

**PROSECUTION OF TRAFFICKING IN PERSONS CASES:  
INTEGRATING A HUMAN RIGHTS-BASED APPROACH IN THE  
ADMINISTRATION OF CRIMINAL JUSTICE**

**BACKGROUND PAPER  
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# Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice

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# Prosecution of Trafficking in Persons Cases: Integrating a Human Rights-Based Approach in the Administration of Criminal Justice<sup>1</sup>

## Introduction

Trafficking in persons is a crime, as well as a serious violation of human rights. The international community now accepts that the investigation, prosecution and punishment of offenders are core aspects of an effective national response to trafficking. Strong prosecutions help to curb the impunity for traffickers, which perpetuates the crime of trafficking in persons. They can also help to ensure justice for those who have been trafficked including access to remedies. An effective criminal justice response to trafficking also operates as a disincentive to future trafficking and is, thereby, an important aspect of prevention.<sup>2</sup>

International law requires States to criminalize trafficking and related offences.<sup>3</sup> States are under a related duty to identify cases of trafficking and to investigate and prosecute those cases to the required level of due diligence.<sup>4</sup> Unfortunately, traffickers and their accomplices are seldom investigated, prosecuted, convicted and punished. The rate (and often, the quality) of prosecutions for trafficking offences appears to be very low in every part of the world. While precise and verifiable data is still not available, recent estimates provide some indication of the scale of the challenge. A 2009 report, issued by the United Nations Office on Drugs and Crime, cited very low numbers of prosecutions.<sup>5</sup> According to the U.S. Government, in 2010 there were only 6,017 prosecutions for trafficking offences worldwide, with fewer convictions and fewer victim identifications than in the previous year.<sup>6</sup> Anecdotally, it appears that the prosecution rate for labor trafficking and forced or coercive labor is even lower.<sup>7</sup>

There are other, related problems with the criminal justice response to trafficking. While the situation is slowly changing, it is still the case that victims of trafficking are rarely identified and even less often brought into the criminal justice system as witnesses. The central role of victims in criminal prosecutions means that this failure directly and negatively impacts on the effectiveness of

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<sup>1</sup> The term “prosecution” as used in this background paper, is intended to encompass all aspects of the criminal justice response to trafficking in persons including investigation, the actual prosecutorial process, adjudication and punishment. Part 1 of this paper was written by Anne Gallagher and draws on a much more extensive consideration of criminal justice responses to trafficking in Anne T. Gallagher, *The International Law of Human Trafficking* (2010). Part 2 was drafted by Nicole Karlebach.

<sup>2</sup> See further, UNODC *From Protection to Prosecution at 2*

<http://www.unodc.org/documents/human-trafficking/2008/BP007FromProtectionToProsecution.pdf>

<sup>3</sup> See further, references in the *Commentary to the United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking (Commentary to the Trafficking Principles and Guidelines)*, pp 185-192. Also Part I, below.

<sup>4</sup> See further, references in *Commentary to the Trafficking Principles and Guidelines*, pp 72-74; 193-202. Also Part I, below.

<sup>5</sup> United Nations Office on Drugs and Crime, “Global Report on Trafficking in Persons,” (2009) available at: [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf)

<sup>6</sup> U.S. Department of State *Trafficking in Persons Report*, (2010), (U.S. TIP Report 2011),.

<sup>7</sup> See US TIP Report 2011; also International Labour Organization, *The Costs of Coercion* (2009), pp 37-41.

the national criminal justice response.<sup>8</sup> Victims themselves are frequently criminalized and denied justice or redress for the harms committed against them. Their involvement in criminal justice actions may be unwilling and may compromise their safety and wellbeing. More broadly, an aggressive law enforcement response to trafficking can operate to displace attention and resources away from victim protection and support. The human rights of persons suspected of trafficking offences can also be compromised: through, for example, denial of the right to a fair trial and the right to proportionality in sanctions.

The complexity of the trafficking crime and related evidentiary difficulties go some way to explaining the unsatisfactory performance of States when it comes to addressing the high levels of impunity currently enjoyed by those who exploit others for economic gains.<sup>9</sup> Corruption, lack of political will, and weak institutions are additional factors that directly contribute to inadequate criminal justice responses. Deficiencies may also be due, at least in part, to lack of experience and exposure among criminal justice agencies. While trafficking has a long history, its criminalization is generally very recent. Indeed, it was not until 2000 that an internationally agreed definition of trafficking was concluded and most national anti-trafficking laws are still less than a decade old. It is therefore not surprising that, at least until recently, States have been developing their criminal justice responses “on the run, often under political pressure and principally through trial and error.”<sup>10</sup>

This background paper seeks to contribute to improved understanding of what is required of States and others with respect to the prosecutorial response to trafficking by clearly identifying the relevant obligations and providing at least preliminary insight into how these obligations are being realized – or could be realized - at the national level. It is divided into two parts. Part 1 explains the applicable international and regional standards in relation to key aspects of the prosecution – or criminal justice - aspect of the trafficking response. Part 2 sets out preliminary conclusions and recommendations. An annex lists references to some of the most important resources that have been developed over the past several years to support more effective and rights-based criminal justice responses to trafficking.

## **Part 1: A rights-based approach to prosecution of trafficking cases: elements and standards**

International law, most particularly human rights law, provides a vital source of authority and guidance to States as they work to develop an effective and rights-based criminal justice response to trafficking. While some of the relevant standards are specific to trafficking, many others reflect or are based on key international legal principles of much broader applicability such as the right to a fair trial; the prohibition on discrimination; and the right of victims of human rights violations to access remedies. An understanding of State obligations with respect to the prosecution of trafficking cases requires a full appreciation of these various norms – as well as of their operation

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<sup>8</sup> As discussed in section 1.2.3. below, there is a need to strike a balance between the focus on the central role of trafficked persons in criminal justice responses and the provision of assistance to trafficked persons conditional upon their cooperation with law enforcement authorities.

<sup>9</sup> These issues are explored in detail in Anne Gallagher and Paul Holmes, “Developing an Effective Criminal Justice Response to Human Trafficking: Lessons from the Front Line,” *International Criminal Justice Review*, Vol. 18, No. 3, 318-43 (Gallagher and Holmes). See also, Albert Moskowitz, *Challenges and Priorities in Prosecuting and Adjudicating Trafficking in Persons Cases* (Moskowitz: Challenges and Priorities). (Unpublished paper, copy on file).

<sup>10</sup> Gallagher and Holmes, p. 318.

in this specific context.

This section commences with a brief explanation of what a rights-based approach actually means. It then utilizes international legal norms as well as insights from professional criminal justice practice to identify and flesh out the content of specific components of a rights-based approach to the investigation and prosecution of trafficking and related crimes.

## 1. 1. Understanding a rights-based approach to trafficking

The Special Rapporteur has previously emphasized the value of a *rights-based approach* to trafficking.<sup>11</sup> Such an approach has been widely endorsed by the international community, including the General Assembly and Human Rights Council.<sup>12</sup> In the present context it is essential to emphasize that a rights-based approach is as important for the prosecution aspect of the trafficking response as it is for every other aspect including protection and prevention.

The *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking* explains that a human rights-based approach is a conceptual framework for dealing with a phenomenon such as trafficking that is *normatively based* on international human rights standards and that is *operationally directed* to promoting and protecting human rights. It affirms that such an approach requires analysis 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.<sup>13</sup>

Under a human rights-based approach, every aspect of the national, regional and international response to trafficking is anchored in the rights and obligations established by international human rights law. The *Commentary* notes that lessons learned 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 programmes 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, individuals accused or convicted of trafficking-related offences), their entitlements and the corresponding *duty-bearers* (usually States) and their obligations. This approach works towards strengthening the capacities of rights-holders to secure their rights and of duty-bearers to meet their obligations; and

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<sup>11</sup> See, for example, *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report submitted by the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, UN Doc. A/HRC/10/16 (20 February 2009).

<sup>12</sup> See, for example, Human Rights Council, *Trafficking in Persons, Especially Women and Children*, Human Rights Council Resolution 11/3, UN Doc. A/HRC/RES/11/3 (17 June 2009), paras. 1, 3(f), 6, 7, 8; *Trafficking in Women and Girls*, GA Res. 63/156, UN Doc. A/RES/63/156 (30 January 2009), preamble, paras. 5, 18.

<sup>13</sup> *Commentary to the Trafficking Principles and Guidelines*, pp 49-50.

- 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.<sup>14</sup>

## 1.2. Key elements and standards of a rights-based approach to prosecution of trafficking cases

The *prosecution* aspect of anti-trafficking responses is a very broad category: encompassing the investigatory, prosecutorial and adjudicatory phases of a trafficking case; as well as issues related to the applicable legal framework; international legal cooperation; asset confiscation and criminal justice aspects of corruption and complicity. A careful analysis of this category of response also reveals significant overlaps with other areas. For example, core aspects of *victim protection* – such as quick and accurate identification and the provision of immediate protection and support -- are critical to bringing victims into the criminal justice system in the first place. As noted previously, an effective criminal justice response to trafficking is an essential element of any credible national *prevention* strategy. While the present section is limited to elements and standards that relate most directly and specifically to the prosecution aspect, it is important to keep such links and overlaps in mind.

### 1.2.1. Criminalization of trafficking

As noted in the introduction to this paper, trafficking is a crime as well as a violation of human rights. Criminalization of trafficking is an important step forward in ending impunity for traffickers. States that fail to criminalize trafficking fully are failing in their obligation to protect victims of trafficking and to prevent future trafficking. They are also failing to provide the necessary structures within which State agencies can investigate, prosecute and adjudicate trafficking in persons cases to the required standard of due diligence, discussed further below.

The obligation on States to criminalize trafficking is very clear. It is contained in all specialist trafficking treaties<sup>15</sup> and its importance has been repeatedly confirmed through international and regional policy instruments<sup>16</sup>, including by the United Nations Global Plan of Action, adopted by the General Assembly in 2010.<sup>17</sup>

There are a number of different elements to the criminalization obligation. For example, States must criminalize trafficking as it has been defined by international law.<sup>18</sup> This means that

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<sup>14</sup> *Commentary to the Trafficking Principles and Guidelines*, pp 49-50.

<sup>15</sup> See, for example, United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime (Trafficking Protocol), Article 5; *Council of Europe Convention on Action against Trafficking in Persons (European Trafficking Convention)*, Article 18; *Convention on Preventing and Combating Trafficking in Women and Children for Prostitution (SAARC Convention)*, Article III; Directive I 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, (European Trafficking Directive), Article 2.

