



UNITED NATIONS  
**HUMAN RIGHTS**  
OFFICE OF THE HIGH COMMISSIONER

**HUMAN RIGHTS**

# Human Rights and Human Trafficking

Fact Sheet No.

**36**



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## **ACRONYMS AND ABBREVIATIONS**

ASEAN Association of Southeast Asian Nations

EU European Union

ILO International Labour Organization

OHCHR Office of the United Nations High Commissioner for Human Rights

UNHCR Office of the United Nations High Commissioner for Refugees

UNICEF United Nations Children's Fund

UNODC United Nations Office on Drugs and Crime

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*Violations of human rights are both a cause and a consequence of trafficking in persons. Accordingly, it is essential to place the protection of all human rights at the centre of any measures taken to prevent and end trafficking. Anti-trafficking measures should not adversely affect the human rights and dignity of persons and, in particular, the rights of those who have been trafficked, migrants, internally displaced persons, refugees and asylum seekers.*

**Recommended Principles on Human Rights  
and Human Trafficking**

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## INTRODUCTION

Human trafficking is generally understood to refer to the process through which individuals are placed or maintained in an exploitative situation for economic gain. Trafficking can occur within a country or may involve movement across borders. Women, men and children are trafficked for a range of purposes, including forced and exploitative labour in factories, farms and private households, sexual exploitation, and forced marriage. Trafficking affects all regions and most countries of the world.

While it is difficult to secure reliable information about patterns and numbers, our understanding about *why* trafficking happens has improved. Inequalities within and between countries, increasingly restrictive immigration policies and growing demand for cheap, disempowered labour are just some of the underlying causes that have been identified. The many factors that increase individual vulnerability to trafficking include poverty, violence and discrimination.

The exploitation of individuals for profit has a long history and international efforts to address it can be traced back at least a century, well before the birth of the modern human rights system. However, it is only over the past decade that trafficking has become a major concern. During that same period, a comprehensive legal framework has developed around the issue. These changes confirm that a fundamental shift has taken place in how the international community thinks about human exploitation. It also confirms a change in expectations of what Governments and others should be doing to deal with trafficking and to prevent it. Hence, the victim-centred approach is also gathering increased support from the international community. Human rights form a central plank of the new understanding and there is now widespread acceptance of the need for a human rights-based approach to trafficking. As explained further in this Fact Sheet, such an approach requires understanding of the ways in which human rights violations arise throughout the trafficking cycle and of the ways in which States' obligations under international human rights law are engaged. It seeks to both identify and redress the discriminatory practices and unequal distribution of power that underlie trafficking, that maintain impunity for traffickers and that deny justice to victims.

This Fact Sheet seeks to provide a brief but comprehensive overview of human rights and human trafficking. In exploring the applicable legal and policy framework, it draws on two major outputs of the Office of the United Nations High Commissioner for Human Rights (OHCHR): the 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking and its extensive *Commentary*.<sup>1</sup>

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<sup>1</sup> *Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary* (United Nations publication, Sales No. E.10.XIV.1). The Recommended Principles and Guidelines themselves have been issued separately (HR/PUB/02/3) and are available from [www.ohchr.org](http://www.ohchr.org).



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The Fact sheet is divided into four chapters. **Chapter I** explores the definition of trafficking and its core elements. It also examines some of the myths and misunderstandings around the definition. **Chapter II** considers the relationship between human rights and human trafficking. It identifies those human rights that are commonly affected by trafficking and considers the situation of special groups with reference to additional or different rights to which they may be entitled. This chapter also summarizes what is involved in taking a “human rights-based” approach to trafficking. **Chapter III** turns to the obligations of States. It identifies the sources of these obligations and explains how a State may be legally responsible for the harm caused by trafficking, even if it did not directly cause it. Specific obligations of States are discussed with reference to victim protection and support; repatriation and remedies; criminal justice responses; and prevention. **Chapter IV** considers how these obligations can be implemented and monitored, with a view to ensuring that States and others are held accountable for their acts and omissions.

## **I. WHAT IS HUMAN TRAFFICKING?**

International agreement on what constitutes “trafficking in persons” is very recent. In fact, it was not until the late 1990s that States began the task of separating out trafficking from other practices with which it was commonly associated such as facilitated irregular migration. The first-ever agreed definition of trafficking was incorporated into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol). That definition has since been incorporated into many other legal and policy instruments as well as national laws.

### **A. The international definition of trafficking**

The Trafficking Protocol defines the term “trafficking in persons” as follows:

- (a) “Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used; ... (art. 3).

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The three key elements that must be present for a situation of trafficking in persons (adults) to exist are therefore: (i) action (recruitment, ...); (ii) means (threat, ...); and (iii) purpose (exploitation).

International law provides a different definition for trafficking in children (i.e., persons under 18 years of age). The “means” element is **not** required in this case. It is necessary to show only: (i) an “action” such as recruitment, buying and selling; and (ii) that this action was for the specific purpose of exploitation. In other words, trafficking of a child will exist if the child was subjected to some act, such as recruitment or transport, the purpose of which is the exploitation of that child.

## **B. Important features of the definition**

The following are key features of the new international legal understanding about trafficking:

**Trafficking affects women, men and children, and involves a range of exploitative practices.** Trafficking was traditionally associated with the movement of women and girls into sexual exploitation. The international legal definition set out above makes clear that men and women, boys and girls can all be trafficked—and that the range of potentially exploitative practices linked to trafficking is very wide. The list of examples set out in the definition is open-ended and new or additional exploitative purposes may be identified in the future.

**Trafficking does not require the crossing of an international border.** The definition covers *internal* as well as cross-border trafficking. That is, it is legally possible for trafficking to take place within a single country, including the victim’s own.

**Trafficking is not the same as migrant smuggling.** Migrant smuggling involves the illegal, facilitated movement across an international border for profit. While it may involve deception and/or abusive treatment, the *purpose* of migrant smuggling is to profit from the movement, not the eventual exploitation as in the case of trafficking.

**Trafficking does not always require movement.** The definition of trafficking identifies movement as just one possible way that the “action” element can be satisfied. Terms such as “receipt” and “harbouring” mean that trafficking does not just refer to the *process* whereby someone is moved into situations of exploitation; it also extends to the *maintenance* of that person in a situation of exploitation.

**It is not possible to “consent” to trafficking.** International human rights law has always recognized that the intrinsic inalienability of personal

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freedom renders consent irrelevant to a situation in which that personal freedom is taken away. This understanding is reflected in the “means” element of the definition of trafficking. As noted by the drafters of the Trafficking Protocol: “once it is established that deception, coercion, force or other prohibited means were used, consent is irrelevant and cannot be used as a defence.”<sup>2</sup>

## **II. WHAT IS THE RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMAN TRAFFICKING?**

The links between human rights and the fight against trafficking are well established. From its earliest days to the present, human rights law has unequivocally proclaimed the fundamental immorality and unlawfulness of one person appropriating the legal personality, labour or humanity of another. Human rights law has prohibited discrimination on the basis of race and sex; it has demanded equal or at least certain key rights for non-citizens; it has decried and outlawed arbitrary detention, forced labour, debt bondage, forced marriage, and the sexual exploitation of children and women; and it has championed freedom of movement and the right to leave and return to one’s own country.

### **Human rights most relevant to trafficking**

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

<sup>2</sup> *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2), p. 270.

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Different human rights will be relevant at different points in the trafficking cycle. Some will be especially relevant to the *causes* of trafficking (for example, the right to an adequate standard of living); others to the actual *process* of trafficking (for example, the right to be free from slavery); and still others to the *response* to trafficking (for example, the right of suspects to a fair trial). Some rights are broadly applicable to each of these aspects.

## **A. Trafficking as a violation of human rights**

As noted above, many of the practices associated with modern-day trafficking are clearly prohibited under international human rights law. For instance, human rights law forbids **debt bondage**: the pledging of personal services as security for a debt where the value of those services is not applied towards the liquidation of the debt or their length or nature is not limited and defined. Many trafficked persons who enter into a debt with their exploiters (relating to, for example, placement or transport fees) find themselves in a situation of debt bondage; the debt is used as a means of controlling and exploiting them. Human rights law also prohibits **forced labour**, defined by Convention No. 29 concerning Forced or Compulsory Labour of the International Labour Organization (ILO) as: “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself [herself] voluntarily”. **Slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution** and the **exploitation of prostitution** are also trafficking-related practices that are prohibited under international human rights law.

Does international human rights law actually prohibit “trafficking in persons”—as opposed to “practices associated with trafficking” such as those listed above? This is an important question because it can have an impact on the nature of a State’s obligations and responsibilities. Only two of the major human rights treaties—the Convention on the Elimination of All Forms of Discrimination against Women (art. 6) and the Convention on the Rights of the Child (art. 35)—contain substantive reference to trafficking. However, over the past decade a general agreement has emerged within the international community that trafficking itself is a serious violation of human rights. For example, both the Council of Europe’s Convention on Action against Trafficking in Human Beings and the European Union Directive on preventing and combating trafficking in human beings and protecting its victims identify trafficking as a violation of human rights. The United Nations General Assembly and the Human Rights Council have repeatedly affirmed that trafficking violates and impairs fundamental human rights, as have many of the international human rights mechanisms.

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## **B. The human rights of trafficked persons**

Both the Charter of the United Nations and the Universal Declaration of Human Rights confirm that rights are universal: they apply to everyone, irrespective of their race, sex, ethnic origin or other distinction. Trafficked persons are entitled to the full range of human rights. Even if they are outside their country of residence, international law is clear that trafficked persons cannot be discriminated against simply because they are non-nationals. In other words, with only some narrow exceptions that must be reasonably justifiable, international human rights law applies to everyone within a State's territory or jurisdiction, regardless of nationality or citizenship and of how they came to be within the territory.

International human rights law recognizes that **certain groups** require additional or special protection. This may be because of past discrimination

### **The rights of aliens**

*Aliens ... have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They may not be subjected to torture or to cruel, inhuman or degrading treatment or punishment; nor may they be held in slavery or servitude. Aliens have the full right to liberty and security of the person. If lawfully deprived of their liberty, they shall be treated with humanity and with respect for the inherent dignity of their person. Aliens may not be imprisoned for failure to fulfil a contractual obligation. They have the right to liberty of movement and free choice of residence; they shall be free to leave the country. Aliens shall be equal before the courts and tribunals, and shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law in the determination of any criminal charge or of rights and obligations in a suit at law. Aliens shall not be subject to retrospective penal legislation, and are entitled to recognition before the law. They may not be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence. They have the right to freedom of thought, conscience and religion, and the right to hold opinions and to express them. Aliens receive the benefit of the right of peaceful assembly and of freedom of association. They may marry when at marriageable age. Their children are entitled to those measures of protection required by their status as minors. In those cases where aliens constitute a minority within the meaning of article 27, they shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practise their own religion and to use their own language. Aliens are entitled to equal protection by the law. There shall be no discrimination between aliens and citizens in the application of these rights. These rights of aliens may be qualified only by such limitations as may be lawfully imposed under the Covenant.*

Source: Human Rights Committee, general comment No. 15 (1986) on the position of aliens under the Covenant, para. 7.

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or because their members share particular vulnerabilities. In the context of trafficking, relevant groups include women, children, migrants and migrant workers, refugees and asylum seekers, internally displaced persons, and persons with disabilities. Sometimes, members of a group will be specifically targeted for trafficking. **Children**, for example, may be trafficked for purposes related to their age such as sexual exploitation, various forms of forced labour and begging. **Persons with disabilities** can also be targeted for certain forms of exploitative labour and begging. **Women and girls** are trafficked into gender-specific situations of exploitation such as exploitative prostitution and sex tourism, and forced labour in domestic and service industries. They also suffer gender-specific forms of harm and consequences of being trafficked (for example, rape, forced marriage, unwanted or forced pregnancy, forced termination of pregnancy, and sexually transmitted diseases, including HIV/AIDS).

