checks in order to verify whether the victim is a national or does indeed hold a right of permanent residence and, if so, ensuring that the individual is in possession of the papers required to travel to and re-enter its territory.

The right to return also implies an obligation on the country of destination to permit those victims who wish to return to do so – again without undue or unreasonable delay. Detention of trafficked persons in shelters, prisons or immigration detention facilities, discussed in the previous section, is one way in which the right to return can be interfered with. Compelling victims to remain for the duration of lengthy criminal proceedings can also constitute interference with the right of return. In respect of each individual case, the State preventing the return must be able to show that its actions are in accordance with law and are not arbitrary or unreasonable. The obligation on States to consider the best interests of the child (discussed above) will also be a major consideration when it comes to upholding this important right in relation to child victims.

Due process and the principle of non-refoulement

The return of trafficked persons cannot operate to violate their established rights (see further the discussion below). This includes the right to due process. Repatriation that is not voluntary effectively amounts to expulsion from a State. International human rights law rejects arbitrary expulsion and is clear on the point that any alien lawfully within the country can only be expelled in accordance with the law. An alien lawfully present is entitled to present reasons why she or he should not be expelled and these reasons must be reviewed by the competent authority.

For trafficked persons who are not lawfully within the country, substantive and procedural guarantees against expulsion are much less clear and States generally retain a considerable degree of discretion in deciding whether and when to remove unlawful immigrants. However, one of the most important protections, potentially applicable to all non-citizens, relates to the principle of non-refoulement. Under this principle, States are prevented from returning an individual to a country where there is a serious risk that she or he will be subject to persecution or abuse. The principle of non-refoulement is well established in international law and the importance of protecting this principle in the context of measures to deal with trafficking is also widely accepted. Human rights treaty
bodies and regional human rights courts have also confirmed that return which risks torture or cruel, inhuman or degrading treatment or punishment is contrary to international law.

The prohibition on *refoulement* has traditionally been applied with reference to risks of persecution that come from States and its agencies or officials. More recently, there has been some recognition that the prohibition might also apply in certain situations where the fear of persecution comes from non-State actors and the relevant State is unable to provide appropriate or effective protection. Such circumstances may well arise in the context of a trafficking case, where the country of origin is unable to offer protection against, for example, reprisals or re-trafficking by criminal groups.

**Right to remain during legal proceedings**

As discussed above, international treaty law, including both the *Trafficking Protocol* and the *European Trafficking Convention*, oblige countries of destination to conduct return “with due regard for ... the status of any related legal proceedings”. States should therefore be careful to ensure that the return of trafficked persons does not jeopardise the initiation and/or successful completion of any legal proceedings involving or implicating the victim.

Such proceedings include those related to compensation. The presence of the trafficked person in the country in which remedies are being sought is often a practical – and sometimes a legal – requirement for that person to secure remedial action. In some countries, civil action to recover damages cannot commence until criminal proceedings have been concluded. Repatriation that does not take account of the victim’s right of access to remedies will inevitably obstruct the free and effective exercise of that right. At the very least, there should be a deferral of deportation, accompanied by a temporary regularisation of legal status until the victim has been able to participate in the relevant legal proceedings.

**Alternatives to repatriation**

In some cases, repatriation of the victim to her or his country of origin, even in the longer term, will not be the preferred course of action. This may be due to on-going risks to victim safety and security. It may also be due to humanitarian considerations that relate, for example, to the victim’s health or the links and relationships that she or he has established in the destination country. While the *Trafficking Protocol* does not address this issue directly, other legal and policy instruments, such as the *European Trafficking Convention and the EU Directive*, by recognising the possibility of temporary visas and even permanent residency, do not automatically assume that repatriation is the immediate or even ultimate outcome of a trafficking event. In some cases, allowing the person to remain permanently in the territory of a destination country will constitute an effective remedy.

The obligations of States with respect to alternatives to repatriation will very much depend on the specific situation. For example, States may be required to provide alternatives to repatriation in situations where return would pose unacceptable risks to the victim and/or the victim’s family. In relation to child victims of trafficking, local and third country integration may be appropriate options for a durable solution in cases where return to the country of origin is not in the child’s best interests. The Committee on the Rights of the Child has affirmed that repatriation is not an option “if it would lead to a
‘reasonable risk’ that such return would result in the violation of fundamental human rights of the child.

If integration into a society of the destination State is deemed the appropriate option for a trafficked person, the victims ought to be provided with the assistance and support necessary to ensure successful integration. This should include, at minimum, provision of adequate housing, assistance in obtaining all the required registration and identification documents and support to access the labour market.

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**Key principles on return of victims of trafficking**

All persons have the right to leave any country, including their own.

All persons have the right to return to their country, or if they have no nationality or are stateless, to the country where they had the right of permanent residence at the time of entry into the receiving country, and to which return is possible.

Measures to restrict the departure of trafficked persons, including where such restrictions are in place to combat trafficking, must meet the tests of legality, necessity, proportionality and non-discrimination.

Requiring that victims remain in the destination country for the duration of criminal proceedings interferes with the right of return. Restrictions imposed by States in this respect must be in accordance with the law and not arbitrary or unreasonable.

The country of origin and country of destination are to permit victims of trafficking who wish to return to their country of origin to do so without undue or unreasonable delay.

The return of trafficked persons should preferably be voluntary. For a return to be voluntary, the person must be able to make a free and informed choice, including through the availability of complete, accurate and objective information on the situation in the country of origin.

Voluntary return implies the absence of coercive measures that would compel the person to return to the country of origin or to stay in the destination country.

In addition to being based on an informed choice, a voluntary return should not be subject to undue or unreasonable delays.

The entire return process must at all times be safe and conducted with due regard for the rights and dignity of the person being returned and the status of legal proceedings.

Forced return is permissible only when it has been established that the proposed return is safe and that it does not interfere with the rights of the person being returned, including the right to be protected from the risk of being subjected to re-trafficking, persecution, torture or inhuman or degrading treatment or punishment, and hence does not necessitate any additional protection measures.

“Safe” refers to both the process and the outcome of return. It imposes an obligation on the returning State to individually assess and manage risks associated with return, including the different risks faced by men and women, persons of different ages and those belonging to certain groups (including minorities), to ensure that the process of return is safe and dignified, and to monitor both the process and outcome of return to assess and ensure the safety of the trafficked person.

Returning States must conduct individualised and gender-sensitive risk assessments prior to the return of trafficked persons, to establish that they are not in danger of re-trafficking, persecution.
or torture, inhuman or degrading treatment or punishment.

Risk assessments should also take into account the safety of victims’ family members, as well as their potential involvement in trafficking. At a minimum, risk assessments should address: the risk of reprisals by the traffickers against the trafficked person and/or her/his family; the risk of being harassed, arrested, detained or prosecuted by the authorities; the social position of trafficked persons upon return; the availability of and actual access to social assistance programs for victims of trafficking; and the situation of the children of trafficked persons.

In cases of trafficking in children, the solution that is in the child’s best interests must be determined in consultation with the child. This includes considerations of different alternatives, including the child’s integration in the society of the destination country, voluntary repatriation to and re-integration in her/his country or place of origin or resettlement, and integration in a third country. A risk assessment must be conducted to verify that family reunification is in the best interests of the child.


Reintegration of victims

Supported reintegration is a critical aspect of safe repatriation. Victims of trafficking who are provided with reintegration assistance are much less likely to be re-trafficked. They may also, depending on the nature and quality of support provided, be less vulnerable to intimidation, retaliation, social isolation and stigmatisation due to their past experience of being trafficked. Supported reintegration is a right owed to trafficked persons by virtue of their status as victims of crime and victims of human rights violations. It must be accompanied by respect for the repatriated individuals’ rights including their right to privacy and the right not to be discriminated against.