<sup>16</sup> See, for example, *Trafficking Principles and Guidelines*, Principle 12; General Assembly, *Improving the coordination of efforts against trafficking in persons*, GA Res. 64/178 (26 March 2010), para. 4;

<sup>17</sup> General Assembly, *United Nations Global Plan of Action to Combat Trafficking in Persons*, GA Res. 64/293 (12 August 2010), (Global Plan of Action), para. 43(b).

<sup>18</sup> *Trafficking Protocol*, Article 2.

criminalization must cover a range of end-purposes including forced and exploitative labour; that it must recognize the possibility of women, men and children becoming victims of trafficking; and that the trafficking in children must be defined differently to trafficking in adults. A trafficking law that covers only trafficking into sexual exploitation, or only trafficking in women in children, would fall short of this standard. From a human rights perspective, such a law would be especially problematic because of the resulting protection gap.

In formulating the criminal offence of trafficking, States must only criminalize offences that have been committed intentionally;<sup>19</sup> they must also ensure the consent of the victim does not alter the offender's criminal liability.<sup>20</sup> States are further required to criminalize related offences, such as attempting or being an accomplice in the commission of trafficking offences<sup>21</sup> and ensure that criminal (and civil) liability can be extended to legal as well as natural persons.<sup>22</sup> This obligation is important in ensuring the legal accountability of corporations and businesses engaging in trafficking such as labor contractors; adoption agencies and entertainment venues.

A human rights approach to trafficking demands that the end-purposes of trafficking are also criminalized and subject to sanction. The end-purposes of trafficking include well-established human rights violations in respect of which a separate obligation to criminalize can generally be found in international human rights law. States should, for example, ensure that national laws criminalize forced labor, exploitative labor, exploitation of prostitution; slavery; and practices similar to slavery including child labor, forced marriage, debt bondage and illegal removal of organs. International criminal justice practice has confirmed that the complexity of the trafficking offence can often be a barrier to effective prosecution.<sup>23</sup> The availability of alternative offences that recognize the gravity of the harm inflicted on victims is important from both an operational and a human rights perspective.<sup>24</sup>

The question of whether States are required to criminalize *use of the services of a victim of trafficking* is not yet settled. While the Trafficking Protocol does not mention this issue as an aspect of the criminalization obligation, the European Trafficking Convention requires States Parties to consider criminalizing the knowing use of the services of a victim of trafficking. The *European Trafficking Directive* requires Member States to consider possibility of imposing sanctions on the users of any service exacted from a victim, with the knowledge that the person has been trafficked.<sup>25</sup> The preamble to the Directive notes that such further criminalization could cover the behaviour of employers of legally staying third-country nationals and Union citizens, as well as

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<sup>19</sup> *Trafficking Protocol*, Article 5.1.

<sup>20</sup> *Trafficking Protocol*, Article 3. See also *European Trafficking Convention*, Article 3(b) and *SAARC Convention*, Article 1(3).

<sup>21</sup> See *United Nations Convention against Transnational Organized Crime (Organized Crime Convention)*, Article 5; *Trafficking Protocol*, Article 5(2) *European Trafficking Convention*, Article 21; *SAARC Convention*, Article 3; *European Trafficking Directive*, Article 3.

<sup>22</sup> See *Organized Crime Convention*, Article 9; *Trafficking Protocol*, Article xx *European Trafficking Convention*, Article 22; *European Trafficking Directive*, Article 5. See also, *Global Plan of Action*, para 44.

<sup>23</sup> Gallagher and Holmes, p.385.

<sup>24</sup> Alternative offences should however, be used carefully. In many countries identification of an individual as a "victim of trafficking" provides the trigger for a range of protection and support entitlements. A decision to prosecute a trafficking case using another offence should not result in the victim receiving a lower standard of support than he or she would otherwise be entitled to.

<sup>25</sup> *European Trafficking Directive*, Article 18(4)

buyers of sexual services from any trafficked person, irrespective of their nationality.<sup>26</sup> The *Commentary to the Trafficking Principles and Guidelines* considers this issue in greater detail.<sup>27</sup>

When considering the obligation to criminalize trafficking, the issue of jurisdiction becomes very important. In short: under what circumstances is a State required or entitled to assert its criminal justice authority over a particular situation? The relevant rules are more complicated for trafficking than for many other crimes because trafficking often involves the commission of multiple offences in two or more countries. However, their purpose is clear: to reduce or eliminate “safe havens” for traffickers by ensuring that all parts of the crime can be punished wherever they took place.<sup>28</sup> An effective criminal justice response to trafficking is obviously promoted when States exercise as broad a jurisdictional reach as possible. The *Organized Crime Convention* requires States to exercise jurisdiction over trafficking offences in two situations: first, when the offence is committed in the territory of that State<sup>29</sup>; and second, when the offender is present in its territory of the State and the State does not extradite the offender on grounds of nationality or any other grounds<sup>30</sup>. International law *permits* but does not require States to exercise jurisdiction under other circumstances – for example, when the offence is committed abroad by or against a national of that State. At the national level, some States do indeed exercise jurisdiction over their nationals even when the offence is committed abroad for certain categories of crimes, such as child sex tourism.

### 1.2.2. No criminalization of trafficked persons

As the Special Rapporteur and others have documented, trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering illegally, working illegally or engaging in prostitution. The vulnerability of trafficked persons to such treatment is often directly tied to their situation: they may not have the correct migration or work papers; their identity documents may be forged or have been taken away from them; and the exploitative activities in which they are or have been engaged such as prostitution, soliciting or begging may be illegal within the State of destination. In many cases, criminalization is tied to failures of the State to identify the victim correctly – trafficked persons arrested, detained and charged, not as victims of trafficking, but as smuggled or undocumented workers. Criminalization can also occur in countries of origin, with returned victims of trafficking being penalized for unlawful or unauthorized departure.

Criminalization and detention of victims of trafficking are incompatible with a rights based approach to trafficking because they will inevitably compound the harm already experienced by trafficked persons and serve to deny them the rights to which they are entitled. For example, as discussed further below, the routine detention of trafficked persons inevitably violates a range of the most essential human rights including the right to freedom of movement, the prohibition on arbitrary detention and the prohibition on sex-based discrimination. Criminalization often results in the rapid deportation of foreign victims – thereby denying them their right of access to an effective remedy.

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<sup>26</sup> *European Trafficking Directive*, preambular paragraph 26

<sup>27</sup> *Commentary to the Trafficking Principles and Guidelines*, pp 102-103, 189.

<sup>28</sup> United Nations Office on Drugs and Crime, *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto*, (Legislative Guide), Part 1, para. 210.

<sup>29</sup> *Organized Crime Convention*, Article 15(1); *European Trafficking Convention*, Article 31(1)(a)-(c).

<sup>30</sup> *Organized Crime Convention*, Articles 15(3), 15(4); *European Trafficking Convention*, Article 31(3).



When considering the human rights aspects of criminalization and detention, it is important to acknowledge the status of trafficked persons as victims of crime,<sup>31</sup> and as victims of human rights violations. While international law does not provide substantial guidance on the treatment of the former group, relevant instruments are clear that victims of crime are to be treated with compassion and respect for their dignity, and to have their right to access to justice and redress mechanisms fully respected.<sup>32</sup> In relation to both groups it is also clear that a person is to be considered a victim irrespective of whether the perpetrator of the violation is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim.<sup>33</sup>

The international legal framework around **prosecution for status-related offences** has not been clear, despite the fact that non-prosecution is generally in keeping with widely accepted principles relating to responsibility and accountability for criminal offences. One factor that may have contributed to lack of clarity is the absence of any relevant provision in the *Trafficking Protocol*. The situation is changing and over the past several years, there has been a noticeable shift towards the standard first articulated in the *Trafficking Principles and Guidelines* in 2002, that trafficked persons “are not to 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”.<sup>34</sup> For example, the 2005 *European Trafficking Protocol* 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.”<sup>35</sup> The 2011 *European Trafficking Directive* goes further, requiring Member States to: “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 [trafficking].”<sup>36</sup>

Various international policy bodies have confirmed non-prosecution of trafficked persons as the standard. The relevant oversight body attached to the Trafficking Protocol, for example, has gone beyond the silence of that instrument to request States Parties to “[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

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<sup>31</sup> [Victims of crime are] persons who ... have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws. *Declaration of Basic Principles for Victims of Crime and Abuse of Power*, UN Doc. A/RES/40/34, (Basic Principles for Victims of Crime and Abuse of Power), para. 1.

<sup>32</sup> See, for example, Basic Principles for Victims of Crime and Abuse of Power, para. 2; and *Optional Protocol to the Child Convention on the Sale of Children, Child Prostitution and Child Pornography, (CRC Optional Protocol on Sale of Children)*. Articles 8 and 9 deal extensively with the rights and interests of child victims of the offences covered by that instrument.

<sup>33</sup> , Basic Principles for Victims of Crime and Abuse of Power, para. 2; *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*, UN Doc. A/RES/60/147, (*Basic Principles and Guidelines on the Right to a Remedy*), para. 9.

<sup>34</sup> *Trafficking Principles and Guidelines*, Guideline 5. See also Principle 7.

<sup>35</sup> *European Trafficking Convention*, Article 26. See also the Explanatory Report to the *European Trafficking Convention*, paras. 272-274.

<sup>36</sup> *European Trafficking Directive*, Article 8.

compelled to commit such unlawful acts.”<sup>37</sup> Both the Human Rights Council and the General Assembly<sup>38</sup> have made similar recommendations, as have regional bodies and instruments and treaty bodies.<sup>39</sup>

International consensus has also evolved in relation to **detention of victims of trafficking**, another issue that is not specifically addressed in any of the international or regional trafficking treaties, but one that has a profound effect on many trafficked persons in many regions of the world. Victims can be detained for many reasons: they may, as noted above, be detained for status offences such as illegal work and illegal stay; they may be identified correctly but be unwilling to cooperate in the investigation or prosecution of their exploiters; they may be placed in shelter detention to secure their cooperation with criminal justice agencies. Shelter detention is also often justified as necessary to protect victims from further harm or to ensure they receive necessary care and support.