Individuals belonging to specific groups who are subject to trafficking may be in a position to claim different or additional rights. For example, international human rights law imposes important and additional responsibilities on States when it comes to identifying **child victims of trafficking** as well as to ensuring their immediate and longer-term safety and well-being. The core rule is derived from the obligations contained in the Convention on the Rights of the Child: the best interests of the child are to be at all times paramount. In other words, States cannot prioritize other considerations, such as those related to immigration control or public order, over the best interests of the child victim of trafficking. In addition, because of the applicability of the Convention to *all* children under the jurisdiction or control of a State, non-citizen child victims of trafficking are entitled to the same protection as nationals in *all* matters, including those related to the protection of their privacy and physical and moral integrity. Other treaties may further specify these rights. For example, the Trafficking Protocol requires certain special measures with regard to child victims, as does the Convention on Action against Trafficking in Human Beings.

### **C. The importance of a human rights-based approach to trafficking**

While the link between human rights and human trafficking is clear, it does not necessarily follow that human rights will naturally be at the centre of responses to trafficking. For example, cross-border trafficking can be dealt with as an immigration issue, with human rights being addressed only as an afterthought. It is also possible for States to address trafficking primarily as a matter of crime or public order. Over the past decade, an international consensus has developed around the need for

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a *rights-based* approach to trafficking. The General Assembly and the Human Rights Council, for example, have both advocated such an approach, as have many relevant human rights mechanisms, including special procedures and treaty bodies.

What does it mean, in practical terms, to take a human rights-based approach to trafficking? 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. 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 distribution of power that underlie trafficking, that maintain impunity for traffickers and that deny justice to their victims.

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 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 are:

- 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
- 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.

The following sections show clearly how recent developments at the international, regional and national levels have helped to clarify what a rights-based approach to trafficking means in practice.

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### III. WHAT ARE THE OBLIGATIONS OF STATES WITH RESPECT TO TRAFFICKING?

Obligations and rights are two sides of the same coin. In most cases, obligations that arise out of international law are imposed on States. However, while the Fact Sheet focuses specifically on this aspect, it is important to keep in mind that individuals and private entities, such as corporations, can also be subject to legal obligations.

#### A. Sources of obligations

Treaties are the primary source of obligations for States with respect to trafficking. By becoming a party to a treaty, States undertake binding obligations in international law and undertake to ensure that their own national legislation, policies or practices meet the requirements of the treaty and are consistent with its standards. These obligations are enforceable in international courts and tribunals with appropriate jurisdiction, such as the International Court of Justice, the International Criminal Court or the European Court of Human Rights, and may be enforceable in domestic courts, depending on domestic law.

Because trafficking is a complex issue that can be considered from different perspectives, many treaties are relevant. For example, treaties dealing with slavery and the slave trade, forced labour, child labour, the rights of women, the rights of children, migrant workers and persons with disabilities, as well as more general treaties dealing with civil, cultural, economic, political or social rights, are all applicable to trafficking. Major crime control treaties, such as the United Nations Convention against Transnational Organized Crime and the United Nations Convention against Corruption are also relevant to trafficking, as is the Rome Statute of the International Criminal Court. These are in addition to the treaties dealing specifically and exclusively with trafficking.

Other accepted sources of international law, such as custom, general principles and the decisions of international tribunals, can also be relevant when determining exactly what is required of States in their response to trafficking. The prohibition on slavery is widely recognized to be part of *customary* international law, binding on all States irrespective of whether they have actually become a party to one or more treaties that specifically prohibit slavery. A *general principle of law* is one that is common to all major legal systems of law and thereby part of international law. A general principle of law relevant to trafficking is that someone should not be held responsible for a crime he or she was compelled to commit. An example of a *judgement of an international tribunal* that has helped to establish the international legal framework around trafficking is *Rantsev v. Cyprus and Russia*, which was decided by the European Court of Human Rights in 2009.



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### **Treaties and other instruments particularly relevant to trafficking**

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, 2000 (Trafficking Protocol)

Convention on the Elimination of All Forms of Discrimination against Women, 1979

Convention on the Rights of the Child, 1989

Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, 2000

United Nations Convention against Transnational Organized Crime, 2000

International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, 1990

International Covenant on Civil and Political Rights, 1966

International Covenant on Economic, Social and Cultural Rights, 1966

Council of Europe, Convention on Action against Trafficking in Human Beings, 2005 (European Trafficking Convention)

Charter of Fundamental Rights in the European Union, 2000, article 5, and Directive 2011/36/EU of the European Parliament and Council on preventing and combating trafficking in human beings and protecting its victims, 2011

South Asian Association for Regional Cooperation, Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002

Finally, it is important to consider the many instruments around trafficking that are not strictly law. These include the Recommended Principles and Guidelines on Human Rights and Human Trafficking; guidelines on child trafficking, issued by the United Nations Children's Fund (UNICEF), and on trafficking and asylum, issued by the Office of the United Nations High Commissioner for Refugees (UNHCR); resolutions adopted by the General Assembly and the Human Rights Council; findings and reports of international human mechanisms such as treaty bodies and special procedures; and non-treaty agreements between countries regarding issues such as the repatriation and reintegration of trafficked persons.

These varied sources of "soft law" do not directly impose obligations on States—or confer rights on individuals or groups. It is therefore important to the integrity of international law that their legal weight is not overstated. However, some soft law instruments can form part of the international legal framework by, for example, helping to identify or confirm a particular legal trend or even by contributing to the development of customary international law in relation to a particular aspect of trafficking. Soft law can also provide insight into the substantive content of more general legal norms that

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are contained in treaties. For example, the Trafficking Protocol requires States to take some measures to provide victims of trafficking with access to remedies. Soft law materials, such as the Recommended Principles and Guidelines, as well as reports of the United Nations Special Rapporteur on trafficking, are key resources in determining the actions required by States to fulfil this particular obligation.

**Some important non-treaty instruments relevant to trafficking**

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

Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Basic Principles and Guidelines on the Right to a Remedy and Reparation)

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

Criminal Justice Responses to Trafficking in Persons: ASEAN Practitioner Guidelines

UNHCR Guidelines on international protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked (UNHCR Trafficking Guidelines)

**B. Understanding State responsibility to address trafficking**

To what extent are States responsible for trafficking-related harm? This is an important question because it will determine what they are required to do to prevent or respond to trafficking. States may sometimes be reluctant to accept legal responsibility for trafficking and its concomitant violations of human rights. They may argue, for example, that the primary wrong has been committed by private criminals and not by the State itself. They might also claim to have done everything possible to prevent the harm.

Although determining the responsibility of States can be difficult because of the complex nature of trafficking and its associated legal framework, in very general terms, States will be responsible for their own acts or omissions that breach their obligations under international law, including human rights law. In addition, States will generally not be able to avoid responsibility for the acts of private persons when their ability to influence an alternative, more positive outcome can be established. In such cases, the source of responsibility is not the act itself but the failure of the State to take measures of prevention or response in accordance with the required standard, usually to be found in a treaty.

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## **C. The obligation to identify, protect and support victims of trafficking**

Over the past decade there has been great progress in clarifying the rights of victims of trafficking to protection and support—and the corresponding obligations of States. While there are still some areas that remain to be settled, there is a general agreement around several core obligations, all based on a general duty to identify victims of trafficking in the first place. Some of these obligations are: providing immediate protection and support; providing legal assistance, including temporary residency, and not criminalizing the victims.

### **Victim identification**

Victims of trafficking are often not identified and, as a result, are simply invisible. When victims of trafficking do come to official attention, they may be misidentified as illegal or smuggled migrants. This is significant because, as explained in the Recommended Principles and Guidelines, “a failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights” (guideline 2). If a trafficked person is not identified at all or is incorrectly identified as a criminal or an irregular or smuggled migrant, then this will directly affect that person’s ability to access the rights to which she or he is entitled. In short, failure to quickly and accurately identify victims of trafficking renders any rights granted to such persons illusory.

The obligation to identify victims of trafficking is implied in all legal instruments that provide for victim protection and support. The Recommended Principles and Guidelines identify a range of practical steps that should be taken to ensure that victims of trafficking are quickly and accurately identified. These include preparing written identification tools such as guidelines and procedures that can be used to support identification; and training relevant officials (such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants) in accurate identification and the correct application of agreed guidelines and procedures.

### **Provision of immediate protection and support**

Victims who break free from their traffickers often find themselves in a situation of great insecurity and vulnerability. They may be physically injured as well as physically and/or emotionally traumatized. They may be afraid of retaliation. They are likely to have few, if any, means of subsistence. Unfortunately, the harm experienced by victims of trafficking does not necessarily cease when they come to the attention of the authorities. Mistreatment by public officials may result in a continuation of an exploitative situation or the emergence of a new one. The harm already done to victims can be

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compounded by failures to provide medical and other forms of support—or by linking it to an obligation to cooperate that victims may not be willing or able to meet.

The State in which a victim is located is responsible for providing that person with immediate protection and support. This responsibility becomes operational when the State knows or should know that an individual within its jurisdiction is a victim of trafficking. The principle is applicable to all countries in whose territory the victim is located. It applies to all trafficked persons, whether victims of national or transnational trafficking.

The first and most immediate obligation of that State is to ensure that the victim is protected from further exploitation and harm—from those who have already exploited that person as well as from anyone else. What this means in practice will depend on the circumstances of each case. The standard of due diligence, discussed at various points in this Fact Sheet, certainly requires States to take *reasonable measures* to this end. In most situations, reasonable protection from harm requires:

- Moving the trafficked person out of the place of exploitation to a place of safety;
- Attending to the immediate medical needs of the trafficked person;
- Assessing whether the trafficked person is under a particular risk of intimidation or retaliation.

While the immediate obligation to protect from further harm relates, of course, to the victim, it may also extend to others who could potentially be harmed or intimidated by traffickers and their accomplices. In addition to

**The obligation to remove from risk of harm**

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

Source: *Rantsev v. Cyprus and Russia*, Application No. 25965/04, Judgement of 7 January 2010, para. 286.

victims, this list could include informants, those giving testimony, those providing support services to the trafficked person and family members.

The right to privacy is an important aspect of protecting victims from further harm. Failure to protect privacy can increase the danger of intimidation and retaliation. It can cause humiliation and hurt to victims and compromise their recovery. The key provisions relating to the right to privacy for victims of trafficking are set out in the text box below. These provisions

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confirm that the protection of privacy should be extended to all trafficked persons unless there are reasonable grounds justifying interference—such as consideration of the rights of accused persons to a fair trial.

### **The right to privacy**

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

*Recommended Principles and Guidelines*, guideline 6

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

*Trafficking Protocol*, article 6

State parties are required to “protect the private life and identity of victims”.

*European Trafficking Convention*, article 11

The State in which a trafficked person is located is also required to provide that person with physical and psychological care that is adequate to meet at least immediate needs. Importantly, the provision of such care has been widely acknowledged to be a *non-negotiable right of the victim*: a right that should be recognized and implemented irrespective of that person’s capacity or willingness to cooperate with criminal justice authorities. There is growing recognition that separating protection and support from victim cooperation in this way is a fundamental part of a human rights approach to trafficking.