The importance of cooperation between countries in securing successful and supported repatriation of victims of trafficking is recognised in relevant regional treaties as well as in key international and regional policy documents. Successful reintegration requires cooperation between repatriating and receiving countries and should involve NGOs in both countries. In some cases, it will be necessary for a victim returning back to their country to be accompanied by a social worker who will ensure that person’s wellbeing throughout the journey and their safe receipt by an NGO in the country of destination.
PART 3 – EMERGING ISSUES OF CONCERN

The following addresses selected issues related to trafficking in persons that are of current interest and concern.

3.1 The private sector: issues of due diligence, complicity, responsibility and accountability

Increasing attention is being paid to the involvement of the private sector in both contributing to and combating trafficking-related exploitation. While States are required to perform due diligence to prevent and respond to the violations committed by private individuals including corporations, the private sector also has legal and ethical responsibilities to address trafficking-related exploitation.

It is widely accepted that private sector actors, including corporations, are under an ethical and legal duty to take all necessary actions to limit the adverse impacts of their operations on human rights. Under the laws of many countries, businesses can be held criminally liable for acts of negligence that lead to harm; for failing to prevent further harm; and for any direct involvement in human trafficking or other unlawful forms of exploitation.

Due diligence in international law

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


States will not be legally responsible under international law for what are termed “purely private harms”. However, international law does impose an obligation on States to address violations committed by private actors: to prevent and protect victims from such abuses, to punish perpetrators and to provide remedies to victims.

The relevant standard against which a State’s actions (or inaction) are to be measured is that of “due diligence”. Under this standard, a State is obliged to exercise a measure of care in preventing and responding to the acts of private entities that interfere with established human rights. Failure to take whatever means are reasonably available to prevent an anticipated abuse or violation by a private individual or entity – or to respond appropriately to a harm already committed - will therefore invoke the responsibility of the State. The scope of the due diligence obligation will depend on the relevant primary rule.
In the case of trafficking for example, it will extend to all individuals within the territory of the State or under its effective control, including citizens and non-citizens, individuals trafficked for all forms of trafficking, regardless of whether the State is one of origin, transit and/or destination. The international legal responsibility invoked by a failure to prevent or respond appropriately to a violation committed by a private entity requires the State at fault to provide the victim with access to an effective remedy (see Chapter 2).\footnote{Due diligence and trafficking in persons. Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children. UN OHCHR, 2015}

### STATE DUE DILIGENCE IN INTERNATIONAL LAW\footnote{Due diligence and trafficking in persons. Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children. UN OHCHR, 2015}

<table>
<thead>
<tr>
<th>INSTRUMENT</th>
<th>DUE DILIGENCE REFERENCE/OBLIGATION</th>
<th>STATUS</th>
</tr>
</thead>
<tbody>
<tr>
<td>ILO 2014 Forced Labour Protocol; Art.2</td>
<td>States Parties are obligated to prevent forced labour, including through “supporting due diligence by both the public and private sectors to prevent and respond to risks of forced or compulsory labour.”</td>
<td>Binding for States Parties</td>
</tr>
<tr>
<td>European Court of Human Rights</td>
<td>Established in the case of Rantsev v. Cyprus and Russia (2010) the standard of “positive obligations” where a State can be held responsible for private acts of human trafficking.</td>
<td>Jurisprudence binding on Council of Europe Members</td>
</tr>
<tr>
<td>UN Trafficking Protocol Art. 6(6)/UN Organized Crime Convention Art. 25(2)</td>
<td>States are required to undertake the prevention, protection, and prosecution of trafficking in persons by private individuals, including providing the possibility for victims to access compensation.</td>
<td>Binding for States Parties</td>
</tr>
<tr>
<td>UN Human Rights Committee General Comment No. 31</td>
<td>States must protect individuals “not just against violations of Covenant rights by [State] agents, but also against acts committed by private persons or entities that would impair the enjoyment of Covenant rights.”</td>
<td>Soft law</td>
</tr>
<tr>
<td>The Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No.19</td>
<td>“[U]nder general international law and human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.”</td>
<td>Soft law</td>
</tr>
<tr>
<td>UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, Principle 2</td>
<td>“States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.”</td>
<td>Soft law</td>
</tr>
</tbody>
</table>

\footnote{Due diligence and trafficking in persons. Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children. UN OHCHR, 2015}
Regulation of business is one of the ways through which States exercise due diligence to protect human rights and prevent human trafficking and exploitation. States can, for example, undertake to license certain industries, such as recruitment and employment agencies; enforce compliance with the law through workplace inspections; and impose administrative sanctions for non-compliance and criminal liability for serious violations.

In the Philippines for example, the Philippine Overseas Employment Administration regularly publishes a list of recruitment agencies whose licenses have been revoked for violations of law or unethical practices. By doing so, the Government seeks to prevent the exploitation of migrant workers abroad by unscrupulous agents.

Increasingly, States and regional bodies are enacting legislation requiring businesses to report their efforts to address and prevent human rights violations in their supply chains in general, or even to disclose their anti-trafficking efforts in particular. While the number of countries with legislation in this area is limited, the potential implications of disclosure legislation are global. For example, some European and American companies bound by transparency legislation have introduced contractual requirements on their suppliers in Asia to comply with human rights standards, including a ban on child and forced labour.

### EXAMPLES OF TRANSPARENCY LEGISLATION

<table>
<thead>
<tr>
<th>COUNTRY/REGION</th>
<th>DISCLOSURE REQUIREMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Europe</td>
<td>Businesses domiciled in the EU with 500 or more employees are required to annually report on non-financial performance of their business, including on social and employee matters and human rights.</td>
</tr>
<tr>
<td>EU Directive 2013/34 on disclosure of non-financial and diversity information</td>
<td></td>
</tr>
<tr>
<td>United Kingdom</td>
<td>All commercial organisations carrying on business in the UK with a total turnover of £36m or more will be required to complete a slavery and trafficking statement for each financial year of the organisation. Applies to both goods and services.</td>
</tr>
<tr>
<td>Modern Slavery Act 2014</td>
<td></td>
</tr>
<tr>
<td>Art. 54 Transparency in supply chains</td>
<td></td>
</tr>
<tr>
<td>California, United States</td>
<td>Every retail seller and manufacturer doing business in this State and having annual worldwide gross receipts that exceed one hundred million dollars ($100,000,000) shall disclose its efforts to eradicate slavery and human trafficking from its direct supply chain for tangible goods offered for sale.</td>
</tr>
</tbody>
</table>
Accountability of the private sector

All corporations and businesses are required to comply with applicable laws in relation to all aspects of their operations. For businesses that operate internationally, certain laws (such as those that relate to bribery and other corrupt practices) may apply extraterritorially, thereby binding them irrespective of which country they actually operate in. In this regard, it is relevant to note that European legislation provides for extraterritorial liability for the involvement in trafficking abroad of legal persons domiciled in an EU country.17

Furthermore, there is growing acceptance of the principle that businesses have a responsibility to respect human rights; to ensure that their operations do not adversely affect the human rights of others; and to address any negative impact on human rights linked to their operations. These responsibilities have been articulated in detail in the United Nations Guiding Principles on Business and Human Rights which were prepared by the UN Special Representative on Business and Human Rights and endorsed by the Human Rights Council in 2011.

In an accompanying interpretive guide, the Guiding Principles are presented as “the global standard of practice that is now expected of all States and businesses with regard to business and human rights”. In relation to their legal status, the interpretive guide explains that “while they do not by themselves constitute a legally binding document, the Guiding Principles elaborate on the implications of existing standards and practices for States and businesses, and include points covered variously in international and domestic law”.18

The Guiding Principles carefully define and explain the responsibility that businesses have to respect human rights, such as the key principle 13:

The responsibility to respect human rights requires that business enterprises:
1. Avoid causing or contributing to adverse human rights impacts through their own activities, and address such impacts when they occur;
2. Seek to prevent to mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts.

