

Chapter 12 Access to Justice

12.1 General principles

Criminal proceedings

- Child victims have the right to be fully informed about security issues and criminal procedures prior to deciding whether or not to testify in criminal proceedings against persons who are suspected of involvement in the exploitation and/or trafficking in children.
- Child victims of trafficking have the “right to recovery time” before deciding whether or not to pursue criminal proceedings against the trafficker.
- Assistance to the child victim of trafficking should not, under any circumstances, be conditional on the child’s willingness to act as a witness.
- The taking of a statement by a law enforcement officer or investigating judge shall in no way inhibit or delay family reunification or the return of child victim to the country of origin if it is in the best interest of the child.
- Direct contact should be avoided between the child victim and the suspected offender during the process of investigation and prosecution as well as during trial hearings as much as possible.
- Law enforcement authorities, in cooperation with social services and non-governmental organizations, should make available necessary legal representation, as well as interpretation into the native language of the child, if necessary.
- States should consider, if necessary, amendments to their penal procedural codes to allow for, inter alia, videotaping of the child’s testimony and presentation of the videotaped testimony in court as an official piece of evidence. In particular, police, prosecutors, judges and magistrates should employ child-friendly practices.

Civil proceedings

- Child victims should be provided with information regarding their right to initiate civil proceedings against traffickers and other persons involved in their exploitation.
- Law enforcement authorities should adopt measures necessary to protect the rights and interests of child victims at all stages of judicial proceedings against alleged offenders and during procedures for obtaining compensation.
- Law enforcement authorities should undertake to ensure that child victims are provided with appropriate access to justice and fair treatment, restitution and compensation including prompt redress.
- Law enforcement authorities, in cooperation with social services and non-governmental organizations, should make available necessary legal representation to bring an action within an appropriate court or tribunal, as well as interpretation into the native language of the child, if necessary.

12.2 Implications of the principles

Like adults whose rights have been abused by someone else, children who have been trafficked have a right to justice. Their right to a remedy for the abuses they have suffered means firstly that the police or others must help them get away from the control of traffickers or exploiters. Beyond that it means the children are entitled to see the people who have abused them prosecuted and punished, and to receive either compensation or some other token of recognition for the material harm and loss which they have suffered.

In some cases trafficked children can secure these remedies (punishment of abusers and compensation) in the course of the prosecution and trial of the individual or individuals involved in trafficking, exploiting or abusing them. However in some countries criminal trials of traffickers leave the victims’ right to restitution and compensation unresolved, in which case civil legal proceedings may be the only way for victims of traffickers to make a claim against their abusers.

When they first stop being under the direct control of their trafficker or exploiters, both children and adults are often traumatized by their experience, unsure what is going to happen next and unable to make a decision if law enforcement officials ask them to make up their minds swiftly if they are willing to testify against someone who has abused or exploited them. It is consequently sensible to allow trafficking victims (children and adults) to recover before asking them to consider whether they want to see charges laid or whether they are willing to cooperate with the authorities by giving a formal testimony which can be used as prosecution evidence at a trial. Under the terms of a 2004 EU Council Directive, most EU States now give suspected victims of trafficking a 'reflection period' to recover from their experience.

The "Recommended Principles and Guidelines on Human Rights and Human Trafficking" of the UN High Commissioner for Human Rights point out, in Guideline 9, that:

Trafficked persons, as victims of human rights violations, have an international legal right to adequate and appropriate remedies. This right is often not effectively available to trafficked persons as they frequently lack information on the possibilities and processes for obtaining remedies, including compensation, for trafficking and related exploitation. In order to overcome this problem, legal and other material assistance should be provided to trafficked persons to enable them to realize their right to adequate and appropriate remedies.⁹⁵

In theory securing a remedy for the abuse which they have suffered should automatically be in a child's best interests. In practice subjecting a child to court proceedings can cause more harm than good. This is particularly the case if a court case reveals the child's whereabouts to a trafficker or his or her accomplices, if it involves subjecting the child to hostile questioning by a trafficker on trial or by the trafficker's legal representative, and so on. In some cases, the very procedures observed in criminal cases can cause so much harm to children that it is clearly not in their best interests to become involved.