The scope and nature of the obligation on States to provide care and support to victims of trafficking will depend on

many factors because the legal basis for such support is very wide. The Trafficking Protocol, for example, sets out a range of support measures that State parties are required to *consider* implementing (art. 6). The European Trafficking Convention details a number of very specific measures that are obligatory (arts. 10–17). Human rights law is another, important source of obligations in this area. For example, if the victim of trafficking is a child then the overarching rule of “the best interests of the child” must guide decision-making about support (see above). In line with the Basic Principles and Guidelines on the Right to a Remedy and Reparation, trafficked persons as victims of crime and of human rights violations have a right to be treated with humanity and respect for their dignity and human rights—and are entitled to measures that ensure their well-being and avoid revictimization (para. 10).

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

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### **Non-coercion in the provision of support**

In relation to health care and counselling, “trafficked persons should not be required to accept any such support and assistance and they should not be subject to mandatory testing for diseases including HIV/AIDS”.

*Recommended Principles and Guidelines, guideline 6*

In relation to all assistance measures provided for in the European Trafficking Convention, State parties are required to ensure the relevant services “are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care”.

*European Trafficking Convention, article 12*

### **Legal assistance and involvement**

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

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

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

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

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

*(a) Informing victims of their role and the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and where they have requested such information;*

*(b) Allowing the views and concerns of victims to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system;*

*(c) Providing proper assistance to victims throughout the legal process;*

*(d) Taking measures to minimize inconvenience to victims, protect their privacy, when necessary, and ensure their safety, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*

*(e) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting awards to victims.*

Source: Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, para. 6.

In summary, trafficked persons should be given a genuine opportunity to consider their legal options. This requires, at a minimum, the provision of information of a type and in a manner that will allow them to make an informed choice. Should trafficked persons be involved in, or otherwise support, any form of legal action, they have the right to play a meaningful role in that process and to receive protection and support for the duration of their involvement.

### **Temporary residence permits and reflection periods**

Victims of trafficking who are unlawfully in a country face special dangers and vulnerabilities as a result of their legal status. For example, they may be unable to access important sources of subsistence and support such as housing and work opportunities. They may be vulnerable to further exploitation as well as intimidation and retaliation. They risk being prevented from participating effectively and meaningfully in legal proceedings against their traffickers. Without regularization of their status, victims also risk being detained in immigration facilities or shelters. In addition, they are liable to deportation at any time.

In practice it has been observed that victims of trafficking may have their situation regularized for a number of reasons and in a number of ways, for instance through:

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- Granting of a *reflection and recovery period* during which non-conditional support is given with the aim of providing victims with time and space to decide on their options, including whether they will cooperate with criminal justice agencies in the prosecution of their exploiters;
  - Granting of a *temporary residence permit linked to (usually criminal) proceedings against traffickers*; such visas usually require victim cooperation and terminate once legal proceedings are completed; and
  - Granting of a *temporary residence permit on social or humanitarian grounds* that may be related to, for example, respect for the principle of non-refoulement (discussed further below), inability to guarantee a secure return and risk of re-trafficking.

The following important principles and obligations, found in a range of international and regional instruments, are relevant to any consideration of whether a victim of trafficking should be granted a right to temporary residence:

- The right of victims to participate in legal proceedings against their traffickers and to remain in the country during the proceedings;
- The right of victims to receive protection from further harm;
- The right of victims to access effective remedies;
- The obligation on States not to return victims when they are at serious risk of harm, including from intimidation, retaliation and re-trafficking; and
- The special rights of child victims of trafficking, including the obligation to take full account of the child's best interests.

## **Non-criminalization of trafficked persons**

In countries of transit or destination, trafficked persons are often arrested, detained, charged and even prosecuted for unlawful activities such as entering illegally, working illegally or engaging in prostitution. For example, 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 demanded of a trafficked person, such as prostitution, soliciting or begging, may be illegal in the country of destination. Criminalization of trafficked persons is commonplace, even where it would appear obvious that the victim was an unwilling participant in the illegal act. Such criminalization is often tied to a related failure to identify the victim correctly. In other words, trafficked persons are detained and subsequently charged, not as victims of



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trafficking, but as smuggled or irregular migrants or undocumented migrant workers. Countries of origin sometimes directly criminalize victims upon their return, penalizing them for unlawful or unauthorized departure.

Criminalization and detention of victims of trafficking are important issues because they are often tied to a concurrent or subsequent failure on the part of the State to afford victims the rights to which they are legally entitled under national and international law. For example, criminalization will generally result in the deportation of foreign victims—thereby denying them their right to participate in legal proceedings or to access an effective remedy.

There is growing international agreement that, in the words of the Recommended Principles and Guidelines, “trafficked persons [should not be] prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons” (guideline 2). For example, the European Trafficking Convention requires State 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” (art. 26). While the Trafficking Protocol does not specifically address prosecution for status-related offences, the body established to provide recommendations on its effective implementation has affirmed that “States parties should ... consider, in line with their domestic legislation, not punishing or prosecuting trafficked persons for unlawful acts committed by them as a direct consequence of their situation as trafficked persons or where they were compelled to commit such unlawful acts.”<sup>3</sup> Human rights treaty bodies as well as both the General Assembly and the Human Rights Council have confirmed the importance of the non-criminalization principle.

### **No detention of trafficked persons**

It is not uncommon for victims of trafficking to be detained, in public or private facilities, even for long periods of time. The term “detention” is used in this context in accordance with its accepted meaning in international law: the condition of “any person deprived of personal liberty except as a result of conviction for an offence”. It can therefore cover a wide range of situations in which victims of trafficking are held in prisons, police lock-ups, immigration detention facilities, shelters, child welfare facilities and hospitals.

In the context of trafficking, detention most commonly occurs when:

- Victims are not correctly identified and are detained as irregular/undocumented migrants pending deportation;

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<sup>3</sup> CTOC/COP/WG.4/2009/2, para. 12.

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- Victims are identified correctly but are unwilling or unable to cooperate in criminal investigations (or their cooperation is not considered useful) and are sent to immigration detention pending deportation;
  - Victims, correctly or incorrectly identified, are detained as a result of their engagement in illegal activities such as prostitution or unauthorized work;
  - Victims are identified correctly and placed in a shelter or other welfare facility which they are unable to leave. Common justifications offered for this form of detention are the need to provide shelter and support; the need to protect victims from further harm; and the need to secure their cooperation in the investigation and prosecution of traffickers.

International law and policy support the following conclusions with regard to the detention of victims of trafficking.

**First, routine detention will always be unlawful.** In evaluating the lawfulness or otherwise of victim detention, it is important to make 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 public/private shelters violates a number of fundamental principles of international law. In some circumstances, it violates 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 absolutely prohibits 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 shelters, 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.

**Second, individual cases of detention could be defended with reference to necessity, legality and proportionality.** A State may be able to successfully defend victim detention case by case with reference to, for example, criminal justice imperatives, public order requirements or victim safety needs. The internationally accepted principles of *necessity*, *legality* and *proportionality* should be used to assess any such claim. They would, most likely, support a claim of lawful detention only if detention is a last resort and is in response to credible and specific threats to an individual victim's safety. Even so, a range of protections should be in place to ensure that the rights of the detained person are respected and protected. Such measures would include, but not be limited to, judicial oversight of the situation to determine its ongoing legality and necessity as well as an enforceable right to challenge the detention.

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### **Third, international law requires special justifications and protections in all cases of detention of children.**

The detaining authority must be able to demonstrate that the detention is in the child's best interests. It must also be able to demonstrate, in relation to each and every case, that there is no reasonable alternative available to it. Specific protections, including judicial or administrative oversight and the right of challenge, must be upheld in all situations where the detention can be legally justified.

### **Special measures for trafficked children: identification**

International law requires that child victims of trafficking should be accorded special measures of protection and support. The nature of these measures will generally reflect the particular challenges involved in supporting and protecting children. For example, in relation to identification, it is important to acknowledge that not all child victims of trafficking will present as such. They may appear to be 18 or older. Their passports may have been destroyed or taken away from them. They may be carrying false identity papers that misstate their age. Child victims of trafficking may lie about their age because this is what they have been told to do by their exploiters. They may lie because they are afraid of being taken into care or being sent back home. There is growing acceptance of a *presumption of age* in the case of children. Under such a presumption, a victim who *may* be a child is treated as a child unless or until another determination is made. It removes special or additional difficulties that would otherwise complicate the identification of child victims

The presumption of age is linked to the presumption of status: that a child who *may* be a victim of trafficking is presumed to be a victim unless or until another determination is made.

Regarding the laws, systems and procedures that should be in place to ensure rapid and accurate identification of child victims, the UNICEF Guidelines provide important guidance:

- States are to establish effective procedures for the rapid identification of child victims, including procedures to identify child victims at ports of entry and other locations;
- Efforts are to be made to share information between relevant agencies and individuals in order to ensure children are identified and assisted as early as possible; and
- Social welfare, health or education authorities are to contact the relevant law enforcement authority where there is knowledge or suspicion that a child is being exploited or trafficked or is at risk of exploitation or trafficking.

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### **Identifying child victims: presumption of age**

“In a case where the age of a victim is uncertain and there are reasons to believe that the victim is a child, a State party may, to the extent possible under its domestic law, treat the victim as a child in accordance with the Convention on the Rights of the Child until his or her age is verified”.

*Legislative guide for the implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime*, para. 65

States parties are to presume the victim is a child if there are reasons for believing that is so and if there is uncertainty about their age. The individual presumed to be a child victim of trafficking is to be given special protection measures in accordance with their rights as defined, in particular, in the Convention on the Rights of the Child.

*European Trafficking Convention*, article 10, and *Explanatory Report of the Council of Europe to the Convention*, para. 136

Where the age of the victim is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child. Pending verification of the victim’s age, the victim will be treated as a child and accorded all stipulated special protection measures.

*UNICEF Guidelines*, guideline 3.2

### **Special measures for trafficked children: protection and support**

International law is clear that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them. The Recommended Principles and Guidelines stipulate that child victims of trafficking are to be provided with appropriate assistance and protection with full account being taken of their special rights and needs (guideline 8). In accordance with the presumptions outlined above, all persons identified as or reasonably presumed to be victims of trafficking and identified as or reasonably presumed to be under the age of 18 are entitled to this higher standard of protection and support.

Appropriate assistance and protection would include the provision of immediate support, such as security, food and safe shelter. It would also include health care, counselling and social services delivered by trained professionals. The services should be appropriate for the child’s age and any special needs as well as for the child’s sex, ethnic or cultural identity.

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

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

*Sources:* Convention on the Rights of the Child, European Trafficking Convention, Recommended Principles and Guidelines, and UNICEF Guidelines.

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## **D. Obligations related to the return of trafficked persons**

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

### **Safe and preferably voluntary return**

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

The obligation to provide safe and, as far as possible, voluntary return implies that the repatriating State will conduct pre-return risk assessments. This is

#### **Treaty provisions on the return of trafficked persons**

- State parties to conduct return “with due regard for the safety of [the] person and for the status of any [related] legal proceedings” (*Trafficking Protocol*) or “with due regard for the rights, safety and dignity of [the] person and for the status of any [related] legal proceedings” (*European Trafficking Convention*).
- Countries of destination to ensure that such return “shall preferably be voluntary” (*Trafficking Protocol*, *European Trafficking Convention*).
- Countries of origin to accept the return of a trafficked national or resident “without undue or unreasonable delay” and “with due regard for the safety of that person” (*Trafficking Protocol*) or to facilitate and accept the return of a trafficked national or resident with due regard for the “rights, safety and dignity” of that person and “without undue or unreasonable delay” (*European Trafficking Convention*).
- Countries of origin to cooperate in the return, including through verification of victim’s nationality or residence and issuing of necessary travel documents (*Trafficking Protocol*, *European Trafficking Convention*).
- State parties “to protect victims of trafficking ... especially women and children, from revictimization” (*Trafficking Protocol*).
- Countries of destination not to return a child victim of trafficking “if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child” (*European Trafficking Convention*).