The responsibility applies to any business, regardless of their sector of operation, size or ownership structures. The Guiding Principles recommend that businesses comply with their responsibility to respect human rights by developing policies and implementing management structures that embed understanding of human rights, risks and establish clear procedures for addressing situations of violation.

With regards to human trafficking this means that businesses need to understand what human trafficking is; how it relates to the sector in which they operate; and ensure that they take steps to address the risk. The Guiding Principles also encourage businesses to report on what they are doing to protect human rights and address concerns. In some jurisdictions, human rights reporting, and reporting on human trafficking in particular, is now a legal obligation for businesses (see text box above).

17 EU Trafficking Directive, Article 10
It is important that businesses understand that the risks of trafficking are both external (e.g. traffickers using the facilities of the business such as hotels, or transportation) and internal (e.g. trafficking occurs directly within their operations or in their supply chains – such as temporary workers abused by agents). Different approaches will be required to address these risks. While the external risk of trafficking can be addressed through codes of conduct and zero tolerance policies, the internal risk will require changes in management procedures, including hiring and procurement practices. Businesses should also consider working with others within the same industry, NGOs and governments to effectively address the risk of human trafficking in their supply chains.

Below are examples of multi-agency initiatives taken to address trafficking in children in the tourism industry and trafficking for labour exploitation in food production and agricultural industries.

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**Code of conduct for the protection of children from sexual exploitation in travel and tourism**

In 1998, child rights NGO ECPAT (End Child Prostitution and Trafficking) partnered with the tourism sector to launch an initiative to address child sexual exploitation and child trafficking in tourism destinations.

Businesses that operate in the tourism industry, such as hotels, airlines, travel agents, that commit to the Code of Conduct to Protect Children from Sexual Exploitation in Travel and Tourism must:

- Establish a corporate ethics policy against commercial sexual exploitation of children.
- Train personnel in countries of origin and travel destinations.
- Introduce clauses in contracts with suppliers, stating a common repudiation of sexual exploitation of children.
- Provide information to travelers through catalogues, brochures, in-flight films, ticket-sips, websites, etc.
- Provide information to local "key persons" at destinations.
- Report annually.

Since its introduction, the code has been implemented in over 40 countries and its signatories include major hotel chains and tour operators.


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**Stronger Together – Initiative to tackle hidden labour exploitation**

In 2013, the British Association of Labour providers, in partnership with industry bodies involved in food production, major retailers, government agencies and NGOs, launched an educational campaign to address labour abuses and trafficking in the food production, agriculture and horticulture sectors in the UK.

The initiative provides guidance, resources and training for employers, labour providers and workers to help reduce exploitation by joint working. In partnership with NGOs, the project delivers regular trainings on human trafficking to HR managers, farmers and other operational staff. In addition to training, it also provides tools for the identification of exploitation, including templates of surveys and interviews to identify potential exploitation of temporary workers by labour brokers. Employers are also encouraged to use the tools developed by the initiative, such
The obligation on States to hold business to account

International law establishes an obligation on the States to hold businesses (legal persons) criminally liable for their involvement in human trafficking. This liability covers both situation where a business is the instigator of human trafficking and where human trafficking happens in part of that business (e.g. though supply chains), but with the complicity of the main business.

European legislation, specifically the EU Trafficking Directive and the Council of Europe Trafficking Convention clarify that criminal liability of legal persons applies not only in circumstances where a business is directly involved, but also in situations where the lack of supervision enabled trafficking to occur.

**CRIMINAL LIABILITY OF LEGAL PERSONS**

<table>
<thead>
<tr>
<th>INSTRUMENT</th>
<th>DUE DILIGENCE DEFINED</th>
<th>APPLICATION</th>
</tr>
</thead>
</table>
| EU Trafficking Directive Art. 5 | Member States are under obligation to ensure that legal persons can be held liable for trafficking offences referred committed for their benefit by any person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:  
  a) a power of representation of the legal person;  
  b) an authority to take decisions on behalf of the legal person; or  
  c) an authority to exercise control within the legal person.  
Member States shall also ensure that a legal person can be held liable where the lack of supervision or control, by a person referred to in paragraph 1, has made possible the commission of the offences referred to in Articles 2 and 3 for the benefit of that legal person by a person under its authority. | Binding for all EU Member States |

| Council of Europe Trafficking Convention Art.22 (Corporate liability) | Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an organ of the legal person, who has a leading position within the legal person, based on:  
  a) power of representation of the legal person; | Binding for all signatory States |
b) an authority to take decisions on behalf of the legal person;
c) an authority to exercise control within the legal person.

Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.

**Challenges to application of the criminal liability of legal persons**

Proving criminal liability of a company for human trafficking is very complicated. Law enforcement agencies often lack the knowledge, skills and resources to penetrate and document complex business structures and financial and other relationships. Such difficulties are particularly acute in cases of trafficking for labour exploitation where long chains of formal and informal recruiters and agents can be involved. Consequently, and perhaps also because of a lack of political will and adequate resources, there are only very few instances in which a company has been successfully prosecuted for involvement in human trafficking. One of the rare examples is cited below. In that case, not only was the company found to be legally responsible for the abuse of workers and prosecuted accordingly, but the joint liability of the main company was also established.
Case study – Corporate liability for human trafficking and remedies for victims

In 2012, a court in Ghent, Belgium, held a company liable for abetting trafficking in persons for the purposes of labour exploitation, although the company had no direct legal relationship with the exploited workers.

In 2007, dozens of workers were recruited in Bulgaria, Moldova, Romania and Kazakhstan for work in Belgium by a German company, Kronos Sanitärservice GMBH, owned by a German national of Kazakh origin. Workers were first transported to Germany, where they were registered for residency, and subsequently posted to work in Belgium under the EU transnational provision of services legislation (known as posting of workers).

In Belgium, the workers were tasked with cleaning toilet facilities for a chain of motorway restaurants owned by N.V. Carestel Motorway Services that contacted Kronos to provide these services. Kronos required workers to work seven days a week for a continuous periods of several weeks; they worked from 7am until 10pm without breaks and were under full control of the contractor. Their wages were withheld and they were told that they would be paid only if they stayed until the end of the contract period. Accommodation provided to the workers was substandard and they were regularly threatened.

Considering the case, the court of Ghent extended the liability for trafficking to Carestel arguing that the abuse of workers by Kronos would not have been possible without Carestel “deliberately ignoring malpractices”. The judge has further established Carestel to be an accomplice in the exploitation, because of their failure to end the contract after they became aware of the exploitative situation faced by workers.


In July 2015, Signal International agreed to apologise and pay damages to former employees to resolve human trafficking lawsuits.

In the aftermath of Hurricane Katrina, Signal recruited around 500 workers in India and brought them to the United States on guest worker visas. The Indian welders and pipefitters were to repair damaged oil-rigs. They paid over $20,000 to a labour recruiter in India to get the jobs and also to an American who promised to obtain permanent visas. However, the workers were misled. They were brought to the US on a temporary visa and found themselves in squalid housing conditions for which Signal charged them over $1,000 a month.

In 2011, the Southern Poverty Law Center filed a class-action lawsuit on behalf of the Indian workers against Signal. Despite almost being thrown out by a federal judge who refused to allow it to proceed as a class action, the case was salvaged by law firms who agreed to represent individual workers on a pro bono basis. In July 2015, six months after a jury ruled that Signal and other defendants should pay $15 million in damages to the workers, the company filed for bankruptcy. Following that, it agreed to pay the 232 former Signal employees between $20M and $22M to resolve the human trafficking lawsuits.

3.2. Trafficking and related exploitation of smuggled migrants

In Europe and Asia, the smuggling of migrants is increasingly intertwined with trafficking in persons – calling into question the division between these two practices that is maintained in international law and raising questions about how migrant smuggling that involves human trafficking should be identified and responded to.