A human rights based analysis of shelter detention provides strong guidance to States and others as to what is acceptable or not.<sup>40</sup> Such an analysis confirms a distinction between *routine detention*, applied generally and as a matter of policy, law or practice; and *case-by-case detention*. Routine detention of victims or suspected victims of trafficking in public detention facilities or in public or private shelters violates a number of fundamental principles of international law and is therefore to be considered, *prima facie*, unlawful. Routine detention of victims of trafficking violates, in some circumstances, the right to freedom of movement and, in most, if not all, circumstances, the prohibitions on unlawful deprivation of liberty and arbitrary detention. International law prohibits, absolutely, the discriminatory detention of victims including detention that is linked to the sex of the victim. The practice of routine detention of women and girls in shelter facilities, for example, is clearly discriminatory and therefore unlawful. Routine detention of trafficked children is also directly contrary to international law and cannot be justified under any circumstances.

However, a rights based approach to this issue also confirms that a State may, on a case-by-case basis, be able to successfully defend victim detention with reference to, for example, criminal justice imperatives, public order requirements or victim safety needs. The validity of such a claim would need to be evaluated against the well-established principles of *necessity*, *legality*, and *proportionality*. It is probable that this standard would only support a claim of lawful detention where such detention is shown to be a last resort and in response to credible and specific threats to an individual victim’s safety. Even under these circumstances, States are required to ensure that protections are in place to guarantee the rights of the detained persons – such as judicial oversight

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<sup>37</sup> Recommendations adopted by the meeting of the Open-ended Interim Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, annexed to *Trafficking in Women and Girls, Report of the Secretary-General*, UN Doc. A/63/215 (4 August 2008), para. 11.

<sup>38</sup> See, for example, *Trafficking in Persons, Especially Women and Children*, Human Rights Council Resolution 11/3, UN Doc. A/HRC/RES/11/3 (17 June 2009), para. 3 (urging States to “take all appropriate measures to ensure that victims of trafficking are not penalized for being trafficked and that they do not suffer from revictimization as a result of actions taken by Government authorities, bearing in mind that they are victims of exploitation”) and General Assembly resolution 63/156 (30 January 2009), para. 12 (reiterating the above and also encouraging Governments to prevent, within their legal framework and in accordance with national policies, victims of trafficking in persons from being prosecuted for their illegal entry or residence”).

<sup>39</sup> See further, the extensive references in the *Commentary to the Trafficking Principles and Guidelines*, at p. 132.

<sup>40</sup> For a detailed overview of the relevant human rights standards and how they apply to the specific situation of victim detention see *Commentary to the Trafficking Principles and Guidelines*, pp133-139.

of the situation to determine its on-going legality and necessity, as well as an enforceable right to challenge the fact of detention. In the case of detained children, special and additional standards must be applied and special and additional protections must be in place. For example, the detaining authority must be able to demonstrate that the detention is in the child's best interests and that there is no reasonable alternative option available.

### 1.2.3. Protection and support for victim-witnesses

Victims of trafficking have a critical role to play in the criminal prosecution of traffickers and their accomplices. As noted previously, the complexity of the crime of trafficking and related evidentiary complications mean that investigations and prosecutions can be difficult, if not impossible, without the cooperation and testimony of victims. While criminal justice agencies can work towards lessening their reliance on victim testimony, the operational reality is that such testimony is usually essential to securing convictions for serious trafficking-related harms. Unfortunately, there are substantial practical obstacles to securing the productive involvement of victims as witnesses. Victims are vulnerable to influence and intimidation. Their evidence may be difficult to corroborate and there can be institutional resistance to providing the time and support that is necessary to build trust between criminal justice officials and victim-witnesses.<sup>41</sup>

While acknowledging the potential dangers and complexities, it is important to be clear that a human rights approach to trafficking *does not* reject the active involvement of victims in the investigation and prosecution of their exploiters. Rather, such an approach confirms that States, through their national criminal justice agencies should be working towards a situation whereby victims of trafficking are recognized as an essential resource and are provided with the protection and support they need to participate safely and effectively in the criminal justice process.

When considering the issue of victims as witnesses, it should be noted that these persons are, first and foremost, *victims of trafficking*, who, by virtue of that status, are entitled to immediate protection and support. International law is clear that *all* trafficked persons have a right to protection from further harm, a right to privacy; and a right to physical and psychological care and support. Trafficked persons also have a right to be informed of their legal options and given the time, space and help required to consider those options carefully. In some cases this may require the regularization of the trafficked person's legal status to enable them to access services and protect them from deportation.<sup>42</sup>

A number of States have **linked the provision of assistance and protection to cooperation with national criminal justice agencies**. Others have gone even further, requiring a separate and additional determination on the quality and usefulness of the victim's potential cooperation before granting protection and support. In some legal systems, the issue of conditional assistance is complicated by a legal requirement on victims to cooperate in an investigation or prosecution if that cooperation is deemed necessary. A human rights analysis of the practice of conditioning the provision of victim protection and support in this way reveals a number of problems. The most

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<sup>41</sup> These challenges are explored in detail in Moskowitz: *Challenges and Priorities*

<sup>42</sup> For a detailed analysis of these and other rights to which all trafficked persons are entitled, see *Commentary to the Trafficking Principles and Guidelines*, Part 2.3.

important is that such an approach amounts to a denial of the right of victims to receive assistance commensurate with their status as victims of crime and victims of human rights violations.

Criminal justice experience has also confirmed that there are other, very practical problems with such an approach. The linking of victim support to cooperation reflects the widely acknowledged importance of victims as a source of intelligence and testimony required to secure convictions against traffickers. However, the compelled victim is unlikely to make a strong witness, particularly in the likely event that this person is still suffering from physical or psychological trauma or fears retaliation.<sup>43</sup> Conditional assistance can be expected to exacerbate the high levels of distrust that may already exist between victims and law enforcement. Conditional assistance can also serve to undermine victim credibility in the trial process in a manner that would be avoided if all identified victims were provided similar levels of assistance and support.

There is growing international acceptance, at both legal and policy levels, of the need to separate protection and support from victim cooperation.<sup>44</sup> While the *Trafficking Protocol* makes no specific reference to this issue, the Legislative Guide to the Protocol states that: “support and protection shall ... not be made conditional upon the victim’s capacity or willingness to cooperate in legal proceedings.”<sup>45</sup> The *European Trafficking Convention* is clear on the need to separate protection and support from legal cooperation. States Parties to the Convention are required to: “adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.”<sup>46</sup> The *European Trafficking Directive* requires Member States to: “take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim’s willingness to cooperate in the criminal investigation, prosecution or trial.”<sup>47</sup> Additional authorities cited in the *Commentary to the Trafficking Principles and Guidelines* provide important, additional evidence of a trend towards acknowledging the need to detach protection and support from victim cooperation, particularly during the time immediately following identification, when victims can be expected to be most vulnerable.<sup>48</sup>

Other important obligations and standards relevant to the situation of victim-witnesses include the following:

**Protection:** Victims of trafficking are often unwilling to assist in criminal investigations for fear of harm to themselves or their families. In many cases, the prosecuting State cannot realistically provide victims with the level of protection they may need or want, either through lack of mandate, or resources, or both. It is essential that victims fully understand the limits of protection and are not lured into cooperating with false or unrealistic promises regarding their safety and that of their

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<sup>43</sup> See Gallagher and Holmes, also Moskowitz: Challenges and Priorities.

<sup>44</sup> See, for example, *Trafficking Principles and Guidelines*, at Guideline 6.1.

<sup>45</sup> *Legislative Guide*, at Part 2, para. 62. The Guide cites (at note 23) the *Trafficking Principles and Guidelines* to support this point.

<sup>46</sup> *European Trafficking Convention*, at Art. 12(6). The Explanatory Report to the Convention confirms the intention of the drafters that this provision refers to both investigations and criminal proceedings. *European Trafficking Convention Explanatory Report*, at para. 168. Note that the Report also highlights the fact that in the law of many countries, it is compulsory to give evidence if required to do so. Under such circumstances, it would not be possible to rely on the above provision in refusing to act as a witness when legally compelled to do so (paras 170, 176).

<sup>47</sup> *European Trafficking Directive*, Article 11(3).

<sup>48</sup> See *Commentary to the Trafficking Principles and Guidelines*, p. 143.

families.<sup>49</sup> At the same time, as noted in both the *European Trafficking Convention* and the UN *Organized Crime Convention*, the State should do all within its power and resources to provide or otherwise ensure effective protection to victims who are cooperating in criminal investigations.<sup>50</sup> This has been most recently affirmed by the *European Trafficking Directive*, which requires Member States to provide victims with immediate access to legal counseling and legal representation, including for the purpose of claiming compensation, as well as appropriate protection on the basis of an individual risk assessment.<sup>51</sup>

**Legal counseling, representation and the right to be present:** while all victims of trafficking may require legal advice and representation at some stage, this need is particularly acute for those who are involved in the criminal justice process including as witnesses. International law and policy confirms that trafficked persons should be provided with legal and other assistance in relation to criminal and other actions against traffickers/exploiters.<sup>52</sup> There is growing acceptance of the need to extend this to legal representation and to ensure that, where necessary, both legal counseling and representation are provided free of charge.<sup>53</sup> The *Trafficking Protocol* recognizes a duty on States to assist in ensuring that victims can be present at, and have their concerns and views considered, during criminal proceedings against traffickers.<sup>54</sup> It further recognizes that this right is compromised by premature repatriation and therefore requires States Parties of destination to ensure, “that such return is undertaken with due regard ... for the status of any legal proceedings related to the fact that the person is a victim of trafficking”.<sup>55</sup>

**Support and protection during the trial process:** It is essential that witness support and protection extend to the trial process itself. As a basic rule, States and others should work to ensure that legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical and psychological wellbeing.<sup>56</sup> An important aspect of this is protection of the victim’s privacy. Victims of trafficking will be understandably reluctant to give evidence if this means being identified by the media or standing up in a public courtroom, often in view of their exploiter, and talking about traumatic personal experiences or their private life. This can be especially difficult for women and girls who have suffered sexual and other forms of violence at the hands of their exploiters. Potentially useful measures include alternatives to direct testimony aimed at protecting the witness’s identity, privacy and dignity such as video, closed hearings and witness concealment, use of pre-trial depositions; and preliminary or accelerated hearings. As discussed further below, the rights and needs of child victims should be given the highest priority in the context of judicial proceedings.

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<sup>49</sup> *Trafficking Principles and Guidelines*, Guideline 6.6.

<sup>50</sup> *European Trafficking Convention*, Article 28; *Organized Crime Convention*, Article 24. Note that trafficked persons have a right, through their status as victims of crime, to measures that ensure their safety from intimidation and retaliation: *Basic Principles for Victims of Crime and Abuse of Power*, para. 6(d).

<sup>51</sup> *European Trafficking Directive*, Article 12.