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especially important in the case of children. It should preferably be undertaken on an individual basis and take into account the particular circumstances of each case. The way in which the victims were trafficked, the extent to which they have cooperated in the prosecution of their exploiters, whether or not they owe money to traffickers, their age, their sex and their family situation, and the capacity of the country of return to provide effective protection are all important factors when considering whether safe return is possible. It is very important that decisions on return are not based on unverifiable or highly generalized situation reports produced by Governments, intergovernmental bodies or non-governmental organizations.

### **An entitlement to return**

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

The right to return also implies an obligation on the country in which victims find themselves to permit those who wish to return to do so—again without undue or unreasonable delay. Detention of trafficked persons in shelters, prisons or immigration detention facilities is one way in which the right to return can be interfered with. Compelling victims to remain for the duration of lengthy criminal proceedings can also constitute an interference with the right of return. In respect of each individual case, the State preventing the return must be able to show that its actions are in accordance with the law and are not arbitrary or unreasonable. The best interests of the child will again also be a major consideration.

### **Due process and the principle of non-refoulement**

The return of trafficked persons may not violate their established rights (see also sect. H below). This includes the right to due process. Repatriation that is not voluntary effectively amounts to expulsion from a State. International human rights law rejects arbitrary expulsion; any non-citizen lawfully within the country can be expelled only in accordance with the law. A non-citizen lawfully present is entitled to present reasons why she or he should not be expelled and these reasons must be reviewed by the competent authority.

For trafficked persons who are not lawfully in the country, substantive and procedural guarantees against expulsion are much less clear and States

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generally retain a considerable degree of discretion in deciding whether and when to remove unlawful immigrants. However, one of the most important protections, potentially applicable to all non-citizens, relates to the principle of non-refoulement. Under this principle, States are prevented from returning an individual to a country where there is a serious risk that she or he will be subject to persecution or abuse. This principle is well established in international law and the importance of protecting this principle in the context of measures to deal with trafficking is also widely accepted. Human rights treaty bodies and regional human rights courts have also confirmed that return which risks torture or cruel, inhuman or degrading treatment or punishment is contrary to international law.

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

### **Right to remain during legal proceedings**

As discussed in section C above, international treaty law, including both the Trafficking Protocol and the European Trafficking Convention, obliges countries of destination to conduct return with due regard for the status of any related legal proceedings. States should, therefore, be careful to ensure that the return of trafficked persons does not jeopardize the initiation and/or successful completion of any legal proceedings involving them.

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

### **Alternatives to repatriation**

In some cases, repatriation to the country of origin, even in the longer term, will not be the preferred course of action. This may be owing to ongoing



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risks to the victim's safety and security. It may also be owing to humanitarian considerations that relate, for example, to the victim's health or the links and relationships that the victim has established in the country of destination. While the Trafficking Protocol does not address this issue directly, other legal and policy instruments, by recognizing the possibility of temporary visas and even permanent residency, do not automatically assume that repatriation is the immediate or even ultimate outcome of a trafficking event.

The obligations of States in this respect will very much depend on the specific situation. For example, States may be required to provide alternatives to repatriation if return poses unacceptable risks to the victim and/or the victim's family. In relation to child victims of trafficking, local and third-country integration may offer a durable solution if return to the country of origin is not in the child's best interests. The Committee on the Rights of the Child affirmed, in its general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin, that repatriation is not an option if it leads "to a 'reasonable risk' that such return would result in the violation of fundamental human rights of the child".

## **Reintegration of victims**

Supported reintegration is a critical aspect of safe repatriation. Victims of trafficking who are provided with reintegration assistance are much less likely to be re-trafficked. They may also, depending on the nature and quality of support provided, be less vulnerable to intimidation, retaliation, social isolation and stigmatization. Supported reintegration is a right owed to trafficked persons by virtue of their status as victims of crime and of human rights violations. It must be accompanied by respect for the repatriated individuals' rights, including their right to privacy and their right not to be discriminated against. Successful reintegration requires cooperation between repatriating and receiving countries. The importance of such cooperation is recognized in regional treaties as well as in key international and regional policy documents.

## **E. Remedies for trafficking**

Victims of trafficking have often been exploited for little or no payment over long periods of time. They may have suffered injuries or contracted illnesses that require medical attention. They may have incurred debts as a result of their trafficking experiences. While remedies for trafficking are still very rare, there is a clear trend towards making this a legal and practical possibility. For example, some countries have expressly granted victims of trafficking the right to private action against their traffickers and have included mandatory restitution to trafficked persons as part of the criminal sentencing of

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traffickers. Other countries grant victims the right to bring civil action against their traffickers, regardless of their nationality or migration status.

The obligation to provide remedies and the right to access remedies will normally arise in one or both of the following ways:

- The State is responsible for the violation of an international legal obligation (for example, the prohibition on non-discrimination, the obligation to criminalize trafficking, and the obligation to protect and support victims of trafficking);
- If the State was not directly involved, but it failed to discharge its obligation to *prevent* the harm and/or to *respond appropriately* (for example, failure to investigate and prosecute trafficking; failure to take measures to prevent trafficking).

The Recommended Principles and Guidelines are explicit on the point that “trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies” (guideline 9). This right is explored further below with reference to general human rights law, law relating to violence against women and law specific to trafficking.

## **An obligation to remedy violations of human rights law**

Chapter I explained how trafficking invariably involves multiple violations of human rights. Most international and regional human rights treaties require States to provide access to remedies for such violations. Once a right to a remedy exists in a treaty then failure to provide such a remedy becomes of itself an *additional* and *independent* breach of that treaty.

Until recently, the only international instrument to focus specifically on the right to a remedy was the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, which focuses specifically on remedies for victims of crimes committed by non-State actors, and was adopted by the General Assembly in 1985. The Declaration affirms that victims of crime (which would include victims of trafficking) are to be treated with compassion and respect for their dignity; that they are entitled to access to justice and fair treatment; that judicial and administrative processes should be responsive to their needs; and that those responsible for the harm, including the State if it can be deemed responsible, should make appropriate restitution to the victim. It further affirms that, if compensation is not fully available from the offender, the State should endeavour to provide compensation from other sources when the victim has sustained serious injury (or to the family if the victim has died or become incapacitated). It encourages the establishment of national funds for compensation to victims.

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The Basic Principles and Guidelines on the Right to a Remedy and Reparation were adopted by the General Assembly in 2005 to clarify the rules on remedies and reparation applicable to human rights violations committed by or implicating States. They identify the purpose of reparation as being to promote justice by redressing violations. They confirm that the general obligation on States to ensure respect for and to implement human rights law includes an obligation to ensure equal and effective access to justice and the availability of remedies. They also confirm that the right to a remedy for gross violations of human rights, a term that would incorporate the most serious cases of trafficking, includes the right of access to justice, the right to reparation for harm suffered *and* the right of access to information concerning violations and reparation mechanisms. Access to justice is seen as including protection of victims' privacy and safety in the course of any legal proceedings and well as measures to ensure that victims can actually exercise their rights to a remedy.

## **The right to a remedy for violence against women**

The obligation on States to investigate and prosecute violence against women is now well established in international law and policy. As noted by the Special Rapporteur on violence against women in her thematic report on reparations (A/HRC/14/22), an essential part of that obligation is a legal duty to provide just and effective remedies to women subjected to such violence.

### **Legal and policy instruments affirming the right to a remedy for violence against women**

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women of the Organization of American States (1994)

Declaration on the Elimination of Violence against Women adopted by the General Assembly (1993)

General recommendation No. 19 (1992) on violence against women of the Committee on the Elimination of Discrimination against Women

Beijing Platform for Action (1995)

Nairobi Declaration on Women's and Girls' Right to a Remedy and Reparation (2007).

While the form and extent of remedies required for trafficking as violence against women will depend on the nature and circumstances of the breach, the Committee on the Elimination of Discrimination against Women has clarified that reparation should be proportionate to the physical and mental harm undergone and to the gravity of the violations suffered. Other international human rights mechanisms, including the Special Rapporteur on violence against women in the report referred to above, have noted the particular issues and concerns that will arise with regard to remedies for violence against women.

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## **The right to a remedy in the specific context of trafficking**

The right to a remedy is affirmed in treaties and other legal and non-legal instruments that deal specifically with trafficking. For example, the Trafficking Protocol requires State parties to ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered (art. 6.6). The European Trafficking Convention requires that victims should be provided with appropriate information, including procedures they can use to obtain compensation, as well as access to legal assistance (art. 15). The Convention specifically provides that victims have a right to monetary compensation from convicted traffickers in respect of both material injury and suffering, and requires parties to take steps to guarantee compensation of victims. It gives examples of ways in which this obligation can be realized, including through the establishment of a special fund or initiatives aimed at social assistance or reintegration of victims. The possibility of State compensation schemes funded by the seized proceeds of trafficking is also noted.

The obligation to provide effective and appropriate remedies to victims of trafficking has been repeatedly confirmed by the General Assembly and the Human Rights Council and human rights mechanisms.

## **The nature and form of remedies**

The Recommended Principles and Guidelines require access to “adequate and appropriate” remedies and this standard is widely accepted. The Recommended Principles and Guidelines also provide some limited guidance on what this might mean in practice—referring to “fair and adequate remedies”, which may be criminal, civil or administrative in nature and which “include the means for as full a rehabilitation as possible” (guideline 9). The Basic Principles and Guidelines on the Right to a Remedy and Reparation are clear that remedies or reparation should be proportional to the gravity of the harm suffered (paras. 15, 18 and 20).

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

**Restitution** comprises material, judicial or other measures aimed at restoring the situation that existed prior to the violation—as far as possible. Adequate

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and appropriate actions to secure restitution in a case of trafficking could include: release of the victim from detention; recognition of legal identity and citizenship; return of property; and safe return to one's place of residence.

**Compensation** is the most common form of remedy and is payable for damage caused by an internationally wrongful act to the extent that such damage is economically assessable and not able to be made good by restitution. In the case of trafficking, an adequate and appropriate remedy could include: compensation payable for physical and psychological harm, lost opportunities, loss of earnings, moral damage, and medical, legal or other costs incurred as a result of the violation.

**Rehabilitation** is a victim-centred notion that recognizes a need to ensure that the person whose human rights have been violated has his or her status and position "restored" in the eyes of the law and of the wider community. Rehabilitation can include the provision of medical and psychological care, as well as legal and social services. Victims of serious violations of human rights such as trafficking will inevitably require a range of support services. The rehabilitation element of reparations would impose an obligation on the offending State to provide such services.

**Satisfaction and guarantees of non-repetition:** satisfaction is a remedy for injuries that are not necessarily financially assessable but can be addressed by ensuring that the violations of the victim's rights are properly acknowledged and dealt with. Verification of the facts and full and public disclosure of the truth (to the extent this will not cause further harm) are examples of remedies aimed at providing satisfaction to the victim. Guarantees of non-repetition are an important component of the right to a remedy in the case of trafficking owing to the danger of, and harm caused by, re-trafficking. Safe return, integration support and measures to prevent future trafficking are relevant, as is effective investigation, prosecution and sanctioning of traffickers. In relation to trafficking in women and girls, modifying legal, social and cultural practices that sustain or promote tolerance of such violence is an important aspect of guaranteeing non-repetition.

### **Ensuring access to remedies**

The right to a remedy is rarely effectively available to trafficked persons because they frequently lack information on the possibilities and processes for obtaining remedies. A right of access to effective remedies means that, in addition to making such remedies available under criminal or civil law, States should ensure that victims are provided with information and assistance that will enable them to actually secure the compensation or restitution to which they are entitled.