The growth in exploitative migrant smuggling

For the millions of people who want to, or are forced to, move, international migration has become increasingly expensive and hazardous. This is not surprising. Contemporary migration regimes deliberately aim to restrict the ability of individuals to secure legal access to preferred destinations. That forces migrants, including refugees who are compelled and have a legal right to seek asylum, into the arms of those who are able to help them circumvent ever-increasing controls. Migrant smuggling – the business of moving people across borders for profit – is reported to be one of the fastest growing and most lucrative forms of organised criminal activity. Smugglers crowd their human cargo into shipping containers and on to boats and trucks. As discussed further below, many arrive safely and consider the investment well spent. But criminality and excessive profiteering routinely places lives and wellbeing at serious risk. Each year thousands of smuggled migrants drown trying to get into Europe across the Mediterranean: cast adrift on unseaworthy vessels once they had paid for their passage. Similar stories are told of those trying to get into Australia from transit points in Indonesia, and into Malaysia and Indonesia from Myanmar.

As smuggling becomes the ‘new normal’ in irregular migration, there is growing evidence that that smugglers are increasingly taking on the role of trafficker: using their clients for extortion, compelling them into situations of sexual enslavement, selling them for forced labour. Even when they have paid off their smugglers, migrants can remain in debt to those who funded their trip, making them highly vulnerable to exploitation in the country of destination. This presents legal, policy and practical dilemmas, considered further below.

A legal and policy distinction between smuggling and trafficking

At the level of law and policy, migrant smuggling and trafficking in persons are considered to be distinct and separate issues. That distinction dates back to December 2000, when States agreed to the establishment of an international legal regime around trafficking and migrant smuggling within the context of a broader cooperation agreement on transnational organised crime (see Part 1, above). Until then, the terms had been used interchangeably, along with “migrant trafficking” and other variants. With the adoption of separate legal instruments on trafficking in persons and smuggling of migrants, the international community affirmed, for the first time, the elements that comprise both phenomena and critically, the distinctions between them.

The term ‘migrant smuggling’ refers to the unauthorised movement of individuals across national borders for the financial or other benefit of the smuggler. This definition, which was agreed in the context of establishing a uniform criminal offence, deliberately excludes those who are helping to move people purely for humanitarian reasons. But it remains sufficiently broad to apply to a wide range of facilitators of irregular migration including recruiters, organisers, transporters and providers of fraudulent travel and identity documents. The identity of the smuggled migrant is not relevant: the cross-border movement of refugees is still considered ‘smuggling’ when it involves a financial or other reward.

Trafficking in persons can be distinguished from migrant smuggling on a number of grounds but the most important is purpose: migrant smuggling seeks to facilitate a person’s illegal movement for profit; trafficking seeks their exploitation. In a classic migrant smuggling situation the relationship between the smuggled migrant and his or her facilitator ends when the journey is completed. In cases of trafficking, both profit and purpose are directly tied to the exploitation of the migrant’s labour.

### Trafficking In Persons — Migrant Smuggling

#### Comparison of the Core Elements

<table>
<thead>
<tr>
<th>FEATURE</th>
<th>TRAFFICKING</th>
<th>MIGRANT SMUGGLING</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Legal definition</strong></td>
<td>“[T]he recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability, or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person for the purposes of exploitation.”</td>
<td>“[T]he procurement, in order to obtain, directly or indirectly a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or permanent resident.”</td>
</tr>
<tr>
<td><strong>Purpose of the movement</strong></td>
<td>Exploitation of the individual's sexuality/labour for profit</td>
<td>Movement for profit</td>
</tr>
<tr>
<td><strong>Nature and quality of consent</strong></td>
<td>Consent for movement may be present but true consent nullified by force, coercion, deception, etc.</td>
<td>Consent for movement clearly present</td>
</tr>
<tr>
<td><strong>Nature of the relationship between the individual and the facilitator</strong></td>
<td>Victim-exploiter. Long-term relationship extending beyond the movement phase (although initial facilitator may be a link in the chain, there is continuity in the individual’s relationship with the trafficker/s)</td>
<td>Buyer-supplier Short-term relationship Terminates upon completion of movement</td>
</tr>
</tbody>
</table>

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20 Adapted from: ASEAN Training Curriculum on Trafficking in Persons (2011).
The profit element

<table>
<thead>
<tr>
<th>Major profit source is the exploitation</th>
<th>Sole profit source is the movement</th>
</tr>
</thead>
</table>

Violence and intimidation

<table>
<thead>
<tr>
<th>Characteristic of trafficking and generally necessary to maintain victim in exploitative situation</th>
<th>Incidental to movement (if present at all)</th>
</tr>
</thead>
</table>

Autonomy and freedom

<table>
<thead>
<tr>
<th>Severely compromised</th>
<th>Generally not severely compromised except to extent required for successful movement</th>
</tr>
</thead>
</table>

Geographical dimension

<table>
<thead>
<tr>
<th>Trafficking can occur internally or across international borders</th>
<th>Migrant smuggling must involve the illegal crossing of an international border</th>
</tr>
</thead>
</table>

Challenges to the distinction between smuggling and trafficking

It has become increasingly apparent that current legal concepts and structures around trafficking and smuggling are poorly suited to capturing the complexity of what is happening. As noted above, an increasing number of smuggled migrants are ending up in situations of trafficking-related exploitation. For all smuggled migrants, the clandestine nature of their journey; the sometimes unscrupulous and corrupt conduct of their facilitators and collaborators; and, most critically, the extent to which some States will go to prevent their departure, transit or arrival, all operate to create or exacerbate serious risks to personal security and wellbeing. In such cases, the maintenance of a distinction between those who are treated as commodities and exploited and harmed incidentally (smuggled migrants) and those who are deliberately subjected to exploitation and harm (trafficked persons) begins to look increasingly unrealistic and unfair.

The blurring of the lines between smuggling and trafficking distinction has significant implications for States and the individuals concerned. Under international and most national laws, smuggled migrants, even those subject to hardship and abuse, are not considered to be victims of crime. They have no apparent right to support and assistance; no right to seek remedies for the harms committed against them; no right to protection from further harm and, with only a marginal exception, are not granted any protection from immediate return.

Increasingly, States are moving beyond the criminalisation of smuggling to criminalise the act of being smuggled – that is, the migrants themselves. This stands in stark contrast to persons identified as having been trafficked who under national and international laws

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21 The exception is provided by EU Directive 2004/81/EC, which defines the conditions for granting residence permits to third-country nationals who are victims of trafficking or who have been subject to migrant smuggling and who are cooperating authorities. However the Directive does not mandate the issuing of such permits and it is only very rarely applied for the benefit of smuggled migrants. In the first ten years since the passage of the law, only ten EU Member States made use of the provisions for smuggled migrants. See Communication from the Commission to the Council and the European Parliament on the application of Directive 2004/81 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. European Commission, 2014.
are entitled, at least in theory, to a raft of rights related to protection, assistance, compensation, protection from criminalisation, safe return and reintegration.

The increasing slippage between trafficking and migrant smuggling

In October 2013, an overcrowded fishing boat, carrying smuggled migrants from war-torn regions of Sub-Saharan Africa to the Italian coast, was set on fire to draw the attention of rescuers. Over a hundred passengers were rescued after the vessel capsized, but more than 360 women, men and children perished. It was alleged that vessels in the area ignored distress signals and failed to come to the rescue of drowning passengers, perhaps fearing prosecution for abetting migrant smuggling. Investigations revealed that some of the passengers had been subject to severe, trafficking-related exploitation and that many had been forced to pay smugglers for their freedom from a detention center in Libya and the onward journey to Europe.