<sup>52</sup> See, for example, *Trafficking Protocol*, Article 6(2)(a); *European Trafficking Convention*, Article 12(1)(d), (e); *SAARC Convention*, Article V.

<sup>53</sup> See, for example, *European Trafficking Directive*, Article 12(2).

<sup>54</sup> *Trafficking Protocol*, Article 6(2)(b).

<sup>55</sup> *Trafficking Protocol*, Article 8(2).

<sup>56</sup> *Trafficking Principles and Guidelines*, Guideline 6.4.

**The special needs of child victim-witnesses:** International law is clear on the point that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them. Children, like all other victims, have a legitimate role to play in criminal (and civil) actions against their exploiters and a right to use that system to protect their own interests: they have a right to be heard, a right to information and a right to be kept informed. However, child victims occupy an especially precarious situation in the criminal justice system. They may be especially vulnerable to intimidation and reprisals and their involvement in legal proceedings can cause further trauma. While the *Trafficking Protocol* does not specifically address this issue, the *Legislative Guide* requests States to ensure that, during investigations, as well as prosecutions and trial hearings: “where possible, direct contact between the child victim and the suspected offender be avoided. Unless it is against the best interests of the child, the child victim has the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings. During legal proceedings, the right to legal safeguards and effective protection of child witnesses needs to be strongly emphasized. Children who agree to testify should be accorded special protection measures to ensure their safety.<sup>57</sup> These and other requirements are affirmed as obligations for EU Member States in the *European Trafficking Directive*.<sup>58</sup> The *Trafficking Principles and Guidelines* and the accompanying *Commentary* provide additional guidance on this issue.<sup>59</sup>

Finally, it is important to recognize that effective support to victim-witnesses invariably requires close and productive **cooperation between criminal justice agencies and victim support agencies**. Police and prosecutors generally do not have the capacity to deliver the kind of support that a trafficked person requires. In some situations, the assumption of that role by criminal justice agencies will be directly counter-productive. A number of legal and policy instruments have affirmed that criminal justice agencies dealing with trafficking should work closely with victim support agencies – including non-governmental organizations – to ensure that the rights of victims are upheld and that they receive protection and support appropriate to their needs.<sup>60</sup>

#### 1.2.4. Due diligence in investigations and prosecutions

A human rights based approach to trafficking requires acknowledgement of a widespread culture of impunity for those involved in trafficking and related exploitation. As noted previously, despite important progress in the development of standards and rules, traffickers and their accomplices are seldom arrested, investigated, prosecuted or convicted. This is a human rights problem because it undermines accountability for human rights violations and prevents victims from receiving the justice to which they are entitled.

International law is clear on the point that States are under a legal obligation to investigate and prosecute trafficking with due diligence. The due diligence standard, explained further below, is generally viewed as requiring States to undertake such investigations and prosecutions seriously.

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<sup>57</sup> Legislative Guide, Part 2, para. 65(b).

<sup>58</sup> *European Trafficking Directive*, Article 15.

<sup>59</sup> See *Commentary to the Trafficking Principles and Guidelines*, pp 170-171

<sup>60</sup> *Trafficking Protocol*, Articles 6(3), 9(3); *European Trafficking Convention*, Article 35. Note that Resolutions of the General Assembly and Commission on Human Rights/Human Rights Council have repeatedly called for closer collaboration between Governments and non-government organizations to provide support for victims. See further, references in the *Commentary to the Trafficking Principles and Guidelines*, p. 199.

As criminal justice agencies gain greater experience in this crime type, the parameters of the relevant due diligence obligation become more clearly established. For example, it is now widely accepted that the obligation of investigation and prosecution requires procedures for the rapid and accurate identification of victims of trafficking: the centrality of victims to the criminal justice response to trafficking means that identification failures will inevitably compromise the quality of that response.<sup>61</sup> Another example is provided by the *organization* of the criminal justice response. States have come to recognize that the complexity of the trafficking crime requires specialization of the investigatory function and perhaps, also, of the prosecutorial process.<sup>62</sup> A failure to cultivate such specialization could well contribute to a finding that the relevant State had not discharged its obligation of investigation and prosecution to the required due diligence standard.

In relation to human rights violations generally, the due diligence standard imposes a *positive duty* on States to ensure the effectiveness of their criminal law through effective investigation and prosecution.<sup>63</sup> The duty to investigate and prosecute is applicable when there is an allegation of violation by State officials *and* when the alleged perpetrator is a non-State actor. In other words, where the State is not the immediate agent of harm, it will still become responsible, under international law, when it fails to seriously investigate private abuses of rights – thereby aiding in their commission – and to punish those responsible. The standard of due diligence has been recognized by the international community in relation to the obligation on States to investigate and prosecute trafficking in persons cases.<sup>64</sup>

The question of how to measure whether a State is taking seriously its obligation to investigate and prosecute trafficking cases is an important one. As the *Commentary to the Trafficking Principles and Guidelines* has noted, the worst cases will usually be the easiest to decide. A State that does not criminalize trafficking, that fails to investigate *any* cases of trafficking, that fails to protect *any* victims or to prosecute *any* perpetrators when there is reliable evidence available of the existence of a trafficking problem, will clearly not pass the due diligence test. In less clear cases, it is necessary to evaluate whether the steps taken evidence a genuine seriousness on the part of the State to investigate and prosecute trafficking.

In evaluating investigations, relevant factors may include: the independence of the investigators; the promptness of the investigation; whether reasonable steps were taken to secure evidence concerning the incident; and whether investigation or its results are open to public scrutiny.<sup>65</sup> Other factors that would be relevant in determining whether a trafficking investigation or prosecution is “full and effective”<sup>66</sup> might include whether an adequate legislative framework is in place and

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<sup>61</sup> See further, *Commentary to the Trafficking Principles and Guidelines*, p. 73.

<sup>62</sup> See further, section 1.2.4, below.

<sup>63</sup> See the discussion of the due diligence standard in the context of investigations and prosecutions in *Commentary to the Trafficking Principles and Guidelines*, pp 194-196. For a much more detailed discussion see Anne Gallagher, *The International Law of Human Trafficking* (2010) at Chapters 4 and 7.

<sup>64</sup> See, for example, *Trafficking in Women and Girls*, GA Res.63/156, UN Doc. A/RES/63/156 (30 January 2009), preamble, (“States have an obligation to exercise due diligence to prevent, investigate and punish perpetrators of trafficking in persons, and to rescue victims as well as provide for their protection, and that not doing so violates and impairs or nullifies the enjoyment of the human rights and fundamental freedoms of the victims”).

<sup>65</sup> These indicia of an effective investigation are drawn from *Finucane v The United Kingdom* (29178/95) [2003] ECHR 328 (1 July 2003)UK, paras. 68-71.

<sup>66</sup> *Case of Rantsev c Cyprus and Russia* (25965/14) [2009] ECHR 22 (7 January 2010) (*Rantsev v. Cyprus and Russia*).

whether officials are able to apply the national legal framework; whether criminal justice agencies been given the powers, resources and technical capacity required to investigate and prosecute this crime; and whether essential victim cooperation is facilitated. Data is another important element of the due diligence standard: States should be able to produce the necessary data on investigations, arrests, prosecutions and convictions for trafficking and related offences which will either confirm or call into question their adherence to the required standard. Some of these elements that have been subject to specific attention at the international legal and policy levels, are explored further below.

**Training, empowerment and specialization of criminal justice officials:** capacity building of criminal justice agencies has been recognized as an important preventive measure. A skilled, empowered and adequately resourced law enforcement response provides a powerful disincentive for traffickers by increasing the risks and costs associated with their activities.<sup>67</sup> Relevant international and regional treaties recognize that an effective criminal justice response to trafficking requires trained and competent officials.<sup>68</sup> The *Trafficking Principles and Guidelines* and other policy documents provide important insight into what this actually means in practice.

- Training should be provided to officials involved in the identification, investigation, prosecution and adjudication of trafficking cases including specialist and front-line law enforcement officials, immigration officials, prosecutors and judges;
- Training should adopt a human rights approach. It should seek to sensitize participants to the needs of trafficked persons, in particular those of women and children;
- Training should aim to provide criminal justice officials with the technical skills they require to identify, investigate, prosecute and adjudicate trafficking cases;
- Training should also aim to strengthen the capacity of criminal justice officials to protect victims and to respect and promote their rights;
- Training should encourage cooperation between criminal justice agencies and non-governmental agencies, especially those working to support victims of trafficking;
- Consideration should be given to the involvement of relevant non-governmental agencies in such training as a means of increasing its relevance and effectiveness; and
- The quality of training should be evaluated. Following training, trainee performance should be monitored and training impact assessment should take place.<sup>69</sup>

In addition to receiving skills and awareness training, criminal justice officials and agencies also need to be organized, empowered and funded in a manner that enables them to respond appropriately and effectively to the crime of trafficking.<sup>70</sup> In practical terms this can be expected to involve the establishment of a dedicated, specialized investigatory capacity;<sup>71</sup> and, potentially, the

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<sup>67</sup> *Trafficking Principles and Guidelines*, Principle 13, Guideline 7.8; *European Trafficking Convention*, Article 29(3);

<sup>68</sup> *Trafficking Protocol*, Article 10(2); *European Trafficking Convention*, Article 29(3); *European Trafficking Directive*, Article 18(3).

<sup>69</sup> See *Trafficking Principles and Guidelines*,

<sup>70</sup> See, for example, *Organized Crime Convention*, Article 20 (special investigative techniques); *Trafficking Protocol*, Article 10 (information exchange and training); *European Trafficking Convention*, Article 29 (specialized authorities and co-ordinating bodies); *SAARC Convention*, Article VIII.1 ("The States Parties ... shall provide sufficient means, training and assistance to their respective authorities to enable them to effectively conduct enquiries, investigations and prosecutions of offences under this Convention.").