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The Basic Principles and Guidelines on the Right to a Remedy and Reparation provide detailed and specific guidance on the steps required to ensure access to justice for victims of serious human rights violations, such as:

- Disseminating information about all available remedies;
- Developing measures to minimize the inconvenience to victims and their representatives; and to protect against unlawful interference with victims' privacy and ensure their safety from intimidation and retaliation before, during and after judicial, administrative or other proceedings that affect their interests;
- Providing proper assistance to victims seeking access to justice; and
- Making available all appropriate legal, diplomatic and consular means to ensure that victims can exercise their rights to a remedy.

In the context of trafficking, an additional and important requisite for realizing the right to a remedy is the presence of the victim in the country where the remedy is being sought (see sect. D above).

The Special Rapporteur on trafficking in persons has proposed a set of draft basic principles on the right to an effective remedy for trafficked persons (see box below).

**Draft basic principles on the right to an effective remedy for trafficked persons**

**1. Rights and obligations**

1. Trafficked persons as victims of human rights violations have the right to an effective remedy for harms committed against them.
2. All States, including countries of origin, transit and destination, are obliged to provide or facilitate access to remedies that are fair, adequate and appropriate to all trafficked persons within their respective territory and subject to their respective jurisdiction, including non-citizens, for harms committed against them.
3. The right to an effective remedy encompasses both a substantive right to reparations and procedural rights necessary to access reparations.
4. In substance, trafficked persons should be provided with adequate reparations for the harms suffered, which may include restitution, compensation, recovery, satisfaction, and guarantees of non-repetition.
5. Trafficked persons should also be provided with access to a competent and independent authority in order to successfully obtain reparations. This necessitates, at a minimum, the provision of:

(a) Information concerning their rights, the reparations available and the existence of and modalities for accessing reparation mechanisms;

(b) Legal, medical, psychological, social, administrative and other assistance necessary in seeking remedies;

(c) A reflection and recovery period, followed by residence status while trafficked persons seek remedies.

## **2. Realizing the right to a remedy**

6. States shall:

(a) Ensure that adequate procedures are in place to enable quick and accurate identification of trafficked persons and provide adequate training to law enforcement and other agencies that might come in contact with trafficked persons;

(b) Ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice on any ground, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, including their age, their status as victims of trafficking, their occupation or types of exploitation to which they have been subjected;

(c) Give due consideration to individual circumstances of trafficked persons to ensure that remedies are centred on the empowerment of trafficked persons and full respect for their human rights. At a minimum, States should “do no harm” and ensure that remedial proceedings are not detrimental or prejudicial to the rights of trafficked persons and their psychological and physical safety.

### **Restitution**

7. States shall:

(a) Place the best interests of trafficked persons at the centre in providing measures of restitution;

(b) Provide trafficked persons with temporary or permanent residence status as a form of remedy where a safe return to the country of origin cannot be guaranteed, may place them at risk of persecution or further human rights violations, or is otherwise not in their best interests;

(c) Effectively address the root causes of trafficking in order to ensure that trafficked persons are not returned to the pre-existing situation which places them at risk of being re-trafficked or further human rights violations.

### **Recovery**

8. States shall:

(a) Provide a non-conditional reflection and recovery period, during which trafficked persons are provided with measures necessary for the physical, psychological and social recovery, including, but are not limited to: appropriate housing, counselling and information about their situations and legal rights; medical, psychological and material assistance; and employment, educational and training opportunities;

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(b) Ensure that trafficked persons' access to assistance and other benefits are under no circumstances dependent upon their cooperation in legal proceedings.

**Compensation**

9. States shall:

(a) Ensure that laws, mechanisms and procedures are in place to enable trafficked persons, if they desire, to:

(i) Obtain civil damages for trafficking-related offences, including breaches of labour laws;

(ii) Secure awards or orders from criminal courts for compensation from persons convicted of trafficking-related offences;

(iii) Gain access to compensation from the State for injuries and damages.

(b) Address the common obstacles for trafficked persons to obtain compensation for their material and non-material damage. To this end, they should ensure that:

(i) All trafficked persons have a legally enforceable right to obtain compensation, irrespective of their immigration status and of whether their perpetrators have been convicted;

(ii) Trafficked persons are fully informed of their legal rights, including their rights to have access to remedies through judicial, labour and administrative proceedings, promptly and in a language and form they understand;

(iii) Trafficked persons seeking to access remedies are provided with necessary assistance to this end, including social assistance, free and qualified legal aid and representation, and, where necessary, qualified interpreters, regardless of their immigration status;

(iv) Trafficked persons are allowed to lawfully remain in the country in which the remedy is being sought for the duration of any criminal, civil, labour or administrative proceedings, without prejudice to any claim they may have to the right to remain on a more permanent basis as a remedy in itself;

(v) Laws and procedures are in place to support the seizure of the proceeds of trafficking and confiscation of traffickers' assets, and explicitly indicate that such proceeds and assets are intended in the first instance to compensate trafficked persons and in the second instance for general provision of remedies to trafficked persons;

(vi) Effective measures are in place for the enforcement of reparation judgements including foreign judgements.

10. In cases of trafficked women and girls who have been subjected to sexual and gender-based violence, States should take into account potential risks of psychological harm, stigma and communal and family ostracism that judicial proceedings may impose on them and provide measures to afford adequate protection to those women and girls affected, while creating opportunities to seek compensation through non-judicial avenues.



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### 3. Trafficked children

11. States shall:

(a) Ensure that the best interests of the child are a primary consideration in providing trafficked children with remedies, taking into account the individual circumstances of the child, including his or her age, upbringing, ethnic, cultural and linguistic background and protection needs;

(b) Respect the child's right to express his or her views freely in all matters affecting the child. To this end, States should provide trafficked children with effective access to information on all matters affecting their interests, such as their situation, entitlements, services available and the family reunification and/or repatriation process;

(c) Take measures to ensure adequate and appropriate training, in particular legal and psychological training, for persons working with trafficked children on specific rights and obligations in cases involving children.

Source: "Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo" (A/HRC/17/35), annex I.

### F. Obligations of an effective criminal justice response

Trafficking is a crime as well as a violation of human rights. International law requires States to ensure an effective criminal justice response to trafficking: a response that works to end the impunity of traffickers and to secure justice for the victims.

### Criminalizing trafficking and related offences

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 cases of trafficking in persons to the required standard of due diligence. International law, as set out in the Trafficking Protocol (art. 5) and confirmed in many other legal and policy instruments, requires States to criminalize trafficking, its component acts and related offences. The international human rights treaty bodies and United Nations special procedures have also noted criminalization as both an obligation and a central component of an effective national response to trafficking in persons.

There are several key elements to the obligation to criminalize trafficking:

- **Criminalization independent of any transnational offence or involvement of organized criminal group:** the offence of trafficking should be established in the domestic law of every State *independently of its transnational nature* or the involvement of an organized criminal group.

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- **Application of the international definition:** international cooperation on trafficking requires a common understanding of trafficking, reflected in a common definition. States are required to ensure that the national definition is in keeping with the international standard. For example, the national definition should recognize that women, men and children can be trafficked for a range of exploitative purposes; it should recognize that the elements of the crime of trafficking in children are different from those of trafficking in adults; and it should be clear that the consent of the victim does not alter the offender's criminal liability.
  - **Complicity and liability in trafficking offences:** criminalization denotes individual criminal responsibility for perpetrators. Organizing, directing or being an accomplice in the commission of trafficking offences and attempting to commit such offences should also be criminalized. The nature of trafficking makes it especially important that liability for trafficking offences should extend to both natural and legal persons. Legal persons, in this context, might be commercial companies and corporations operating in a range of sectors such as tourism, entertainment, hospitality, labour recruitment, adoption and the provision of medical services.
  - **Criminalizing related conduct:** the importance of and the need for criminalizing component acts of trafficking as well as related offences are increasingly acknowledged. This would include violations of human rights law most directly associated with trafficking, such as sexual exploitation, forced labour or services, slavery or slavery-like practices, servitude, debt bondage, the worst forms of child labour and forced marriage. Proper criminalization of associated conduct, such as rape, sexual assault, physical assault, money laundering and corruption, can help to support a strong criminal justice response.
  - **Criminalization of the use of the services of a victim of trafficking:** the question of whether using the services of victims of trafficking should be criminalized has not yet been settled. While the Trafficking Protocol does not refer to it, the European Trafficking Convention requires its State parties to *consider* criminalizing the knowing use of the services of a victim of trafficking (art. 19). This issue is discussed further in the context of dealing with demand for trafficking (see sect. G below).
  - **Criminal jurisdiction:** the rules related to the exercise of criminal jurisdiction identify the circumstances under which a State is required to assert its criminal justice authority over a particular situation. For

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cases of trafficking, these rules are set out in the major international and regional treaties. Their objective is to reduce or eliminate jurisdictional safe havens for traffickers by ensuring that all parts of the crime can be punished wherever they took place. Another concern is to ensure coordination mechanisms if more than one country may have grounds to assert jurisdiction. The main rules require States to exercise jurisdiction over trafficking offences: (a) when the offence is committed on their territory or on board a vessel flying their flag or on an aircraft registered under their laws (territoriality principle); or (b) when the offender is present on their territory and they do not extradite the offender on grounds of nationality or any other grounds (principle of “extradite or prosecute”).

### **Effective investigation and prosecution of trafficking**

Traffickers and their accomplices are seldom arrested, investigated, prosecuted or convicted. As noted previously, victims of trafficking are rarely identified and too often criminalized. Despite being the key to successful prosecutions, victims are seldom brought into the criminal justice process as witnesses.

The Recommended Principles and Guidelines declare unequivocally that “States have a responsibility under international law to act with due diligence to ... investigate and prosecute traffickers” (principle 2). That obligation applies whether the allegation involves a State official or a non-State actor. International treaty law, including human rights law, supports this standard.

How does one measure whether a State is taking seriously its obligation to investigate and prosecute trafficking cases? The worst case will generally be the easiest to decide. A State that does not criminalize trafficking, that fails

#### **Due diligence in the investigation of trafficking cases**

In *Rantsev v. Cyprus and Russia*, the European Court of Human Rights identified an obligation on State parties to the European Convention on Human Rights to investigate cases of trafficking. The Court emphasized the need for such investigations to be full and effective: covering all aspects of trafficking allegations, from recruitment to exploitation. It further noted that these positive obligations applied to the various States potentially involved in human trafficking—States of origin, States of transit and States of destination. The Court affirmed that States are required 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” and 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”.

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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 show that the State is serious about investigating and prosecuting trafficking.

Legal and policy developments over the past decade have affirmed that the obligation to investigate and prosecute trafficking also requires attention to the following:

- **Treatment of and cooperation with victims:** effective prosecution of trafficking requires the cooperation of victims. If victims are prevented or discouraged from making complaints then this will have a direct impact on the ability of the criminal justice system to investigate and prosecute trafficking cases.
- **Training, empowerment and specialization of criminal justice officials:** an effective criminal justice response to trafficking requires trained and competent officials. Legal and policy sources confirm that training should adopt a human rights approach, aiming to strengthen the capacity of criminal justice officials to protect victims and to respect and promote their rights. 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. This may require, for example, the establishment of a dedicated, specialized investigatory capacity.
- **Integration of a gender perspective:** international and regional treaty law notes the importance of ensuring the integration of a gender perspective into responses to trafficking, including criminal justice responses. Men and boys are often overlooked as victims of trafficking and related exploitation. The harm done to them may be underreported and criminal justice agencies may be less willing to investigate and prosecute such cases. Women and girls have often been trafficked in ways that are specific to their gender and with an impact that can also be very gender-specific. 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 ending impunity and securing justice.
- **Rights of suspects and the right to a fair trial:** a human rights response to trafficking requires the rights of all persons to be respected and protected. The pursuit of traffickers can never be at the

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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.