Unfortunately, these very different legal regimes can create perverse incentives for States to avoid identifying smuggled migrants as victims of trafficking, even when signs of trafficking are present or easily discoverable. While precise information is impossible to obtain, it appears that few (if any) of the hundreds of thousands of smuggled migrants who have entered Europe in the most recent wave of 2015 have been screened for trafficking. Even when highly credible allegations of trafficking of smuggled migrants are made, this rarely translates into the application of a different standard of treatment. For example, while many smuggled Rohingya refugees from Myanmar have been subjected to severe, trafficking-related exploitation including being sold into forced labour, countries of destination including Malaysia and Thailand have not taken these persons into their well-structured trafficking victims assistance programs.

Dangerous conflation of smuggling and trafficking

Other, quite different risks arrive when trafficking and smuggling are conflated for purposes that are not necessarily related to advancing human rights and protecting the vulnerable. For example, it has been noted that during the 2015 European refugee crisis, senior government leaders and public officials regularly referred to trafficking in relation to situations that appeared to be migrant smuggling. As the head of a major human rights organisation, Anti-Slavery International, recently noted:

The conflation of smuggling and trafficking conveniently obfuscates the issue and buys political breathing space. It is a classic public relations move by those faced with evidence of their complicity in human rights abuses – or in this case, arguably, a preventable atrocity. When faced with such horror, it is easier to make grand statements blaming migrant deaths on evil traffickers than to seek the causes and identify proper responses.22

Identifying a situation as one of trafficking can also be used to give political legitimacy to responses that may be politically unpalatable if directed against facilitators of irregular migration, especially when those involved are refugees with a valid claim to seek and receive asylum from persecution. For example, the language of ‘trafficking’ and ‘slave traders’ may be used to justify military action against smugglers and their vessels.

**Addressing the smuggling / trafficking dynamic**

Despite a growing awareness of the scale and seriousness of exploitation in facilitated migration, the international response to migrant smuggling has been desultory and inconsistent. While new international rules around migrant smuggling acknowledge the possibility of harm and the need to preserve the human rights of migrants, this has done little to dispel the widespread perception that smuggling is a crime against the State, and that smuggled migrants are complicit in their own misfortune and thereby not ‘victims’ deserving of protection and support. As noted above, protections that should, in theory, be available to smuggled migrants who have suffered exploitation – including those provided under human trafficking laws - are rarely acknowledged or applied.

The number of people who want—or are forced—to move shows no sign of slowing and will most probably increase, at least over the short to medium term. Most of this migration will be facilitated by smugglers and, based on current trends, it is likely that the blurring of lines between smuggling and trafficking will continue. Under these circumstances it is essential that the international community and concerned States work to ameliorate the greatest harms and injustices caused by exploitation in migration. For example, much more could and should be done on the broader issue of migrants’ rights. States that reap the incalculable benefits of low cost migrant labour, that generate the demand being met by migrants, should not be able to get away so easily with defending and maintaining a system that deprives them of even the most basic legal and social protections.

International action against trafficking in persons provides perhaps the most valuable opportunity to redress the current protection gaps. While not all exploitation directed at migrants can be rightly characterised as “trafficking,” a great deal of the debt bondage, forced labour, and abuse of migrants that has been documented over recent years does indeed reach the required threshold of seriousness. As this background paper has amply demonstrated, the tools now available to deal with trafficking in persons are considerable. They include strong international and national legal frameworks, dedicated criminal justice institutions, powerful oversight and reporting mechanisms, and a vigorous civil society. These must all be directed toward exposing exploitation in migration and securing a stronger, more effective response.

**3.3. Trafficking for forced criminal activities**

The purposes of trafficking are as varied as the potential for profit and new forms of trafficking are emerging in both Asia and Europe. In Europe, in particular, there is growing evidence of trafficking for purposes of exploitation through criminal activities. This often results in the victim being prosecuted for the crime for which they have been trafficked - while their exploiters enjoy impunity. Forced criminality of victims raises questions about how this form of human trafficking should be identified and responded to.
The extent of forced criminal exploitation

Women, men and children trafficked across international borders or within a country are increasingly coerced into committing criminal activities. The range of crimes that they may be compelled to commit is broad and includes petty crime (such as pick-pocketing, shoplifting or distraction theft) and more serious offences (such as drug cultivation and distribution and drug smuggling).

Coercing others to commit crime, brings traffickers significant profit at a very low risk as it is the victims who are most likely to be arrested and prosecuted. Commonly, the police apprehend a victim committing the actual crime, which makes it straightforward to evidence and prosecute the unlawful act. Against this backdrop, the serious crime against the victim - trafficking, is often overlooked.

European institutions and civil society increasingly pay attention to this problem as they repeatedly encounter cases of victims convicted of crimes. Approximately 4% of the cases of trafficking identified in the European Union and reported to the Europol focal point on human trafficking, concern trafficking for forced criminality and begging. However, as with the overall extent of trafficking, real number of those trafficked for forced criminality is likely to be much higher. A research study in the UK identified that in the period from 2012 to 2014, at least 159 victims of trafficking from Vietnam were prosecuted for forced labour in cannabis factories. The prosecutions went ahead despite indicators of trafficking being present in these cases.

Forms of forced criminality

Trafficking for forced criminality takes a variety of forms. The most prevalent types of forced criminality recorded in the past ten years in Europe involved women, children and men are trafficked for the purposes of:

- Theft (e.g. pick-pocketing; shoplifting; occasional burglary; distraction theft at ATMs; precious metal theft from railway lines; charity bag theft )
- Sham marriages (a EU national woman is compelled to marry a third country national thereby committing an offence of facilitating illegal entry)
- Drug production or cultivation (usually cannabis factories; but recent reports of methamphetamine production)
- Drug distribution (usually young men who are forced by their traffickers to sell drugs on the streets)
- Production and distribution of counterfeit goods (e.g. DVDs, clothes or cigarettes)
- Benefit fraud (victims are coerced into fraudulently claiming benefits such as child welfare benefits – with all monies going directly to the trafficker. This form of exploitation typically involves victims who are concurrently being exploited in other ways).
- Drug trafficking (typically transportation of illicit drugs across international borders)
- Begging (which is criminalised in some countries but not in all instances)

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23 Presentation by Europol Focal point at a conference on trafficking for forced criminality in the Hague, 17 June 2014.
24 Trafficking for Forced Criminal Activities and Begging in Europe, Anti-Slavery International, 2014
The above list is by no means exhaustive. Experience has shown that traffickers are skilled in adapting and refining their business models, constantly inventing new ways of exploiting their victims in order to generate further profit. For example, an increasing amount of cases has been reported across Europe, of traffickers stealing the identity of a victim. This involves the abuse of the victim’s personal data, identity documents, and signature in order to fraudulently obtain loans or credit. As a consequence, the victim is left with liabilities they are not aware of.

**Forced criminality in the definition of trafficking**

Trafficking for forced criminality is not referred to in the *Trafficking Protocol* or in the *Council of Europe Trafficking Convention*, likely because States were not aware of this form of exploitation at the time of drafting. However in relation to both instruments the list of exploitative purposes is explicitly non-exhaustive and States retain the freedom to include other exploitative purposes such as forced criminality. In addition, forced criminality may be integrated into the Protocol and Council of Europe definition of trafficking through being characterised as a form of forced labour. This is the position taken by the ILO, which has affirmed that forced labour is not confined to labour in regular industries but encompasses any activity that is exacted under the menace of any penalty and for which the individual has not offered him or herself voluntarily. This includes criminal activity and begging\(^{25}\).

An improved information position on trafficking for forced criminality guided development of the 2011 *EU Trafficking Directive*, which identifies the exploitation element of the definition of trafficking as follows:

**Art. 3(3):** Exploitation shall include, as a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, including begging, slavery or practices similar to slavery, servitude, or the exploitation of criminal activities, or the removal of organs.