<sup>71</sup> *European Trafficking Convention*, Article 29; ASEAN Practitioner Guidelines, Guideline B.1; International Criminal Police Organization (Interpol), *Trafficking in Human Beings - Best Practice Guidance Manual for Investigators* (2007), Ch 2/7; Gallagher and Holmes at 323-326.



specialization of other functions such as the prosecution and adjudication of trafficking cases;<sup>72</sup> coordination between various criminal justice agencies (for example, between front-line police agencies and specialist investigation units, between specialist units and prosecutorial agencies;<sup>73</sup> and close cooperation between specialist criminal justice agencies and victim support agencies to ensure that the rights of victims are upheld and that they receive protection and support appropriate to their needs.<sup>74</sup>

**A gender perspective on investigations and prosecutions:** International and regional treaty law notes the importance of ensuring the integration of a gender perspective into responses to trafficking.<sup>75</sup> This need is particularly acute in the context of criminal justice responses. Men and boys are often overlooked as victims of trafficking. The harm done to them may be under-reported and criminal justice agencies may be less willing to investigate and prosecute such cases.<sup>76</sup> Women and girls have often been trafficked in ways that are specific to their gender and with impacts that can also be very gender specific. Criminal justice systems may not be well equipped to deal with this reality. Failure of national criminal justice agencies to integrate a gender perspective into their work may aggravate the harm done to victims and render responses less effective in terms of ending impunity and securing justice. In the area of investigations and prosecutions, an appropriate gender perspective will ensure that criminal justice responses do not discriminate against any person on any of the prohibited grounds and that such responses do not result in a violation of any other established right.

### 1.2.5. Rights of suspects and the right to a fair trial

A human rights based response to trafficking is protective of the rights of all persons. This includes individuals who are suspected (or indeed, convicted) of trafficking offences. In practice, this means that the pursuit of traffickers can never be at the expense of international rules governing the administration of justice. These rules guarantee, to all persons, the right to receive a fair and public hearing by a competent, independent and impartial tribunal established by law.<sup>77</sup> As noted in the *Commentary to the Trafficking Principles and Guidelines*, States that fail to observe these standards risk compromising the integrity and reputation of their national criminal justice systems. Such failures can also lead to an erosion of community support for the investigation and prosecution of traffickers.<sup>78</sup>

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<sup>72</sup> The 2007 ASEAN Practitioner Guidelines on Effective Criminal Justice Responses to Trafficking in Persons, (ASEAN Practitioner Guidelines) propose specialization of both the prosecutorial and adjudicatory functions: Guideline 1.B.2 (“Prosecution agencies should ... develop a specialist response capacity. A number of prosecutors – appropriate to the current and anticipated caseload- should be specially trained and designated to undertake the preparation and presentation of TIP and related prosecutions”), Guideline 1.B.5 (“A number of judges, appropriate to the current and anticipated caseload, should be specially prepared and designated to undertake the management and adjudication of TIP related trials.”). The Brussels Declaration recommends the establishment of “specialized, joint investigative teams of investigators and prosecutors”.

<sup>73</sup> *European Trafficking Convention*, Article 29(2).

<sup>74</sup> *Trafficking Protocol*, Articles 6(3), 9(3); *European Trafficking Convention*, Article 35. 17.

<sup>75</sup> See, for example, *Trafficking Protocol*, Article 10(2); *European Trafficking Convention*, Article 17;

<sup>76</sup> See, for example, Rebecca Surtees, “Trafficked Men as Unwilling Victims” (2008) 4(1) *St Antony’s International Review* 16; United Nations Inter-Agency Project on Human Trafficking, *Exploitation of Cambodian Men at Sea* (2007).

<sup>77</sup> ICCPR, Articles 9, 14; *European Convention on Human Rights*, Articles 5, 6; *American Convention on Human Rights*, Articles 7, 8; *African Charter*, Articles 6, 7.

<sup>78</sup> *Commentary to the Trafficking Principles and Guidelines*, p. 201.

When developing systems and processes to protect victims and encourage their participation in court processes, it is essential to remain mindful of the rights of accused persons to a fair trial. Basic fair trial principles include the principle that all persons are considered equal; that everyone is entitled to and receives a fair and public hearing by a competent, independent and impartial tribunal established by law; and that all accused persons are presumed innocent until proven guilty according to law. International law also grants a range of procedural and other rights to suspects. These rights are extensive and include: the right to be informed promptly and in detail of the nature and cause of the charges; and the right of accused persons to examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions.<sup>79</sup> In the specific context of a criminal trial it is the responsibility of both the prosecutor and the judge to ensure that a fair trial takes place in accordance with applicable international standards.<sup>80</sup> Oversight mechanisms should be in place to ensure transparency and accountability of the investigatory/prosecutorial/judicial process.

### 1.2.6. Proportionality in sanctions

Sanctions are an essential component of a comprehensive response to trafficking. Effective and proportionate sanctions should be applied to those convicted of trafficking including its component or related offences such as sexual exploitation, forced labour or services, slavery or practices similar to slavery and servitude, debt bondage, the worst forms of child labour and forced marriage.

International law places an obligation on States to impose effective and proportionate sanctions for trafficking and related offences. The *Organized Crime Convention*, for example, requires that offences established under the *Trafficking Protocol* are liable to sanctions that take into account the gravity of the offences and that discretionary sentencing powers take into account the need to deter the commission of trafficking-related offences.<sup>81</sup> The *European Trafficking Convention* requires trafficking and other offences established under that instrument to be punishable by “effective, proportionate and dissuasive sanctions” including custodial penalties that can give rise to extradition.<sup>82</sup> A similar, but more detailed obligation is set out in the *European Trafficking Directive*.<sup>83</sup> The *Organized Crime Convention*, the *European Trafficking Convention* and the *European Trafficking Directive* require, in cases of trafficking involving legal persons (such as companies, business enterprises and charitable organizations), that such legal persons be made subject to effective, proportionate and dissuasive criminal or non-criminal sanctions including monetary sanctions.<sup>84</sup> Such non-criminal sanctions could include the confiscation of assets (discussed further below) and measures such as closure of any establishment used to carry out

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<sup>79</sup> *International Covenant on Civil and Political Rights*, (ICCPR), Article 14(3).

<sup>80</sup> This responsibility is noted in the ASEAN Practitioner Guidelines at 1.F.5.

<sup>81</sup> *Organized Crime Convention*, Article 11. A State that is party to the *Organized Crime Convention* and not the *Trafficking Protocol* would be required to establish that trafficking is, under its law, a “serious crime” as defined in the Convention for these provisions to apply to trafficking offences: *Organized Crime Convention*, Article 2(9)(b).

<sup>82</sup> *European Trafficking Convention*, Article 23.1. As noted in the Explanatory Report to the Convention, this would require provision for custodial penalties of at least one year: Explanatory Report to the *European Trafficking Convention*, para. 252.

<sup>83</sup> *European Trafficking Directive*, Article 4.

<sup>84</sup> *Organized Crime Convention*, Article 10(4); *European Trafficking Convention*, Article 23(2), *European Trafficking Directive*, Article 6.

trafficking in human beings and the banning of a perpetrator from carrying out the activity in the course of which the offence was committed.<sup>85</sup>

When considering the appropriate standard, it is important to recognize that sanctions that are disproportionate to the harm caused and the potential benefits derived from trafficking will create distortions that can only hinder effective criminal justice responses. For example, inadequate penalties for trafficking can fail to deter future crimes, fail to deliver justice to victims; and potentially impair the effectiveness of international cooperation procedures, such as extradition, which are triggered by a severity test linked to the gravity of sanctions. On the other hand, rigid or extremely severe sanctions, such as mandatory minimum custodial terms or provision for capital punishment, may not meet the required human rights and criminal justice standard in all cases. Such penalties may also have the unintended consequence of decreasing reporting and convictions.

The *Organized Crime Convention* (and, by extension, the *Trafficking Protocol*) requires penalties that take into account the gravity of the offence and that give due regard to deterrence.<sup>86</sup> The *European Trafficking Convention* standard for sanctions is that they be “effective, proportionate and dissuasive”.<sup>87</sup> Sanctions must be generally consistent with the harm caused and the benefits derived from trafficking and related exploitation. They must, in short, “clearly outweigh the benefits of the crime”.<sup>88</sup> Other important considerations relate to the nature of the offence. A typical trafficking case may involve low-level recruiters and brokers as defendants - as well as individuals more directly involved in the exploitation. The benefits that each party derives from the exploitation are likely to be starkly different as, will be their contribution to the harm caused to victims. The removal of judicial discretion through minimum mandated penalties, or the application of the death penalty to trafficking cases may not meet the “effective and proportionate” standard in all cases given the complexity of the trafficking crime, the inevitable investigatory difficulties and the highly variable levels of complicity among offenders.<sup>89</sup>

Another aspect of the proportionality requirement is the concept of aggravated offences, which accepts that a crime such as trafficking can be made worse under certain circumstances and should, therefore, attract a different, presumably harsher penalty. Aggravated offences are recognized in relevant treaty law. The *European Trafficking Convention*, for example, requires that certain circumstances be regarded as aggravating circumstances in the determination of penalties for trafficking-related offences. These include: when the offence endangered the life of the victim or was committed against a child; when it was committed by a public official in the performance of her/his duties; and when it was committed within the framework of a criminal organization.<sup>90</sup> This

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<sup>85</sup> These latter two measures are specifically envisaged in the *European Trafficking Convention*, Article 23(4). See also the *Trafficking Principles and Guidelines*, which, at Guideline 4.2, propose a review of laws, administrative controls and conditions relating to licensing and operation of businesses that may serve as a cover for trafficking.

<sup>86</sup> *Organized Crime Convention*, Article 11.

<sup>87</sup> *European Trafficking Convention*, Article 23(1).

<sup>88</sup> *Legislative Guide*, Part 1, para. 262.

<sup>89</sup> Gallagher and Holmes. Some extradition treaties specify that States shall not grant extradition when the offence in question is punishable in the requesting State by death penalty: *Inter-American Convention on Extradition*, Article 9; or at least that States may refuse extradition in such circumstances: *European Convention on Extradition*, Article 11; *ECOWAS Convention on Extradition*, Article 17.

<sup>90</sup> *European Trafficking Convention*, Article 24. See also *SAARC Convention*, Article IV;

standard is affirmed by the *Trafficking Principles and Guidelines*, which request States to consider making legislative provision for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.<sup>91</sup> The *European Trafficking Convention* and *SAARC Trafficking Convention* both recognize the principle of *international recidivism* by providing that previous convictions in other countries, particularly for similar offences, could be taken into account when determining penalties.<sup>92</sup>

### 1.2.7. Trafficking related corruption

The term corruption generally refers to the misuse of public power for personal benefit or gain. While this issue has not traditionally been linked to human rights, it is clear that corruption exacerbates human rights violations and negatively affects the capacity of States to meet their human rights obligations.<sup>93</sup> The human rights violations associated with corruption invariably afflict the poorest and most vulnerable - including women, children migrants and minorities – groups that are also over-represented amongst victims of trafficking.