- **Sanctions:** it is widely recognized that sanctions are an essential part of the national response to trafficking. International law requires States to ensure that trafficking offences and related violations of human rights are subject to effective and proportionate sanctions. Weak sanctions can undermine criminal justice efforts and may fail the victims by not offering them the protection they deserve. On the other hand, rigid or extremely severe sanctions, such as mandatory minimum custodial terms or the death penalty, may not meet the required human rights and criminal justice standard.
- **Asset confiscation and disposal:** trafficking is a highly lucrative and relatively risk-free crime. An effective criminal justice response requires steps to be taken to ensure that trafficking does not reward its financiers, organizers and beneficiaries. International treaty law confirms an obligation on States to seize and confiscate assets of trafficking and to ensure their laws and institutions are up to this task. The Recommended Principles and Guidelines (principle 16 and guideline 4.4) as well as the European Trafficking Convention (art. 23.3) encourage States to find ways to use confiscated assets to support victims of trafficking.
- **International cooperation:** informal cooperation mechanisms, such as intelligence exchange between national law enforcement agencies, as well as legal tools, such as extradition and mutual legal assistance, are important means of eliminating safe havens for traffickers and thereby ending the high levels of impunity they currently enjoy and securing justice for victims. International law requires States to facilitate such cooperation, for example, by making trafficking an extraditable offence and by adhering to the principle of “extradite or prosecute”. Human rights law also places limits on the ways in which such cooperation is to take place.<sup>4</sup>

## G. Preventing trafficking

In the context of trafficking in persons, prevention refers to *positive measures to stop future acts of trafficking from occurring*. Policies and activities identified as “prevention” are generally those considered to be addressing

<sup>4</sup> See further Association of Southeast Asian Nations, *ASEAN Handbook on International Legal Cooperation in Trafficking in Persons Cases* (2010).

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the *causes* of trafficking. These are generally agreed to be the factors that (a) increase the vulnerability of victims and potential victims; (b) create or sustain demand for the goods and services produced by trafficked persons; and (c) create or sustain an environment within which traffickers and their accomplices can operate with impunity.

International law confirms that States bear some responsibility for preventing the occurrence of an internationally wrongful act such as trafficking. The standard implied in this obligation is, once again, one of due diligence: the State is required to take “all reasonable and necessary measures” to prevent a given event from occurring. A decision on what is “reasonable and necessary” in this context will require consideration of the facts of the case and the surrounding circumstances, including the capacities of the State. The key trafficking treaties confirm an obligation of prevention, as do “soft law” sources, such as resolutions and policy documents of United Nations bodies and regional intergovernmental organizations and the work of the human rights treaty bodies and special procedures.

A human rights-based approach to trafficking may question or place limits on the use of certain common prevention strategies. The most important restriction is that responses to trafficking should not violate established rights (see sect. H below). The practical implications of this rule for the prevention of trafficking are considered further below.

### **Prevention through addressing vulnerability to trafficking**

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

Vulnerabilities to trafficking can be short- or long-term, specific or general, procedural, political, economic or structural. Understanding the nature of particular vulnerabilities can help to ensure that responses are targeted, appropriate and effective. An example of a short-term, specific vulnerability that has been repeatedly recognized, including by several human rights treaty bodies, is that caused by a lack of information about safe migration options and the dangers associated with trafficking. This vulnerability could

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be addressed through initiatives aimed at raising the awareness of potential migrants, including those who could be trafficked, with appropriate precautions and advice on how to avoid falling under the control of traffickers. Poverty and lack of avenues for safe, legal and non-exploitative migration increase vulnerability in much more complex ways and require long-term and more comprehensive approaches.

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

States have a legal obligation to prevent trafficking and associated human rights violations through addressing vulnerability. However, there is not yet sufficient clarity about what this means in practice. The Trafficking Protocol, for example, requires State parties to “take or strengthen measures ... to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity” (art. 9.4). Its parent instrument, the United Nations Convention against Transnational Organized Crime, also requires States to address the adverse social and economic conditions believed to contribute to the desire to migrate and, hence, to the vulnerability of victims of trafficking (art. 31.7). Both treaties highlight the need for education and awareness-raising aimed at improving understanding of trafficking, mobilizing community support for action against trafficking, and providing advice and warning to specific groups and individuals that may be at high risk of victimization. The European Trafficking Convention has similar provisions (arts. 5–6).

The importance of addressing vulnerabilities to trafficking is emphasized by the United Nations General Assembly, the Economic and Social Council and the Security Council, United Nations human rights bodies and through a range of regional and international policy instruments. The Recommended Principles and Guidelines highlight particular measures to reduce vulnerability, such as: providing accurate information to potential migrants; developing realistic information campaigns to inform communities about trafficking; and expanding the opportunities for legal, gainful and non-exploitative labour migration.

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The following paragraphs identify some of the issues that may arise in addressing specific forms of trafficking-related vulnerability.

#### *Vulnerability related to poverty and inequality*

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

#### **Poverty and vulnerability to trafficking**

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

Source: Explanatory Report of the Council of Europe.

Addressing poverty and inequality must be a priority for all countries, and for the intergovernmental organizations that represent them and promote their interests. While this is a broad and long-term goal that goes well beyond the issue of trafficking, there are certain steps that could be taken in this direction to specifically address those aspects of poverty and inequality that are most directly relevant to trafficking. These include: better educational opportunities, especially for women and children; better access to credit, finance and productive resources, especially for women; and legal and social measures to ensure labour rights, including a minimum wage that enables an adequate standard of living.

#### *Vulnerability related to discrimination and violence against women*

Major human rights instruments, both international and regional, prohibit discrimination on a number of grounds such as race, sex, language, religion, property, birth, nationality, ethnic or social origin, or other status. Discrimination can be linked to trafficking in a number of ways. It is no coincidence that those most likely to be trafficked (irregular migrants, stateless persons, non-citizens and asylum seekers, members of minority groups) are especially susceptible to discrimination and intolerance, based on their race, ethnicity,



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religion or other distinguishing factors. Some groups, such as migrant women and girls, are vulnerable to intersectional and multiple discrimination. In addition to increasing the risk of trafficking, discriminatory attitudes, perceptions and practices contribute to shaping and fuelling the demand for trafficking.

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

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

#### *Special vulnerabilities of children, including unaccompanied and separated children*

International law recognizes that children, because of their reliance on others for their security and well-being, are vulnerable to trafficking and related exploitation. It, therefore, accords children special rights of care and protection. Appropriate responses to child vulnerability must be built on a genuine understanding of that vulnerability—specifically, why some children are trafficked and others are not.

All measures taken to reduce the vulnerability of children to trafficking should aim to improve their situation—rather than just prevent behaviours such as migration for work, which, while not desirable, especially for young children,

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may not necessarily be exploitative or lead to trafficking. It is also important to recognize that children are not a homogenous group: older children have different needs, expectations and vulnerabilities than younger children; girls and boys can similarly be disaggregated.

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

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

*Source: Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary.*

### *Vulnerability in conflict and post-conflict situations*

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

### **Prevention through addressing demand**

Trafficking feeds into a global market that seeks cheap, unregulated and exploitable labour and the goods and services that such labour can produce.

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It is this realization that has prompted calls for States and others to consider demand as part of the problem of trafficking and to acknowledge demand reduction as an important part of any comprehensive approach to prevention.

It is difficult and sometimes controversial to focus on demand, and the fact that there is no common understanding of what “demand” actually means further complicates matters. For example, when used in connection with trafficking, demand can refer to quite different things: e.g., *employer demand* for cheap and exploitable labour; *consumer demand* for the goods or services produced or provided by trafficked persons; and even *demand generated by exploiters* and others involved in the trafficking process such as recruiters, brokers and transporters, who rely on trafficking and victims of trafficking to generate income. A distinction can also be made between the demand itself, and the causes and factors that can shape it. Of course, demand cannot be considered separately from supply—not least because supply may well generate its own demand. For example, the availability of a cheap and exploitable domestic labour force can itself contribute to generating demand for exploitative domestic labour at a level that may not otherwise have existed. Similarly, some argue that demand for prostitution fuels the market for persons trafficked into prostitution.

International treaty law requires States to take at least some measures to discourage the demand that fosters trafficking-related exploitation. However, provisions relating to demand are very general and it is difficult to isolate specific actions. For example, the Trafficking Protocol requires State parties to “adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking” (art. 9.5). The European Trafficking Convention contains a similar provision, along with a list of minimum measures that its State parties have to take (art. 6).

Several of the United Nations human rights treaty bodies and special procedures have taken up this issue, in particular the need to raise public awareness of the unlawful and exploitative nature of human trafficking. International and regional policy documents provide further confirmation of a growing understanding of the need for States to consider demand as a root cause of trafficking and a key factor in any effective prevention strategy. However, once again, there is a lack of specificity about how demand can or should actually be addressed in practice.

It is helpful to consider how human rights can contribute to fleshing out the substantive content of the obligation to address demand (see also chap. II,

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sect. C above). The following text box provides guidance on the various considerations that should underpin a human rights-based approach to addressing demand.

### **Considerations for a human rights approach to addressing demand**

#### ***Focus and scope***

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

#### ***Demand and discrimination***

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

#### ***The role of the State***

- States are able to shape demand for the goods and services produced by trafficking through laws and policies on a range of matters, including immigration, employment, welfare and economic development. For example, failure to provide legislative protection to certain individuals, such as domestic workers, “entertainers” or migrant workers, creates an environment that encourages demand.
- Laws and policies that institutionalize discrimination can also shape demand, as can a failure on the part of the State to challenge discriminatory social attitudes, practices and beliefs effectively.

- By maintaining trafficking as a low-risk, high-profit crime, a failure on the part of the State to investigate, prosecute and punish trafficking and related exploitation effectively can contribute to the demand generated by traffickers and exploiters.
- Failure on the part of the State to protect the rights of certain persons, including women, children and migrants, can further contribute to building demand by exacerbating vulnerability and, thereby, exploitability.

**The importance of labour protection**

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

**Non-violation of established rights**

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

*Source: Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary.*

**Prevention through addressing corruption and complicity**

In many situations of trafficking, some level of direct or indirect involvement of public officials is often claimed. Direct involvement refers to situations whereby public officials are actually part of the trafficking process—for example, as recruiters, brokers or exploiters. There are also many types of less direct official involvement (see text box below). Public sector complicity in trafficking, whether direct or indirect, undermines confidence in the rule of law and the fair operation of the criminal justice process. It fuels demand for illegal markets, such as trafficking, helps organized criminal groups to obstruct justice, exacerbates victim vulnerability, and renders almost impossible the full discharge of a State’s obligation to investigate and prosecute trafficking cases with due diligence.

Military, peacekeeping, humanitarian and other international personnel may also be involved in trafficking and related exploitation. This is a complex issue and the dynamics are not yet fully understood. Certainly, a large, mostly male international presence is likely to fuel the demand for goods and services

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produced through trafficking and exploitation, in particular prostitution. International personnel are generally deployed to situations of conflict or immediate post-conflict in which populations are vulnerable and basic institutions, including law enforcement, are fragile or non-existent. In addition, the legal framework governing engagement may be unclear and lines of responsibility and control blurred. The growing privatization of conflict, characterized by the increased involvement of private corporations as contractors and subcontractors, has exacerbated problems of responsibility and control. These various factors can combine to create a climate of impunity: a legal and procedural vacuum in which international personnel involved in criminal exploitation and trafficking are not investigated, apprehended or prosecuted.