**Forced criminality and the principle of non-punishment for status offences**

To provide a safeguard against prosecution of victims who may have been compelled to commit crimes as a consequence of trafficking, the international community has developed a principle of *non-prosecution or non-punishment for status offences*. While this principle is not part of the *Trafficking Protocol*, it was first introduced via the 2002 *United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking*. It subsequently entered into international treaty law via in the *Council of Europe Trafficking Convention*, the *EU Trafficking Directive*, and the 2014 *ILO Forced Labour Protocol*.

The principle of non-punishment for status offences is based on a premise that trafficked persons may, in the course of their trafficking or as a consequence of their trafficking, commit administrative and criminal offences for which they should not be held legally responsible. This is not a new principle but rather draws on long-established principles common to all legal systems around concepts such as criminal responsibility and duress.

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\(^{25}\) Forced labour and human trafficking, Casebook of court decision. ILO, 2009, p. 9
## Non Prosecution / Punishment Provision in International Law

<table>
<thead>
<tr>
<th>INSTRUMENT</th>
<th>NON-PUNISHMENT DEFINED</th>
<th>APPLICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Council of Europe Trafficking Convention</td>
<td><strong>Art.26: Non-punishment provision</strong> Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.</td>
<td>Binding for States Parties</td>
</tr>
<tr>
<td>EU Trafficking Directive</td>
<td><strong>Art. 8: Non-prosecution or non-application of penalties to the victim</strong> Member States shall, in accordance with the basic principles of their legal systems, take the necessary measures to ensure that competent national authorities are entitled not to prosecute or impose penalties on victims of trafficking in human beings for their involvement in criminal activities which they have been compelled to commit as a direct consequence of being subjected to any of the acts referred to in Article 2.</td>
<td>Binding for all EU Member States</td>
</tr>
<tr>
<td>ILO 2014 Forced labour protocol;</td>
<td><strong>Art. 4(2):</strong> Each Member shall, in accordance with the basic principles of its legal system, take the necessary measures to ensure that competent authorities are entitled not to prosecute or impose penalties on victims of forced or compulsory labour for their involvement in unlawful activities which they have been compelled to commit as a direct consequence of being subjected to forced or compulsory labour.</td>
<td>Binding for States Parties</td>
</tr>
</tbody>
</table>

There is debate about the appropriate interpretation and transposition of the non-punishment provision on national level. While some countries have introduced a non-prosecution/non-punishment provision in their anti-trafficking legislation in connection with status offences, others have incorporated the principle into policies or guidelines. Often, States provide guidance to prosecutors and other parts of the criminal justice system on when discretion to not prosecute or punish should properly be exercised in cases of trafficking.
### Example of National Application of the Punishment Provision

<table>
<thead>
<tr>
<th>COUNTRY</th>
<th>NON-PUNISHMENT IMPLEMENTATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moldova</td>
<td>Arts 165 &amp; 32 of anti-trafficking law provides for exemption trafficked persons from liability for criminal and administrative offences committed in connection with their trafficked status.</td>
</tr>
<tr>
<td>Hong-Kong</td>
<td><strong>Prosecution Code 18.2.</strong> In appropriate cases, a prosecutor should consider a credible claim that a defendant or intended defendant is a victim of trafficking. If such a claim is found, a prosecutor should appropriately deal with the case bearing in mind that the person is a victim of trafficking. In this regard, reference can be made to applicable international standards and practices concerning victims of trafficking.</td>
</tr>
<tr>
<td>United Kingdom</td>
<td><strong>Modern Slavery Act 2014 Art. 45</strong> provides for a statutory defence that can be raised if a person is compelled to do something by another person or circumstances and the compulsion is attributable to trafficking, slavery, forced labour or servitude.</td>
</tr>
</tbody>
</table>

It is important to note that the principle of non-prosecution/non-punishment for status offences does not grant victims of trafficking *blanket immunity* for any and all crimes they may have committed before, during or after their trafficking experience. Indeed, it would be both unnecessary and dangerous to grant persons identified as victims of trafficking some kind of special defence or immunity from prosecution without tying this to the fact and situation of their trafficking. What would be the parameters of such a defence/immunity? Within what time frame would it operate? What steps would be taken to address the potential consequences of such a law (e.g., increased use of victims of trafficking for the commission of serious offences)? Persons who are or have been trafficked can and do commit serious crimes. They may kill their employers/exploiters. More commonly they may traffic/exploit others. Practitioners, for example, report cases of women who become recruiters for their traffickers in order to lessen the abuse they are exposed to. In such cases it is necessary for national criminal justice authorities to make a full and fair assessment of the situation and to consider, for example, whether the fact of trafficking is a mitigating, rather than an exculpatory factor.

In conclusion, it is essential that the principle of non-prosecution/non-punishment is interpreted and applied in such a way as to ensure that its intention is preserved: victims of trafficking do not have blanket immunity from prosecution – but they should not be punished for crimes they were compelled to commit in the course of or as a direct consequence of their trafficking.

**Challenges to application of the non-punishment provision**

The application of the non-punishment provision in Europe is not without challenges. In assessing the use of the provisions by member States, the Council of Europe identified a significant lack of awareness about the provision amongst competent authorities. In

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26[http://www.coe.int/t/dghl/monitoring/trafficking/Docs/SeminarsConf/Presentations_workshop/Presentation_P.Nestorova.asp](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/SeminarsConf/Presentations_workshop/Presentation_P.Nestorova.asp)
In addition, the confusion over the positive obligation of the police to act on an allegation of crime, and the application of the non-punishment provision at the same time, is also an issue.

In order for the law enforcement agencies to identify a victim of trafficking for forced criminality, they need to be seeing the crime behind the crime. This requires, first, familiarity with the indicators of trafficking, second, awareness of the fact that trafficking can occur for the purposes of criminal exploitation and finally the knowledge about the non-punishment provision.

### Miscarriages of justice – prosecution of victims trafficked for forced criminality

In the past few years, a number of cases with claims of wrongful prosecutions were brought to courts of high instance in the UK by persons trafficked for forced criminality. In 2013, the High Court of England and Wales Criminal Division ruled in L, HVN, THN, T V R. The judgment concerned four unrelated cases, three involving Vietnamese children that were trafficked for cannabis cultivation and one involving a West African woman trafficked for sexual exploitation. All four victims were prosecuted for criminal offence and convicted, the three children for cannabis cultivation, the adult for passport offences. In all four cases, the High Court quashed the original convictions.

The significance of this judgment is in that it provides guidance to courts as how the interests of those who may be victims of trafficking, and are involved in criminal activities should be handled by courts and how to approach such cases in criminal proceedings. The judgment also made reference to international law, namely the Council of Europe Convention and the EU Trafficking Directive.

In the judgment, the Lord Chief Justice explained the very essence of trafficking for forced criminality:

“The criminality, or putting it another way, the culpability, of any victim of trafficking may be significantly diminished, and in some cases effectively extinguished, not merely because of age (always a relevant factor in the case of a child defendant) but because no realistic alternative was available to the exploited victim but to comply with the dominant force of another individual, or group of individuals.”

**Source:** [https://www.judiciary.gov.uk/judgments/l-hvn-thn-t-v-r-judgment/](https://www.judiciary.gov.uk/judgments/l-hvn-thn-t-v-r-judgment/)
3.4. Challenges in measuring trafficking and assessing responses

Intergovernmental organisations, individual countries and private bodies are increasingly engaged in measuring the trafficking phenomenon and assessing the response of States. Advocates assert that such efforts are essential: data on where trafficking is happening, and to whom, provides the critical evidence required to develop relevant and effective interventions. And assessing State responses helps to encourage greater attention to trafficking and related abuses. But critics questions methods and methodologies, also calling into question the overall strategic value of trying to quantify trafficking and trafficking responses and the focus of these efforts.