The link between corruption and the criminal justice side of trafficking appears is a strong one. International trafficking requires the active involvement or at least the acquiescence of public officials to move individuals across international borders and, in relation to both internal and international trafficking, to deliver them into and maintain them in situations of exploitation. The high levels of impunity enjoyed by traffickers and their accomplices appears due, in large part, to public sector corruption involving enforcement officials, prosecutors and the judiciary.<sup>94</sup> Public sector involvement 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 organized criminal groups to obstruct justice. Such involvement, particularly by criminal justice personnel, exacerbates victim vulnerability and renders almost impossible the full discharge of a State's obligation to investigate and prosecute trafficking cases with due diligence.

International law requires States to identify and eradicate public sector involvement in trafficking. The *Organized Crime Convention*, for example, acknowledges the strong link between organized criminal activities such as trafficking and corruption.<sup>95</sup> It requires States to take strong measures to criminalize all forms of corrupt practices and ensure their laws are harmonized so as to facilitate cooperation.<sup>96</sup> States parties are required to adopt measures designed to promote integrity and to

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<sup>91</sup> *Trafficking Principles and Guidelines*, Guideline 4.3.

<sup>92</sup> *European Trafficking Convention*, Article 25: "each Party shall adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another party in relation to offences established in accordance with this Convention when determining the penalty"; *SAARC Convention*, Article IV: "States Parties to ensure courts ... can take into account factual circumstances which make the commission of [offences established under the Convention] particularly grave, viz ... previous convictions, particularly for similar offences, whether in a Member State or in any other country".

<sup>93</sup> See International Council on Human Rights Policy and Transparency International, *Corruption and Human Rights: Making the Connection* (2009).

<sup>94</sup> See further, Anne Gallagher, *The International Law of Human Trafficking*, Chapter 8.

<sup>95</sup> Legislative Guide, Part 1, paras. 163-165.

<sup>96</sup> *Organized Crime Convention*, Article 8. See further, Legislative Guide, Part 1, paras. 163-192.

prevent and punish corruption of public officials.<sup>97</sup> States parties 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.<sup>98</sup> The *European Trafficking Convention*, the *European Trafficking Directive* and the *SAARC Convention* all recognize public sector complicity in trafficking as an aggravated offence warranting relatively harsher penalties.<sup>99</sup> Many international and regional policy documents, confirm the link between trafficking and corruption and the need for States to respond effectively.<sup>100</sup>

An international legal obligation to address trafficking related corruption can also be based on other sources of law. For example, the provisions of the UN *Convention Against Corruption* apply to all forms of trafficking-related corruption and complicity. It requires States Parties to establish specific corruption-related offences including bribery, abuse of functions; and “obstruction of justice” (defined as the use of corrupt or coercive means to interfere with potential witnesses or to interfere with the actions of judicial and law enforcement officials as a criminal offence). It also requires States Parties to put in place a range of preventive measures and to cooperate with each other in every aspect of the fight against corruption including through rendering specific forms of mutual legal assistance in gathering and transferring evidence for use in prosecutions, to extradite offenders and to support the tracing, seizure and confiscation of the assets of corruption. Similar obligations can be found in a series of corruption conventions that have been developed at the regional level in Africa and Europe.<sup>101</sup>

States are responsible for identifying, investigating and punishing trafficking related corruption. The standard that is to be applied in evaluating whether states have met their obligation in this respect is “due diligence”, the same standard that is used to judge trafficking related investigations and prosecutions. Due diligence is also the appropriate standard in evaluating whether the State has taken sufficient steps to *prevent* involvement in trafficking by its officials. As previously discussed, application of this standard requires a consideration of whether the State has taken its obligation seriously. The previous discussion on due diligence confirmed that deciding whether or not a State is meeting the due diligence standard ultimately comes down to an assessment of whether the State is taking its obligations to prevent, respect, protect and fulfill human rights seriously. Relevant factors to consider in this context would include: whether the legal framework supports action against trafficking related corruption; whether public sector involvement in trafficking is grounds for an aggravated offence attracting relatively harsher penalties; whether procedures are in place for the effective, independent and public investigation of complaints of trafficking involving or implicating public officials; and whether there is independent and effective scrutiny of complaints involving public officials.<sup>102</sup>

### **1.2.8. Asset recovery**

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<sup>97</sup> *Organized Crime Convention*, Article 9(1).

<sup>98</sup> *Organized Crime Convention*, Article 9(2).

<sup>99</sup> *European Trafficking Convention*, Article 24(c); *European Trafficking Directive*, Article 4(3); *SAARC Convention*, Article IV.

<sup>100</sup> See the citations in the *Commentary to the Trafficking Principles and Guidelines*, pp 118-119.

<sup>101</sup> See further *Commentary to the Trafficking Principles and Guidelines*, p. 119.

<sup>102</sup> For further details and citations, see *Commentary to the Trafficking Principles and Guidelines*, p. 121-123.

Asset recovery is an important part of an effective criminal justice response to trafficking. Attacking the financial basis of trafficking helps to prevent future trafficking by driving up the risks and lowering profits. A strong confiscation and recovery regime can also support the criminal conviction of traffickers by providing evidence to substantiate and/or corroborate a case of trafficking. Confiscated assets can also be used to realize the important right of victims to access compensation for the harms committed against them. The assets of a trafficking crime are often substantial and will usually include *profits* or *proceeds* of trafficking as well as *instrumentalities* such as factories, brothels, boats and farms where the exploitation took place.

Asset recovery is usually a three-step process: (i) investigative measures to trace the assets in question; (ii) preventive measures to immobilize the assets identified as related to the crime in question (freezing, seizing); and (iii) confiscation, return and disposal. Criminals involved in trafficking may organize their affairs so that the proceeds derived from a trafficking-related crime are located in a State other than the one in which they live or in which the crime takes place. The international cooperation mechanisms discussed in the next sub-section enable countries to give effect to foreign freezing and confiscation orders, and to work together in recovering criminal assets.

The legal basis of asset recovery regime can be national law, bilateral or multilateral treaties or, most commonly, a combination of both. States generally develop their own national laws that specify a range of matters such as: which “proceeds” can be a target of confiscation; criminal and civil evidentiary standards; institutions, tools and court or legal orders for obtaining financial information; and procedures for recovery of proceeds. In relation to cooperation with other countries, recovery of proceeds is a form of mutual legal assistance. States will therefore rely on provisions of their national mutual legal assistance laws as well as any treaties that may exist between them and the cooperating State. Domestic money laundering laws and extradition treaties may also contain provisions on international cooperation in the recovery of the proceeds of crime.

International law requires States to take action to recover the assets of trafficking related crimes. The *Organized Crime Convention* sets out detailed rules and procedures for identification, tracing, freezing and seizure of assets and confiscation of proceeds of designated crimes including trafficking.<sup>103</sup> States Parties to the Convention and the *Trafficking Protocol*<sup>104</sup> are required to create adequate powers (relating to both substantive and procedural law) to enable and support confiscation and seizure.<sup>105</sup> The *European Trafficking Convention* requires States Parties to “adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with [the Convention] or property the value of which corresponds to such proceeds”.<sup>106</sup> International and regional treaties on related issues such as corruption<sup>107</sup> and sale of children, child prostitution and

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<sup>103</sup> *Organized Crime Convention*, Articles 12-14.

<sup>104</sup> A State that is party to the Convention and not the Protocol would be required to establish that trafficking is, under its law, a “serious crime” as defined in the Convention for these provisions to apply to trafficking offences: *Organized Crime Convention*, Article 2(9)(b); Legislative Guide to the *Organized Crime Convention* and its Protocols, Part 1, para. 302.

<sup>105</sup> *Organized Crime Convention*, Article 12. See further, Legislative Guide, Part 1, paras. 302-313.

<sup>106</sup> *European Trafficking Convention*, Article 23(3).

<sup>107</sup> *Convention Against Corruption*, Article 31; *Inter-American Convention Against Corruption*, Article XV; *Criminal Law Convention on Corruption*, Article 23; *African Union Convention on Combating Corruption*, Article 16.

child pornography<sup>108</sup> identify an obligation on States Parties to confiscate the assets and proceeds of relevant crimes. International policy documents affirm the importance of this aspect of the criminal justice response to trafficking.<sup>109</sup>

Are States required to use confiscated assets to benefit victims? Certainly the linking of a criminal justice measure, such as confiscation of proceeds, to victim support is an important step forward in integrating a human rights approach to trafficking. At the present stage however, the relevant international law on this point is advisory rather than mandatory. For example, the *Organized Crime Convention* requires States parties to consider specific disposal options including victim compensation as a *priority option*.<sup>110</sup> The *European Trafficking Convention* requires States Parties to guarantee compensation for victims “for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, *which could be funded by the assets resulting from the application of [confiscation] measures*”.<sup>111</sup> The preamble to the *European Trafficking Directive* encourages “the use of seized and confiscated instrumentalities and the proceeds from the offences referred to in this Directive to support victims’ assistance and protection, including compensation of victims”.<sup>112</sup>

In her recent report to the Human Rights Council on remedies, the Special Rapporteur on Trafficking recommended that States: “establish legislative provisions for the confiscation of assets and proceeds of trafficking offences, and for the use of such assets and proceeds to compensate trafficked persons”. She further recommended that States ensure law enforcement officials are adequately trained in identifying, tracing, freezing and confiscating assets connected to the crime of trafficking.”<sup>113</sup> These recommendations echo the position of the Trafficking Principles and Guidelines on the issue of asset recovery.<sup>114</sup>

### 1.2.9. International cooperation in investigations and prosecutions

The crime of trafficking in persons often has a strong transnational element. For example, victims may be recruited in one country, transported through a second, and exploited in a third. Evidence, suspects and assets can be located in a country other than the one where an investigation or prosecution is taking place. This can present a real obstacle to effective criminal justice responses because the core components of that response, (laws, law enforcement agencies, prosecution services and the courts), are typically structured and generally only operate within the confines of national borders. Other, more practical obstacles to cooperation across borders in trafficking cases

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<sup>108</sup> *CRC Optional Protocol on Sale of Children*, Article 7.

<sup>109</sup> See, for example, Global Plan of Action, para. 45 and *Trafficking Principles and Guidelines*, Principle 16.

<sup>110</sup> Under the terms of the Convention, when a State Party has responded to a request from another State Party with regard to asset confiscation, then the requested State shall, if requested and legally able, “give priority to returning the confiscated proceeds or property to the requesting State Party so that it can give compensation to the victim of the crime or return such proceeds of crime or property to their legitimate owners.” *Organized Crime Convention*, Article 14(2). Other options proposed under Article 14 include contributing proceeds or property to a special UN fund for use against organized crime and sharing confiscated funds with other States Parties in order to encourage enhanced cooperation among law enforcement agencies.