#### **Examples of trafficking-related corruption and complicity**

- Border officials accepting bribes or inducements to permit the passage of persons who may be trafficked;
- Law enforcement officials or international peacekeeping, military or humanitarian personnel accepting favours in exchange for protection from investigation or prosecution;
- Labour inspectorates or health and safety officials accepting bribes to certify dangerous or illegal workplaces;
- Law enforcement or other public officials (including international peacekeeping or international military personnel) maintaining commercial interests in businesses using the services of trafficked persons, such as brothels; and
- Criminal justice officials, including prosecutors and judges, accepting bribes to dispose of trafficking cases in a particular way.

*Source: Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary.*

States have an obligation to identify and respond adequately to trafficking-related corruption and complicity—an obligation that should be seen as part of the broader duty to prevent trafficking. The United Nations Convention against Transnational Organized Crime, for example, acknowledges the strong link between organized criminal activities such as trafficking and corruption. It requires State parties to take strong measures to criminalize all forms of corrupt practices (art. 8). State parties are also required to adopt measures designed to promote integrity and to prevent and punish the corruption of public officials. They must also take measures to ensure effective action by their authorities in the prevention, detection and punishment of the corruption of public officials, including providing such authorities with adequate independence to deter the exertion of inappropriate influence on their actions (art. 9). The provisions of this Convention affirm the much more specific obligations of the United Nations Convention against Corruption.

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Other specialist trafficking treaties, including the European Trafficking Convention (art. 24), recognize public sector complicity in trafficking as an aggravated circumstance warranting relatively harsher penalties. Many international and regional policy documents confirm the link between trafficking and corruption and the need for States to respond effectively. For example, the General Assembly has sought to protect trafficked persons against further harm by calling upon Governments to penalize persons in authority found guilty of sexually assaulting victims of trafficking in their custody.

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

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

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

- Ensuring that the legal framework provides for the identification, investigation and prosecution of trafficking-related offences, including those committed by or with the complicity of public officials;
- Ensuring that the involvement of public officials in trafficking or related offences is an aggravated circumstance attracting relatively harsher penalties;
- Ensuring that procedures are in place for the effective investigation of complaints of trafficking involving or implicating public officials. These procedures should aim to ensure accountability, maintain public confidence and alleviate legitimate concerns. Accordingly, the investigation should commence promptly and be conducted with expedience. It must not be a mere formality but must be capable of leading to the identification and punishment of culprits. The investigation must be independent and public. There must be meaningful measures to establish the truth of a victim's allegations or to obtain corroborating evidence.

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If military, peacekeeping, humanitarian and other international personnel are involved in trafficking and related exploitation, the legal issues are more complicated. The Recommended Principles and Guidelines provide a very useful guide in this respect, focusing particular attention on closing this responsibility gap, identifying the obligations and responsibilities of States and intergovernmental organizations, and ensuring that international military, peacekeeping and humanitarian operations do not become safe havens for traffickers and their accomplices (guideline 10). Many of the practical steps proposed by the Recommended Principles and Guidelines (e.g., training, the adoption of regulations and codes of conduct, the establishment of investigatory and prosecutorial bodies, the removal of privileges and immunities, and the imposition of criminal disciplinary and financial responsibility) have been affirmed and even extended by recent reports, recommendations, commitments and initiatives of the major intergovernmental organizations, such as the General Assembly, the Security Council, the North Atlantic Treaty Organization, and coalitions of United Nations and private agencies involved in humanitarian work.

## **H. Ensuring responses do not violate established rights**

Measures taken to address trafficking can have an adverse impact on the rights and freedoms of trafficked persons and others—a danger that has been repeatedly recognized by the United Nations human rights system.

States and others are under an international legal obligation to ensure that measures taken to combat and prevent trafficking do not undermine or otherwise negatively affect human rights. This principle is recognized in the Recommended Principles and Guidelines. It is affirmed in the Trafficking Protocol:

*Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein (art. 14.1).*

Several human rights are particularly at risk through the application of anti-trafficking measures: the prohibition of discrimination; the right to freedom of movement; and the right to seek and receive asylum from persecution. These are discussed further below.

### **Anti-trafficking measures and the prohibition on discrimination, including gender-based discrimination**

The link between discrimination and vulnerability to trafficking has been explored in some detail in section G above. Another important aspect of the



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### **Examples of anti-trafficking measures that may adversely affect established rights**

- Detention of trafficked persons in immigration or shelter facilities;
- Prosecution of trafficked persons for status-related offences including illegal entry, illegal stay and illegal work;
- Denial of exit or entry visas or permits—whether generally applicable or only in relation to a group of persons identified as being especially vulnerable to trafficking;
- Denial of the right of all persons, including those who have been trafficked, to seek asylum from persecution;
- Denial of basic rights to migrants, including migrant workers and those not lawfully within the territory of the State;
- Raids, rescues and “crackdowns” that do not include full consideration and protection of the rights of the individuals involved;
- Forced repatriation of victims in danger of reprisals or re-trafficking;
- Denial of a right to a remedy;
- Violations of the rights of persons suspected or convicted of involvement in trafficking and related offences, including unfair trials and inappropriate sentencing; and
- Laws or procedures that authorize any of the above.

### **Risks to human rights that may arise in addressing vulnerability to trafficking**

- Failing to distinguish between children who are trafficked into situations of exploitation and children who migrate on their own or are assisted by others to find non-exploitative jobs they want to stay in;
- Failing to distinguish between those who are trafficked and those who migrate for work;
- Preventing or obstructing children, women or members of a particular ethnic or racial group from leaving home or migrating in search of work;
- According insufficient recognition and protection to male victims of trafficking;
- Failing to focus adequate attention on all forms of trafficking.

*Source: Recommended Principles and Guidelines on Human Rights and Human Trafficking: Commentary.*

link between discrimination and trafficking lies in the fact that measures taken by States and others to prevent or respond to trafficking can perpetuate discrimination and even violate the legal prohibition against discrimination. This danger is explicitly recognized in the Trafficking Protocol:

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*The measures set forth in this Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the grounds that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination (art. 14.2).*

The problem of gender-based discrimination is particularly acute. Under international human rights law, an anti-trafficking measure will violate the prohibition on sex-based discrimination if the measure can be shown to: (a) negatively affect the rights of the individual involved; and (b) be overwhelmingly directed to and affect women and girls. Detention of women and girls and restrictions on the emigration of women and girls are just two examples of potentially discriminatory responses to trafficking.

### **Anti-trafficking measures and the right to freedom of movement**

The right to freedom of movement generally refers to a set of individual rights that include: the right to move freely and to choose a place of residence within a State; the right to cross frontiers in order to both enter and leave the country; and the prohibition on the arbitrary expulsion of non-citizens. Many of the major international human rights treaties, including the International Covenant on Civil and Political Rights (art. 12), explicitly recognize and protect the right to freedom of movement, as does the Universal Declaration of Human Rights (art. 13) and all the major regional human rights treaties.

Freedom of movement is particularly vulnerable to being compromised by States in their efforts to respond to trafficking. States may, for example, take legislative, administrative or other measures to prevent individuals from emigrating in search of work. They may take (or not prevent non-governmental entities from taking) national or foreign victims of trafficking into “protective” custody. They may prevent a victim from returning home until certain requirements, such as providing testimony against traffickers, are met.

The Recommended Principles and Guidelines contain a specific reference to freedom of movement in the context of protecting established rights:

*States should consider protecting the rights of all persons to freedom of movement and ensuring that anti-trafficking measures do not infringe upon this right (guideline 1).*

When considering the human rights impact of a particular anti-trafficking measure, it is important to acknowledge that freedom of movement and related rights are not absolute. Such freedom may, for example, be guaranteed only to those who are *lawfully* within the territory of the State. In its general comment

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No. 27 (1999) on freedom of movement, the Human Rights Committee, in considering limits on this right, noted that it is “an indispensable condition for the free development of a person”. Any restrictions on this right “must be provided by law, must be necessary ... and must be consistent with all other rights recognized in the Covenant” and “conform to the principle of proportionality”.

In deciding whether a restriction on freedom of movement is lawful, it is therefore essential to ask whether it is: (a) provided for by law; (b) consistent with other rights (such as the prohibition on sex-based discrimination); and (c) strictly necessary. These requirements must all be fulfilled. For example, even if a State is able to argue that its emigration restrictions are based on a need to preserve public order or public morals through preventing trafficking *and* that the measures taken are both necessary and in proportion to their stated aim, that same State must also be able to show that its restriction is non-discriminatory. Since almost all emigration restrictions related to trafficking are limited to women and girls, it would be difficult for any State to argue convincingly for their lawfulness under current international legal standards.

### **Anti-trafficking measures and the rights of refugees**

Refugees and asylum seekers may also be victims of trafficking. International law is clear that asylum claims are to be considered on their substantive merits and not on the basis of the applicant’s means of entry. In practical terms this means that all persons, including both smuggled migrants and trafficked persons, should be given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country of destination on that basis. This rule has important practical significance. Many States impose penalties for unlawful entry, use of fraudulent travel documents, etc. It has been noted that such penalties increasingly consist of a denial of rights in the context of refugee determination procedures.

Trafficking itself could potentially be the basis of a claim for refugee status. In 2006, UNHCR issued *Guidelines on international protection: The application of article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (UNHCR Trafficking Guidelines). They acknowledge that not all victims or potential victims of trafficking fall within the scope of the refugee definition and that being a victim of trafficking does not, per se, represent a valid ground for claiming refugee status. However, they also affirm that, in some cases, trafficked persons may qualify for international refugee protection if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the definition of the 1951 Convention and the State does not provide effective protection.

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The principle of non-refoulement is another important aspect of the trafficking-refugee nexus that is particularly relevant to the obligation on States not to violate established rights. It prevents a State from returning a person to another State if there are substantial grounds for believing that the individual in question would be subjected to persecution. It also provides that States are not permitted to return or extradite a person to another State where there are substantial grounds for believing that the individual in question would be subjected to torture or other forms of ill-treatment. A determination that a victim of trafficking would likely face serious reprisals or re-trafficking may, in certain circumstances, trigger the obligation of non-refoulement.

**Measures to guard against the violation of established rights in relation to asylum**

- Ensure that procedures and processes are in place for the receipt and consideration of asylum claims for both trafficked persons and smuggled asylum seekers, and that the principle of non-refoulement is respected and upheld at all times;
- Ensure that a supportive environment is provided to asylum applicants who claim to be victims of trafficking;
- Understand that asylum seekers who are victims of trafficking may be in fear of revealing the full extent of their persecution and that this fear may have a gender dimension that needs to be taken into account;
- Accept that certain forms of trafficking may have a disproportionately severe effect on women and children and may, in fact, give rise to individuals being considered victims of gender-related persecution; and
- Avoid any overt or implied link between the merits of an asylum claim and the willingness of a victim to give evidence against his or her exploiters.

*Sources:* Recommended Principles and Guidelines and UNHCR Trafficking Guidelines.

## **IV. IMPLEMENTATION, MONITORING AND ACCOUNTABILITY**

The value of new international, regional and national laws around trafficking depends on their effective implementation. This chapter provides a brief overview of the web of mechanisms and procedures that have been established to help close the “implementation gap” between laws and practice, and thereby to ensure greater accountability of States and others who are responsible for responding to trafficking.

### **A. Mechanisms attached to treaties on trafficking**

The Trafficking Protocol does not establish a specific monitoring mechanism to oversee its implementation. However, its parent instrument, the United

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Nations Convention against Transnational Organized Crime, establishes a Conference of the Parties to the Convention, which has been empowered to request and receive information on State parties' implementation of the Protocol and to make recommendations to improve the Protocol and its implementation. In 2008 the Conference of the Parties set up a working group to assist and advise it in fulfilling its responsibilities with regard to the Protocol. That working group is mandated to:

- Facilitate implementation of the Protocol through the exchange of experience and practices between experts and practitioners;
- Make recommendations on how State parties can better implement the Protocol;
- Assist the Conference of the Parties in providing guidance to its secretariat (United Nations Office on Drugs and Crime) on its activities relating to the implementation of the Protocol; and
- Advise the Conference of the Parties on implementation-related cooperation with other bodies.