Measuring trafficking

As noted in Part One of this background paper, our understanding of trafficking prevalence, patterns and trends is imperfect and incomplete. This is unsurprising. Trafficking is a covert activity involving marginalised individuals and ‘hidden populations’. Many of those who have been or are being exploited will never be identified or counted. It is therefore necessary to extrapolate from the very little reliable information and data that is available. But even here, the obstacles are considerable. Most particularly, there are still questions around what is being counted when trafficking statistics are produced. For example, while the United Nations Office on Drugs and Crime relies on the definition of trafficking set out in the Trafficking Protocol when compiling its Global Report on Trafficking in Persons, the information in that report comes directly from States, not all of which will be providing data in strict accordance with that definition. The International Labour Organisation has undertaken Important and groundbreaking work in measuring the extent of forced labour, using the international legal definition first set out in the 1930 Forced Labour Convention. But while forced labour and trafficking will often overlap, the two concepts are not identical in law or in practice.

The annual US Trafficking in Persons Report (TIP Report), discussed further below, uses a definition established under US national law that is different, in several important respects, to the one set out in the Trafficking Protocol. Early TIP Reports cited global figures that were later questioned by the US Government Accountability Office which

noted that: “the accuracy of the estimates is in doubt because of methodological weaknesses, gaps in data, and numerical discrepancies” (USGAO, 2006). The TIP Report no longer provides global or even country estimates of prevalence, rather restricting its hard data to numbers of victims identified and traffickers prosecuted and convicted.

Other efforts from outside government are even more problematic in terms of being able to extrapolate across data sets. For example, the Global Slavery Index, which has been produced twice to date (2013 and 2014) is measuring what it calls ‘modern slavery’, a term that does not exist in national law; it is defined by the authors of the report and has been defined differently between one report and the next. The methodology used by the Index to measure the prevalence of modern slavery and the number of slaves as a percentage of the total (national) population has been strongly criticised.28

Similar issues have been highlighted in Europe. Eurostat, the European Union’s statistics agency, collects data from EU Member States and several associated States across a range of indicators including the number of victims of trafficking that have been identified. According to Eurostat, 30,146 victims were registered in the 28 EU Member States between the period 2010-2012. However, the accuracy of this figure is weakened by differences in how individual States formally identify (register) victims. In the UK, for example, each potential victim who is referred to the national system for identification (the National Referral Mechanism) will be noted as a potential victim for purposes of the Eurostat figures – although it is only subsequently that a conclusive determination is made by the competent authorities as to whether or not the individual is indeed a victim of trafficking. By contrast, in other countries such as Romania, a person is only identified as a victim of trafficking if there are criminal proceedings against a perpetrator. Inevitably, data collected across the EU can only be interpreted as a sample of the problem, not the real extent of it.

Assessing the response of States

Attempts to measure the nature and extent of trafficking have gone hand in hand with efforts to assess the response of States. In some cases, this is done with reference to a specific legal instrument. For example, within the European system, States Parties to the Council of Europe Convention are subject to a rigorous oversight mechanism that includes country assessment visits. While the Trafficking Protocol itself does not include a compliance mechanism, other international bodies (including the UN’s Human Rights Council, treaty bodies, the Special Rapporteur on trafficking in persons and other mechanisms) regularly draw attention to obligations under the Protocol. ILO supervisory bodies are also involved in assessment of State responses and the role of the ILO in this area is likely to grow with the recent adoption of new instruments on domestic servitude and forced labour.

The most high profile and influential assessment of State responses to trafficking is provided by the annual Trafficking in Persons Report (TIP Reports), produced by the US Government. The relevant statute requires the State Department to produce annual Reports describing “the nature and extent of severe forms of trafficking in persons” and

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assessing governmental efforts across the world to combat such trafficking against criteria established by US law. The Report establishes a system of rankings based on three tiers. Tier One is for countries in full compliance with the minimum standards, Tier Two for countries making an effort but not yet fully compliant, and Tier Three for those countries that were failing on both counts. An additional category, “Tier Two Watch List,” applies to countries that, owing to the severity of the problem or failure to provide evidence of progress, are considered to be on the lower edge of the Tier Two classification. Tier Two Watch List countries are subject to special scrutiny and, in the absence of a special presidential exemption, are downgraded to Tier Three after two consecutive years on the Watch List. The President is authorised to deny the provision of non-humanitarian, non-trade-related assistance to any Tier Three country. In addition, such countries will risk US opposition to their seeking and obtaining funds from multilateral financial institutions, including the World Bank and the International Monetary Fund (IMF).

The TIP Reports have been justifiably criticised on many grounds. For example, they fail to properly acknowledge that anti-trafficking responses can sometimes have terrible costs in terms of human rights. Examples include detention of trafficked persons in shelters; their prosecution for illegal entry or illegal work; denial of protection and support to victims who will not or cannot cooperate with criminal justice authorities; and being forced to return to a situation of danger. The pressure on governments to demonstrate their anti-trafficking commitment through increased prosecutions has also resulted in unsafe convictions and the imposition of penalties that are disproportionate to the offence. And while the reliability of individual country assessments has improved over the years, there is still a strong correlation between the US government's attitude towards a particular country and the ranking allocated to it.  

Despite these and other significant weaknesses, there is little doubt that the TIP Reports have helped to raise the profile of trafficking as an issue of international concern; contributed to improved understanding about the nature and extent of trafficking; and provided strong political impetus for more effective responses. The reports have also helped to reinforce the core provisions of the international legal framework around trafficking; for example in relation to whether States have criminalised trafficking, whether they are prosecuting and appropriately punishing offenders, and whether they are cooperating with each other to that end. Country assessments also routinely consider how the State under review treats victims of trafficking in both law and practice—focusing on issues as diverse as detention of victims in shelters, to protection of trafficked persons who are cooperating in the prosecution of their exploiters.

**EFFORTS TO MEASURE TRAFFICKING AND ASSESS RESPONSES**

<table>
<thead>
<tr>
<th>SOURCE</th>
<th>METHODOLOGY / OUTCOME ETC.</th>
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<table>
<thead>
<tr>
<th><strong>and Crime</strong></th>
<th><strong>Global Report on Trafficking in persons</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Assessment of responses</strong></td>
<td>Measures # of trafficking laws; # of investigations, prosecutions and convictions; # of identified victims; # of sheltered victims.</td>
</tr>
<tr>
<td><strong>Trend analysis but no critical assessment</strong></td>
<td></td>
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<table>
<thead>
<tr>
<th><strong>International Labour Organisation</strong></th>
<th>Various publications</th>
</tr>
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<tbody>
<tr>
<td><strong>Measurement:</strong></td>
<td>Various initiatives over the past decade to measure prevalence of forced labour in targeted areas or within targeted populations</td>
</tr>
<tr>
<td>- In 2012 developed guidelines for qualitative surveys on forced labour and a global estimate of forced labour (20.9 million)</td>
<td></td>
</tr>
<tr>
<td>- In 2014 estimated illegal profits from forced labour ($150 billion)</td>
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<thead>
<tr>
<th><strong>EUROSTAT</strong></th>
<th><strong>Trafficking in Human Beings</strong></th>
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</thead>
<tbody>
<tr>
<td><strong>Produced in 2013 and 2014 (the latter covering 2010-2012)</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Measurement:</strong></td>
<td>Using data received from States, provides statistics on # and profile (including gender, citizenship, form of exploitation) of identified victims; # and profile of suspected and prosecuted traffickers; # of final decisions; court judgements and convictions.</td>
</tr>
</tbody>
</table>