<sup>111</sup> *European Trafficking Convention*, Article 15(4) (emphasis added).

<sup>112</sup> *European Trafficking Directive*, para. 13

<sup>113</sup> Human Rights Council, Report of the Special Rapporteur on Trafficking in Persons Especially Women and Children, Joy Ngozi Ezeilo, Un Doc. A/HRC/17/35 (2011), para. 70.

<sup>114</sup> *Trafficking Principles and Guidelines*, Principle 16, Guideline 4.4.

include difficulties in communicating with counterparts who speak a different language and differences in legal, political and cultural traditions. It is also important to note that international cooperation requires a high level of political will. In the absence of a strong government commitment on both sides, such cooperation will inevitably be weak, sporadic and ineffective.

While there are many challenges, there are also important opportunities. Through international agreements and national laws, most countries have developed a strong legal basis for international cooperation in criminal matters such as trafficking and a range of tools that can be used by criminal justice agencies to facilitate such cooperation. Progress has been made in the three key areas of cooperation: operational, police to police cooperation; mutual legal assistance (including for the recovery of proceeds of crime); and extradition. Human rights are highly relevant to each of these aspects of international cooperation – not just because effective cooperation helps to address impunity and secure access to justice – but also because such cooperation is subject to a range of international legal rules that aim to ensure the rights of all persons involved, including suspects, are respected and protected.

International law and policy strongly supports more effective international cooperation in the investigation and prosecution of traffickers. The *Organized Crime Convention* and *Trafficking Protocol*, for example, both contain many provisions aimed at ensuring States have an adequate legal basis and appropriate tools to undertake such cooperation. The *European Trafficking Convention* also sets out a number of obligations in this area. The obligation on States to cooperate in trafficking cases was recently affirmed by the European Court of Human Rights in the case *Rantsev v Cyprus and Russia*. In its judgment, the court held that the obligation on States to conduct full and effective investigations into trafficking allegations requires them to “take such steps as are necessary and available in order to secure relevant evidence, whether or not it is located in the territory of the investigating State”.<sup>115</sup> The Court further confirmed that, “in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States are also subject to a duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories”.<sup>116</sup>

The following paragraphs provide a brief overview of the three main forms of international cooperation with a particular focus on the relevant legal standards and human rights implications.

**Extradition:** is the formal name given to the process whereby one State (the Requesting State) asks another State (the Requested State) to return an individual to face criminal charges or punishment in the Requesting State. The extradition process is not one in which guilt or innocence is determined. It is the Courts of the Requesting State that will ultimately make that determination. The *Organized Crime Convention* requires States to make trafficking an extraditable offence under their national law and extradition treaties.<sup>117</sup> This obligation finds strong legal and political support

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<sup>115</sup> *Rantsev v Cyprus and Russia*, para 241.

<sup>116</sup> *Rantsev v Cyprus and Russia*, para 249.

<sup>117</sup> *Organized Crime Convention*, Article 16. Note that the obligation to make trafficking an extraditable offence would only apply to offences constituting a “serious” transnational crime under the Convention and Protocol, and involving an organized criminal group: Legislative Guide to the *Organized Crime Convention* and its Protocols, Part 1, paras. 403, 414-417. States Parties may, however, apply the extradition provisions to other offences (such as trafficking that does



elsewhere.<sup>118</sup> The *Organized Crime Convention* also encourages States to adopt a range of measures designed to streamline the extradition process by expediting requests and simplifying evidentiary procedures.<sup>119</sup> This is a very important practical requirement. Extradition is invariably a complicated and time-consuming process that is subject to numerous obstacles and restrictions. Unless States make a positive effort to streamline their extradition procedures in cases of trafficking, it is unlikely that this tool of international legal cooperation will contribute greatly to ending impunity for traffickers who move across borders to escape prosecution or punishment.

Human rights are a key aspect of extradition. The importance of fair treatment and human rights in extradition is confirmed by the *Organized Crime Convention*<sup>120</sup> as well as by regional extradition treaties.<sup>121</sup> The relevant international rules require States to deny requests for extradition that may result in the suspect being treated unfairly (e.g. being tried for conduct that has already been the subject of acquittal or punishment or that is not an offence in the requested State). These rules also prevent persons from being extradited on grounds that the request is discriminatory in purpose or effect, or that the person may be subject to the death penalty, torture or cruel, inhuman or degrading treatment or punishment. States can (and, arguably, should) also refuse extradition when the Requesting State is not able to assure that the suspect will receive the minimum procedural guarantees that are essential to a fair trial.

When a State denies an extradition request that is not the end of the matter. While respecting that entitlement, international law places an obligation on States refusing extradition to nevertheless prosecute certain offences. States are, for example, required to extradite and prosecute in relation to war crimes, crimes against humanity and torture.<sup>122</sup> States are also required, under customary international law, to extradite or prosecute in relation to violations of key international norms such as those relating to slavery and the slave trade.<sup>123</sup> The *Organized Crime Convention* extends the principle of “extradite or prosecute” to trafficking offences.<sup>124</sup> States Parties to the *European Trafficking Convention* are similarly obliged to prosecute if a request for extradition for an offence

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not involve an organized criminal group) and, under Article 16(2), are encouraged to do so. For details of other relevant treaty-based provisions and policy documents see *Commentary to the Trafficking Protocol*, pp 205-206.

<sup>118</sup> See further, *Commentary to the Trafficking Protocol*, pp 205-206.

<sup>119</sup> *Organized Crime Convention*, Article 16(8). See also *Trafficking Principles and Guidelines*, Guideline 11.9.

<sup>120</sup> *Organized Crime Convention*, Article 16(13) provides: “Any person [involved in an extradition request or process]...shall be guaranteed fair treatment at all stages of the proceedings including enjoyment of the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present”. Article 16(14) provides that an obligation to extradite will not exist under the Convention “if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s race, sex, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any of these reasons”.

<sup>121</sup> For example, the *Inter-American Convention on Extradition*, Article 16(1) provides that “The person sought shall enjoy in the requested State all the legal rights and guarantees granted by the laws of that State”. See also *ECOWAS Convention on Extradition*, Articles 5, 14.

<sup>122</sup> See, for example, *Statute of the International Criminal Court*, particularly Part 2, Articles 5, 8(1), 11, 12, 13, 17, 19, and Part 3, Article 26.h, and *Torture Convention*, Article 7(1).

<sup>123</sup> M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (1995). See also Colleen Enache-Brown and Ari Fried, “Universal Crime, Jurisdiction and Duty: The Obligation of Aut Dedere Aut Judicare in International Law” (1998) 43 *McGill Law Journal* 613.

<sup>124</sup> *Organized Crime Convention*, Articles 15(3), 16(10). Note that the *aut dedere aut judicare* rule is limited, in the Convention, to cases where refusal relates to nationality of the suspect.

established under that instrument is refused.<sup>125</sup> Other international treaties reiterate the importance of this principle.<sup>126</sup>

**Mutual legal assistance:** is the process countries use to formally ask other countries to provide information and evidence for the purpose of an investigation or prosecution. Mutual legal assistance is a very formal cooperation tool because it is generally seeking to obtain evidence that must be admissible in a criminal trial. Common types of mutual legal assistance include: taking evidence or statements from persons; locating and identifying witnesses and suspects; effecting service of judicial documents; executing searches and seizures; freezing assets; providing originals or certified copies of relevant documents and records; identifying or tracing proceeds of crime; facilitating the voluntary appearance of persons in the Requesting State; transfer of proceedings/investigation/prisoners; transfer of prisoners to give evidence; and video recording of testimony.

Mutual legal assistance regimes are often established through a bilateral or multilateral treaty that may cover a single issue such as terrorism, money laundering or organized crime. Treaties can also be concluded for the purpose of providing a general framework of rules within which mutual legal assistance matters are dealt with between two or more countries. Mutual legal assistance treaties generally indicate: the kinds of assistance to be provided; the rights of the requesting and requested States; the rights of alleged offenders; and the procedures to be followed in making, receiving and executing requests. States can also deal with mutual legal assistance matters through their domestic law. Many countries have passed legislation enabling them to provide various forms of assistance to other States without the need for treaty relations.

International treaty law confirms the importance of mutual legal assistance in trafficking and related cases. The *Organized Crime Convention*, as the parent instrument to the *Trafficking Protocol*, obliges States Parties to afford one another the widest measure of such assistance in investigations, prosecutions and judicial proceedings in relation to offences covered by that instrument, including trafficking.<sup>127</sup> It also sets out a detailed legal and procedural framework for mutual legal assistance between States Parties.<sup>128</sup> The *SAARC Convention* contains an obligation of mutual legal assistance in respect of offences established under that treaty,<sup>129</sup> as does *CRC Optional Protocol on Sale of Children*.<sup>130</sup> The importance of mutual legal assistance in trafficking cases is reiterated in international and regional policy documents.<sup>131</sup>

Human rights guarantees apply as much to mutual legal assistance as they do to extradition. States must ensure that nothing in the terms of a mutual legal assistance request would constitute

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<sup>125</sup> *European Trafficking Convention*, Article 31(3). Note that the provision is limited to cases where refusal relates to nationality of the suspect.

<sup>126</sup> *SAARC Convention*, Article VII (4); *CRC Optional Protocol on Sale of Children*, Article 4(3), 5; *Inter-American Convention on Extradition*, Article 8.

<sup>127</sup> *Organized Crime Convention*, Article 18.

<sup>128</sup> *Organized Crime Convention*, Article 18.

<sup>129</sup> *SAARC Convention*, Article VI. Note that the drafters of the *European Trafficking Convention* decided not to create a separate mutual legal assistance regime that would either unnecessarily duplicate or compete with the comprehensive standards already in existence: Explanatory Report to the *European Trafficking Convention*, para. 337.

<sup>130</sup> *CRC Optional Protocol on Sale of Children*, Articles 6, 10.

<sup>131</sup> See, for example, Global Plan of Action, para. 49. See also, *Trafficking Principles and Guidelines*, Guideline 11.8.

an actual or potential infringement of human rights, in relation to both the subject of the request and any third parties. Cooperation may be refused when requesting States do not respect basic rights and procedural guarantees as set out in major human rights instruments such as the *Universal Declaration of Human Rights* and the *ICCPR*.

**Informal cooperation:** is a separate, less rule-bound international criminal cooperation tool, which is available outside the formal mutual assistance regime. Informal cooperation enables law enforcement and regulatory agencies (such as taxation and revenue authorities; companies and financial service regulators) to share information and intelligence directly with their foreign counterparts without any requirement to make a formal mutual assistance request. In this sense, informal cooperation complements mutual legal assistance regimes. In the trafficking context, informal cooperation might be used to conduct surveillance, locate victims, or take voluntary witness statements.