The European Trafficking Convention has a relatively sophisticated monitoring mechanism comprising a technically focused Group of Experts on Action against Trafficking in Human Beings and a more politically oriented Committee of the Parties, linked directly to the Committee of Ministers of the Council of Europe. State parties are required to regularly report to the Group of Experts on their implementation of the Convention and the Group of Experts is itself empowered to seek information including through on-site visits. Reports prepared by the Group of Experts are sent to the State party as well as to the Committee of the Parties for any follow-up that may be required. While the Committee cannot modify or change these reports, it can request State parties to take certain measures to implement its recommendations.

## **B. The international human rights system**

The international human rights system plays a central role in promoting the effective implementation of the international legal framework around trafficking. The United Nations Human Rights Council considers the issue of trafficking and, along with the General Assembly, regularly adopts resolutions on the subject. The work of other key players is briefly described below.

### **United Nations human rights treaty bodies**

For each of the major international human rights treaties, a committee of independent experts has been established to monitor the implementation of its

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provisions by its State parties. As part of their obligations under most of these treaties, State parties are required to submit regular reports to the respective committees on the situation with regard to protected rights and the steps that they have taken to fulfil their treaty obligations. The committees examine these reports and a dialogue is initiated with the reporting State. In addition to providing guidance to that State, the “concluding observations” of a treaty body on the performance of a State party can provide useful information to other countries on what is expected of them in relation to a particular right or standard set out in the treaty. Most treaty bodies also issue general comments interpreting the treaty provisions.

Some of the treaty bodies perform additional functions aimed at strengthening the implementation of the treaties by their State parties (such as inquiries). Some treaty bodies may consider complaints or communications from individuals alleging that their rights have been violated by a State party, provided the State has opted into this procedure. Finally, the Subcommittee on Prevention of Torture, a new type of treaty body, may visit all places of detention in State parties and provides assistance and advice to both State parties and independent national bodies for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

Given the broad scope of rights potentially affected by trafficking, it is not surprising that the work of most human rights treaty bodies touches on trafficking in one way or another. Their attention to trafficking has increased greatly over the past decade as trafficking has become more prominent on the international political agenda and its relationship to specific human rights more clearly established. For example, trafficking in children and women is now regularly discussed by the Committee on the Rights of the Child and the Committee on the Elimination of Discrimination against Women; and the trafficking of migrant workers is a major issue for the Committee that oversees the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Both the Human Rights Committee and the Committee on Economic, Social and Cultural Rights have repeatedly raised the issue of trafficking in the context of specific rights protected by the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The Committee against Torture and the Committee on the Elimination of Racial Discrimination have occasionally discussed trafficking during their consideration of State party reports.

### **United Nations human rights special procedures and trust funds**

The United Nations investigatory mechanisms or “special procedures” are charged with monitoring, advising and publicly reporting on a human rights

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situation in a specific country (country mandates) or on a particular issue (thematic mandates). All thematic and country-specific mechanisms are authorized to receive information relevant to their mandate from a variety of sources (including intergovernmental and non-governmental organizations), and to make recommendations regarding the prevention of violations. Some are empowered to respond to allegations of violations by, for example, establishing a dialogue with complainants and Governments or even engaging in investigating allegations. The reports of the special procedures can be an important source of information and insight into human rights norms and standards. Because special procedures are dealing with real situations, they are often able to identify the practical measures required by States to protect, respect and fulfil a certain human right.

### **Mandate of the Special Rapporteur on trafficking**

- Promote the prevention of trafficking in persons in all its forms and the adoption of measures to uphold and protect the human rights of victims;
- Promote the effective application of relevant international norms and standards and contribute to their further improvement;
- Integrate a gender and age perspective throughout the work of the mandate through, inter alia, the identification of gender- and age-specific vulnerabilities in relation to the issue of trafficking in persons;
- Identify and share best practices as well as challenges and obstacles in order to uphold and protect the human rights of victims and identify protection gaps in this regard;
- Give particular emphasis to recommendations on practical solutions with regard to the implementation of the rights relevant to the mandate, including by the identification of concrete areas and means for international cooperation to tackle the issue of trafficking in persons;
- Examine the impact of anti-trafficking measures on the human rights of victims of trafficking in persons with a view to proposing adequate responses to challenges arising in this regard and to avoid revictimization of victims of trafficking;
- Request, receive and exchange information on trafficking in persons from Governments, treaty bodies, special procedures, specialized agencies, inter-governmental organizations and non-governmental organizations and other relevant sources, as appropriate, and respond effectively to reliable information on alleged human rights violations with a view to protecting the human rights of actual or potential victims of trafficking.
- Work in close cooperation with other relevant agencies, organs and institutions, and report annually to the Human Rights Council and the General Assembly.

*Source:* United Nations Human Rights Council resolution 17/1.

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The special procedures most relevant to the subject of trafficking are the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences; the Special Rapporteur on the sale of children, child prostitution and child pornography; the Special Rapporteur on the human rights of migrants; and the Special Rapporteur on contemporary forms of slavery.

The United Nations Voluntary Trust Fund on Contemporary Forms of Slavery was established by the General Assembly in 1991 to provide humanitarian, legal and financial aid to individuals who are victims of contemporary forms of slavery. This term covers trafficked persons who are victims of exploitative practices such as forced labour, bonded labour, sexual slavery, the worst forms of child labour, commercial sexual exploitation of children and forced marriage. Priority in allocating grants is given to projects addressing the root causes of slavery; to projects providing direct medical, psychological, social, legal, humanitarian, educational or other forms of assistance to victims of contemporary forms of slavery; and to projects combined with income-generating activities.

### **The Office of the United Nations High Commissioner for Human Rights (OHCHR)**

While several United Nations specialized agencies have a mandate to work on migration-related issues, few have a protection mandate or an explicit human rights focus to their activities. OHCHR situates human trafficking in the global context of movement and migrations increasingly undertaken as a result of economic globalization, the feminization of migration, armed conflict, the breakdown or reconfiguration of States, or the transformation of political boundaries. Its strategy further acknowledges that migrants in an irregular situation are more likely to be victimized by unscrupulous employers or fall in the hands of traffickers. It also recognizes that restrictive and exclusionary immigration and asylum policies push migrants into alternative migration methods, including trafficking, with serious implications for their human rights.

In line with these issues, priorities and strategies, OHCHR is involved in analysing the impact of migration laws, policies and programmes on the rights of migrants; assisting Governments and other national stakeholders in reinforcing their capacity to monitor, investigate and provide redress for violations of migrants' rights; and providing training to migration officials, law enforcement officers, parliamentarians, judges and lawyers, on identifying victims of trafficking and monitoring violations of migrants' rights.

OHCHR is a member of the Inter-agency Coordination Group against Trafficking in Persons and has been instrumental in strengthening and transforming it from an information-sharing body to an inter-agency policymaking



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body. OHCHR is also a member of the Global Migration Group, comprised of 16 United Nations agencies and other international entities. During its term as chair in the second half of 2010, the Global Migration Group issued a landmark joint statement voicing deep concern about the human rights of migrants in an irregular situation, including the risk of trafficking. It called on States to address the demand side of trafficking and exploitation and expressed continued commitment to anti-trafficking measures.

### **C. The Global Plan of Action to Combat Trafficking in Persons and the United Nations Trust Fund for Victims of Trafficking**

In 2010, the General Assembly adopted the Global Plan of Action to Combat Trafficking in Persons, which focuses on preventing trafficking, prosecuting offenders and protecting victims, and affirms many of the standards and rules set out in chapter III above. It also stresses the importance of obtaining more research, data and analysis about the problem; urges all Governments to take coordinated and consistent measures to defeat trafficking; and calls for integrating the fight against human trafficking into the United Nations broader programmes to boost development and strengthen security around the world.

The Global Plan does not directly contribute to strengthening monitoring and accountability mechanisms. However, it does establish the United Nations Voluntary Trust Fund for Victims of Trafficking in Persons, Especially Women and Children, to provide humanitarian, legal and financial aid to victims of trafficking through established channels of assistance, such as governmental, intergovernmental and non-governmental organizations. The Trust Fund is administered through a board of trustees, which meets regularly to consider and advise on proposals.

### **D. International and regional courts and tribunals**

International and regional courts and tribunals are another potentially important source of monitoring and accountability. Several of the ad hoc international criminal tribunals (such as the International Criminal Tribunal for the former Yugoslavia) have occasionally considered trafficking-related issues. The inclusion of trafficking and related practices such as slavery and sexual slavery into the Statute of the International Criminal Court (art. 7.1 (c) and (g)) raises the possibility that this important mechanism of individual criminal accountability will have future relevance to the issue of trafficking. The European Court of Human Rights has issued judgements in several cases that dealt with or touched on trafficking. *Rantsev v. Cyprus and Russia* has been especially significant in fleshing out the substantive content of several impor-

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tant legal obligations, including the obligation to prevent trafficking-related exploitation and the obligation to investigate cases of trafficking with due diligence.

Human rights issues relating to trafficking, such as slavery, forced labour and exploitation of migrant workers, have also been considered by regional courts, including the European Court of Human Rights, the Inter-American Court of Human Rights and the Court of Justice of the Economic Community of West African States.

## **E. National monitoring and accountability**

In the final analysis, human rights are protected and respected because of what exists and what is done at the national level. It is the quality and strength of national laws, procedures and practices that will ultimately determine the nature of a State's response to trafficking.

The establishment of mechanisms to oversee and guide national trafficking responses is an important aspect of developing a strong, rights-based response. Such mechanisms should be mandated to and capable of measuring the national response against the international standards set out in this Fact Sheet. As recognized in the Recommended Principles and Guidelines (guideline 1), national mechanisms also have a critical role to play in monitoring the impact of anti-trafficking interventions to ensure they do not interfere with or otherwise negatively affect established rights.

An increasing number of countries are setting up single national offices, such as a rapporteur to oversee the national response to trafficking. Recently, the European Union mandated the creation of such a position within its member States (see below). In other countries, independent national human rights institutions, such as national human rights commissions, have taken up the issue of trafficking: conducting inquiries into the national situation, advising government agencies and assessing national responses that are seen to fall short of the State's international obligations.

### **National rapporteurs or equivalent mechanisms**

*Member States shall take the necessary measures to establish national rapporteurs or equivalent mechanisms. The tasks of such mechanisms shall include the carrying out of assessments of trends in trafficking in human beings, the measuring of results of anti-trafficking actions, including the gathering of statistics in close cooperation with relevant civil society organisations active in this field, and reporting.*

Source: Directive 2011/36/EU on preventing and combating trafficking in human beings and protecting its victims (art. 19).

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While independent monitoring is an important aspect of ensuring that laws, policies and practices protect and do not infringe established rights, those governmental agencies most directly involved in the trafficking response—including legislators, law enforcement, prosecutorial and judicial bodies and victim support agencies—should also monitor their own actions and performance from a human rights perspective. In addition, as noted in the Recommended Principles and Guidelines, non-governmental organizations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures. Such monitoring should not be limited to the actions of the State, but could usefully be extended to encompass the activities of non-governmental agencies themselves, in particular service providers and others involved directly with victims.

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Enquiries should be addressed to:

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Office of the United Nations High Commissioner for Human Rights  
United Nations Office at Geneva  
8-14, Avenue de la Paix  
CH-1211 Geneva 10  
Switzerland

New York Office:  
Office of the United Nations High Commissioner for Human Rights  
United Nations  
New York, NY 10017  
United States of America

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