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<thead>
<tr>
<th><strong>Group of Experts on Action against Trafficking in Human Beings</strong></th>
<th><strong>Country reports</strong></th>
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<tbody>
<tr>
<td><strong>Independent monitoring mechanism established under the Council of Europe Trafficking Convention</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Assessment:</strong></td>
<td>Conducts country visits and other activities to assess implementation of the Convention by States parties. Publishes country reports detailing findings including recommendations for improvement.</td>
</tr>
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<table>
<thead>
<tr>
<th><strong>United States of America</strong></th>
<th><strong>Trafficking in Persons Report</strong></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Produced annually since 2001</strong></td>
<td></td>
</tr>
<tr>
<td><strong>Measurement:</strong></td>
<td>Provided estimates of global prevalence from 2001-2008. Then cited ILO data on forced labour to extrapolate trafficking prevalence. Currently only provides data on # of prosecutions and convictions; # of identified victims; # of investigations (all disaggregated into labour trafficking and (presumably) trafficking for sexual exploitation.</td>
</tr>
<tr>
<td><strong>Assessment:</strong></td>
<td>Uses information provided by States as well as other sources to assess response of States to trafficking against criteria established by US law. States are assigned one of four grades with the lowest grade attracting sanctions.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Private sector measurements and assessments</strong></th>
<th>Various reports (examples)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Example of global assessment: Global Slavery Index:</strong></td>
<td>Produced in 2014, 2015 (Walk Free Foundation)</td>
</tr>
<tr>
<td><strong>Measurement:</strong></td>
<td>estimates prevalence of “modern slavery” in each country and # of slaves as a percentage of total population.</td>
</tr>
<tr>
<td><strong>Assessment:</strong></td>
<td>asks “how are governments tackling modern slavery?”, using a set of indicators developed by an ‘expert working group”.</td>
</tr>
</tbody>
</table>
Towards the future

Efforts to measure the nature and extent of trafficking - and to assess the quality and effectiveness of responses – are important and deserve to be encouraged. But it is essential to remain alert to the many pitfalls. For example, experience teaches us that reliable, replicable data on the prevalence of trafficking is extremely difficult to secure and that extrapolating from thin or poor quality data sets does not address the underlying problems. Assessing the performance of States is an equally important and fraught endeavor, particularly when responsibility for such assessment is placed in the hands of individual States or private bodies whose understanding of what is required for an effective response may be unclear or not in full accordance with international norms.

Recent developments - such as specialist research into specific issues or industries - hold the promise of more and better information that will help in determining the nature and scope of the problem as well as evaluating the quality and impact of responses. For example, a recent detailed study of Malaysia’s electronics industry was able to secure the qualitative and quantitative information necessary to understand the extent to which exploitation has become part of this sector including estimates of prevalence.30 The work was not undertaken in a vacuum. Rather, researchers utilised methods and assessment tools produced by the ILO for the specific purpose of guiding prevalence measurement in relation to forced labour. A report from the same organisation on labour brokerage and trafficking of Nepali workers to the Middle East provided a similar level of forensic detail on how such exploitation occurs; who is being targeted and who is responsible.31 Exploitation in the global fishing industry has now been taken up by the United States Government and international organisations, but only after researchers and advocates did much of the hard work documenting the horrific abuses involved and mapping the factors that facilitate and sustain exploitation.32

ENDS/

30 Verite, Forced Labour in the Production of Electronic Goods in Malaysia (2014)
31 Verite, Labour Brokerage and Trafficking of Nepali Migrant Workers (n.d.)
32 See Part 1 case study
**ANNEX 1: LIST OF ACRONYMS**

<table>
<thead>
<tr>
<th>Acronym</th>
<th>Full Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>ACWC</td>
<td>ASEAN Commission on the Promotion and Protection of the Rights of Women and Children</td>
</tr>
<tr>
<td>ASEAN</td>
<td>Association of Southeast Asian Nations</td>
</tr>
<tr>
<td>ATM</td>
<td>Automated Teller Machine</td>
</tr>
<tr>
<td>CEDAW</td>
<td>The Convention on the Elimination on all Forms of Discrimination Against Women</td>
</tr>
<tr>
<td>CoE</td>
<td>Council of Europe</td>
</tr>
<tr>
<td>COMMIT</td>
<td>The Coordinated Mekong Ministerial Initiative Against Trafficking</td>
</tr>
<tr>
<td>COTC</td>
<td>United Nations Convention against Transnational Organized Crime</td>
</tr>
<tr>
<td>ECPAT</td>
<td>End Child Prostitution and Trafficking</td>
</tr>
<tr>
<td>EEZ</td>
<td>Exclusive Economic Zone</td>
</tr>
<tr>
<td>EU</td>
<td>European Union</td>
</tr>
<tr>
<td>GRETA</td>
<td>Group of Experts on Action against Trafficking in Human Beings</td>
</tr>
<tr>
<td>HRC</td>
<td>United Nations Human Rights Council</td>
</tr>
<tr>
<td>ILO</td>
<td>International Labour Organization</td>
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<tr>
<td>IOM</td>
<td>International Organization for Migration</td>
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<tr>
<td>MOU</td>
<td>Memorandum of Understanding</td>
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<tr>
<td>NGO</td>
<td>Non-Governmental Organisation</td>
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<tr>
<td>NRM</td>
<td>National Referral Mechanism</td>
</tr>
<tr>
<td>OECD</td>
<td>Organisation for Economic Co-operation and Development</td>
</tr>
<tr>
<td>ODIHR</td>
<td>Office for Democratic Institutions and Human Rights</td>
</tr>
<tr>
<td>OHCHR</td>
<td>Office of the United Nations High Commissioner for Human Rights</td>
</tr>
<tr>
<td>OSCE</td>
<td>Organization for Security and Co-operation in Europe</td>
</tr>
<tr>
<td>RACE</td>
<td>Response Against Trafficking for Forced Criminal Exploitation</td>
</tr>
<tr>
<td>SAARC</td>
<td>South Asian Association for Regional Cooperation</td>
</tr>
<tr>
<td>SOMTC</td>
<td>Senior Officials Meeting on Transnational Crime</td>
</tr>
<tr>
<td>TIP</td>
<td>Trafficking in Persons</td>
</tr>
<tr>
<td>UN</td>
<td>United Nations</td>
</tr>
<tr>
<td>UNGA</td>
<td>United Nations General Assembly</td>
</tr>
<tr>
<td>UNHCR</td>
<td>Office of the United Nations High Commissioner for Refugees</td>
</tr>
<tr>
<td>UNIAP</td>
<td>The United Nations Inter-Agency Project on Human Trafficking</td>
</tr>
<tr>
<td>UNICEF</td>
<td>United Nations Children’s Fund</td>
</tr>
<tr>
<td>UNODC</td>
<td>United Nations Office on Drugs and Crime</td>
</tr>
</tbody>
</table>
ANNEX 2: BIBLIOGRAPHY


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The Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism: http://www.thecode.org/


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- **Differences in Asian and European Values; Rights to Education; Rights of Minorities** (1999, China)
- **Freedom of Expression and Right to Information; Humanitarian Intervention and the Sovereignty of States; Is there a Right to a Healthy Environment?** (2000, France)
- **Freedom of Conscience and Religion; Democratisation, Conflict Resolution and Human Rights; Rights and Obligations in the Promotion of Social Welfare** (2001, Indonesia)
- **Economic Relations; Rights of Multinational Companies and Foreign Direct Investments** (2003, Sweden)
- **International Migrations; Protection of Migrants, Migration Control and Management** (2004, China)
- **Human Rights and Freedom of Expression** (2007, Cambodia)
- **Human Rights in Criminal Justice Systems** (2009, France)
- **Human Rights and Gender Equality** (2010, Philippines)
- **National and Regional Human Rights Mechanisms** (2011, Czech Republic)
- **Human Rights and Information and Communication Technologies** (2012, Korea)
- **Human Rights and the Environment** (2013, Kingdom of Denmark)
- **Human Rights and Businesses** (2014, Viet Nam)

The Seminar series is co-organised by the Asia-Europe Foundation (ASEF), the Raoul Wallenberg Institute (delegated by the Swedish Ministry of Foreign Affairs), the French Ministry of Foreign Affairs and International Development and the Department of Foreign Affairs of the Philippines. ASEF has been the secretariat of the Seminar since 2000.

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ASEF’s contribution is with the financial support of the European Union

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