The *Organized Crime Convention* and the *Trafficking Protocol* both recognize the value of the most common form of informal cooperation, which is between police agencies of different States. The Convention lists a range of objectives for such cooperation including early identification of offences and exchange of information and intelligence.<sup>132</sup> It encourages States Parties to enter into bilateral or multilateral agreements or arrangements with a view to enhancing cooperation between law enforcement agencies including through joint investigations.<sup>133</sup> The Protocol emphasizes cooperation through information exchange for purposes such as victim/perpetrator identification in transit, document verification and proactive intelligence gathering.<sup>134</sup> The importance of law enforcement cooperation in the investigation of trafficking-related crimes has been recognized widely outside these two treaties.<sup>135</sup>

## Part 2: Preliminary Conclusions and Recommendations

States have begun to incorporate and implement elements and standards found in international human rights law but much remains to be done. The challenge of balancing criminal justice imperatives with strong and consistent commitment to human rights for all persons is shared by all States, in different ways. World-wide low prosecution and conviction rates confirm that even those States with the most advanced criminal justice systems and the most sophisticated anti-trafficking strategies must look to improve their performance. Of particular concern in the present context is the need to ensure that the rights of all persons, most particularly but not exclusively victims, are respected in the quest to end impunity for traffickers.<sup>136</sup> The goal of anti-trafficking strategies should be to promote, protect and respect the rights of all persons and at minimum, to do no harm.<sup>137</sup> It is important that States enact clear and enforceable legal frameworks that comply with international human rights law, standards and principles in pursuing effective criminal justice

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<sup>132</sup> *Organized Crime Convention*, Article 27(1).

<sup>133</sup> *Organized Crime Convention*, Articles 19, 27(2).

<sup>134</sup> *Trafficking Protocol*, Article 10(1).

<sup>135</sup> See references in the *Commentary to the Trafficking Principles and Guidelines*, pp 210-211.

<sup>136</sup> See further, Kelly Hyland Heinrich, *Ten Years After the Palermo Protocol: Where are protections for Human Trafficking?*, Human Rights Brief, Volume 18, Issue 1, (Fall 2010).

<sup>137</sup> See Rights4Change, *The Right Guide*; a tool to assess the human rights impact of anti-trafficking policies, 10 [http://www.humanrightsimpact.org/fileadmin/hria\\_resources/Trafficking - Right guide/The Right guide ENG.pdf](http://www.humanrightsimpact.org/fileadmin/hria_resources/Trafficking_-_Right_guide/The_Right_guide_ENG.pdf) (Right Guide).

responses to trafficking in persons and take steps to identify and prevent any unintended negative consequences on the rights of all persons concerned.

## **2.1. Ensuring that trafficked persons are not criminalized**

A pre-requisite to building an effective criminal justice response to trafficking in persons that ensures that trafficked persons are not criminalized is for States to take proactive steps to quickly and accurately identify trafficking victims. This should include providing training on identification to specialists and generalists and in particular, frontline responders who often have the greatest opportunity to identify victims.<sup>138</sup>

Further, laws and policies that do not contain adequate safeguards to prevent the prosecution of trafficking victims for status-related offenses must be revised. States that have laws criminalizing certain activities commonly known to be the end result of trafficking violations, including sex crimes, begging, labor or immigration violations, should take steps to ensure that those prosecuted are not trafficked persons.

## **2.2. Facilitating the safe and productive involvement of victims in prosecutions**

As discussed in Part 1, victims of trafficking are legally entitled to take an active and meaningful role in efforts to convict their exploiters and should be supported to that end. Some States offer reflection and recovery periods accompanied by the provision of assistance that is not conditioned on cooperation with authorities. The adoption and further development of such periods should be encouraged. Attention should be paid to ensuring that victims are able to make informed decisions on whether to accept or refuse care and support.<sup>139</sup>

The provision of protection and support to victims during the trial period is often complicated. As States work to better facilitate the meaningful participation of victim-witnesses, the issues of communication, safety and privacy should be carefully considered. States should aim to incorporate skilled translators with experience in local legal systems into their criminal justice agencies to be present during witness interviews, court preparation and testimony. In addition, States should do everything possible to ensure the safety and well-being of victim-witnesses and their families and should inform victims of the limits of protection. In order to protect privacy, the use of protective screens, closed hearings or testimony via video-link has proven useful.<sup>140</sup>

## **2.3. Promoting cooperation between criminal justice and victim support agencies**

Coordinated and consistent collaboration between government and victim support agencies is important to the provision of services for trafficking victims.<sup>141</sup> The role of victim support agencies in helping to identify trafficking cases and victims, provide information on trends in human trafficking

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<sup>138</sup> Gallagher and Holmes, p 326.

<sup>139</sup> See *Commentary to the Trafficking Principles and Guidelines*, p 150.

<sup>140</sup> Gallagher and Holmes, p 333.

<sup>141</sup> See *From Protection to Prosecution*, pp 5-7.

and to deliver services and support should be recognized and facilitated by States.<sup>142</sup> In addition, work should be done to minimize levels of distrust and to encourage greater coordinated collaboration.<sup>143</sup>

## 2.4. Improving investigations and prosecutions

In order for States to fulfill their duty to investigate, prosecute and adjudicate trafficking crimes with due diligence, it is necessary to build the capacity of criminal justice agencies and to address gaps in knowledge, low levels of commitment and morale among officials.<sup>144</sup> Training is also an important component of anti-trafficking strategies and should be provided to officials from all agencies that might encounter trafficking crimes or victims – with a special focus on those agencies or individuals expected to be involved in the investigation, prosecution and adjudication of trafficking cases.

Another way that States can strengthen capacity to investigate and prosecute trafficking is through promoting a specialist response to the crime. Specialist units should be subject to well-developed controls; equipped with clear mandates to address anti-trafficking matters, including both sex and labor trafficking crimes; and given the necessary administrative and legal power to perform their functions, as well as sufficient and consistent funding.<sup>145</sup>

Finally, while States should primarily devote attention to providing sound protections for victim-witnesses, increased attention to the development of alternative or corroborative evidence is important.<sup>146</sup> Investigations conducted by trained professionals may generate eyewitness testimony, business records, including receipts and physical evidence from the crime scene.<sup>147</sup> Expert witnesses may also be useful, particularly with respect to analyzing psychological issues that arise at trial concerning victims or to interpreting financial records.<sup>148</sup> Even monitoring newspapers or websites to learn how traffickers advertise the services of their victims may help to generate increased information to support cases.<sup>149</sup>

## **SELECTED RESOURCES**

Association of Southeast Asian Nations, *Criminal Justice Responses to Trafficking in Persons ASEAN Practitioner Guidelines* (2007). Available at [http://www.artipproject.org/artip-tip-cjs/tip-cjr/recent\\_developments/ASEAN-PG\\_Web\\_English\\_Final.pdf](http://www.artipproject.org/artip-tip-cjs/tip-cjr/recent_developments/ASEAN-PG_Web_English_Final.pdf)

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<sup>142</sup> See US TIP Report 2011, pp 44-45.

<sup>143</sup> See US TIP Report 2011, pp 44-45.

<sup>144</sup> See Gallagher and Holmes, pp 327-328.

<sup>145</sup> See Gallagher and Holmes, pp 324-325.

<sup>146</sup> See Kevin Koliner, *Best Practices to Combat Human Trafficking; Human Trafficking in the United States*, Harvard University, Kennedy School Webinar, 6 (May 25, 2011) <http://www.innovations.harvard.edu/cache/documents/17076/1707648.pdf>.

<sup>147</sup> Moskowitz: *Challenges and Priorities*, p 11.

<sup>148</sup> See Lauren Hersh, *Sex Trafficking Investigations and Prosecutions*, in *LAWYER'S MANUAL ON HUMAN TRAFFICKING: PURSUING JUSTICE FOR VICTIMS* 268 (Jill Laurie Goodman & Dorchen A. Leidholdt, eds. 2011), available at <http://www.nycourts.gov/ip/womeninthecourts/LMHT.pdf>; also Moskowitz: *Challenges and Priorities*, p 11.

<sup>149</sup> See Hersh, p 264-265.

Association of South East Asian Nations, "International Legal Cooperation in Trafficking in Persons Cases" (2010), available at <http://www.artiproject.org/ic-handbook/asean-ic-handbook-toc.pdf>

International Centre for Migration Policy Development, Handbook on Anti-Trafficking Data Collection in South-Eastern Europe: Developing Regional Criteria (2010), available at [http://www.ungift.org/doc/knowledgehub/resource-centre/ICMPD\\_Handbook\\_on\\_Anti-Trafficking\\_Data\\_Collection\\_in\\_SEE.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/ICMPD_Handbook_on_Anti-Trafficking_Data_Collection_in_SEE.pdf)

International Center for Migration Policy Development, Guidelines for Development of Transnational Referral Mechanism for Trafficked Persons: South-Eastern Europe (2009), available at [http://pdf.usaid.gov/pdf\\_docs/PNADS413.pdf](http://pdf.usaid.gov/pdf_docs/PNADS413.pdf)

International Center for Women Rights Protection and Promotion "La Strada," Good Practices in ensuring adequate assistance to all categories of trafficked persons: source book (2006), available at [http://www.lastrada.md/publicatii/ebook/good\\_dan\\_eng.pdf](http://www.lastrada.md/publicatii/ebook/good_dan_eng.pdf)

International Labour Office, The Cost of Coercion (2009), available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---declaration/documents/publication/wcms\\_106268.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_106268.pdf)

International Organization for Migration, Guidelines for the Investigation and Prosecution of Human Trafficking Cases and the Treatment of Victims During Law Enforcement Proceedings (2005), available at [http://www.iom.or.id/publications/pdf/18\\_CTGuidelines.pdf](http://www.iom.or.id/publications/pdf/18_CTGuidelines.pdf)

International Organization for Migration, Direct Assistance for Victims of Human Trafficking (2007), available at [http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published\\_docs/books/CT%20handbook.pdf](http://www.iom.int/jahia/webdav/site/myjahiasite/shared/shared/mainsite/published_docs/books/CT%20handbook.pdf)

International Labour Office, Forced Labour and Human Trafficking: Casebook of Court Decisions (2009), available at [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@declaration/documents/publication/wcms\\_106143.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@declaration/documents/publication/wcms_106143.pdf)

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