Individual trials and other legal proceedings should not cause harm to children and effective, child-sensitive procedures available to children and their representatives should be put in place to enable them to seek both the prosecution of their abusers and some form of compensation. Such procedures should include the provision of child-friendly information, advice, advocacy (including support for self-advocacy) and access to independent complaints procedures and to the courts with necessary legal and other assistance.⁹⁶ When it comes to children that do not speak the language of the country to which they were trafficked, they are entitled to the services of an interpreter at all stages in the legal proceedings.

Furthermore, child-friendly court procedures can also include provisions to allow for, inter alia, videotaping of the child's testimony and presentation of the videotaped testimony in court as an official piece of evidence. This would keep children from having to be physically present in court where they might be overwhelmed by the formality of proceedings or intimidated by the presence of someone who has abused them. In many countries, such provisions require amendments of the code of penal (criminal) procedure. However, amendments of this sort would potentially benefit a much wider group of children than just those who have been trafficked, including a range of children who have been abused.

⁹⁵ UN document E/2002/68/Add.1, 20 May 2002.

⁹⁶ See Paragraph 24 ('Justiciability of Rights') in: Committee on the Rights of the Child, General Comment No. 5 (2003), "General measures of implementation for the Convention on the Rights of the Child," UN document CRC/GC/2003/5.

Children that have been trafficked should be provided with information about remedies they are entitled to and how to exercise these rights. Some of the damages and losses which entitle trafficked children to monetary compensation have already been mentioned.⁹⁷ In summary, they include:

- abuse and offences committed against the child, i.e., physical or mental harm including pain, suffering and emotional distress;
- money taken from the child which the child earned legitimately;
- money taken from the child which was acquired in the course of activities that the child was instructed to carry out and worked to earn, even if the activities were not legal (e.g. prostitution);
- unpaid or underpaid wages or their equivalent in terms of the time which the child was obliged to spend earning money for a trafficker or exploiter;
- earnings or other property to which the child was entitled but that were held by the traffickers or exploiters and not given back when the child left their control;
- lost opportunities, including education and loss of earnings potential;
- harm to the reputation or dignity of the child (including harm that is likely to continue in the future, e.g., as a result of stigmatization);
- medical and related professional services relating to physical, psychiatric or psychological care, including psycho-social counselling;
- physical and occupational therapy or rehabilitation;
- costs of transportation and residential care or temporary housing;
- fees and other costs for a legal representative and expenses incurred in relation to legal proceedings by the legal representative, the child and her or his guardian;
- other costs incurred by the child's guardian; and
- costs incurred by the child and members of her or his family in the course of finding out what has happened to the child or in making suitable arrangements for the child.

This list is not complete. In addition to compensation to which the child is entitled, other people who have incurred costs for legal or expert assistance, including medical services and medicines, are also entitled to compensation. The police and other relevant authorities, including NGOs, should make available to the child's lawyers all documents and other information in their possession that are relevant to a trafficked child's claim for monetary damages, including compensation, restitution and recovery. A reason cited by the authorities in several countries for not providing victims of trafficking with information about how to make claims for damages or compensation is that orders for payment are frequently not complied with – i.e., no payment is ever made. This reflects a need for better laws on the seizure of the assets of suspected criminals (and their implementation) and on better ways of tracing their assets.

⁹⁷ Various legal terms apply the right to a remedy and to compensation:

- "The right to a remedy against violations of human rights and humanitarian norms includes the right to access to national and any available international procedures for their protection."
- "Reparation shall render justice by removing or redressing the consequences of the wrongful acts and by preventing and deterring violations. Reparations shall be proportionate to the gravity of the violations and the resulting damage and shall include restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition."
- "Restitution shall be provided to re-establish the situation that existed prior to the violations of human rights or international humanitarian law."
- "Compensation shall be provided for any economically assessable damage resulting from violations of human rights or international humanitarian law, such as:
 - (a) physical or mental harm, including pain, suffering and emotional distress;
 - (b) lost opportunities including education;
 - (c) material damages and loss of earnings, including loss of earning potential;
 - (d) harm to reputation or dignity;
 - (e) costs required for legal or expert assistance, medicines and medical services."

Source: 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, Commission on Human Rights resolution 2005/35, UN Document E/CN.4/2005/L.10/Add.11, 19 April 2005.

Information on available remedies might be channelled to children (in an appropriate form and language) through lawyers who are likely to represent trafficked children, but should also be provided directly to trafficked children and their guardians. The sort of information to present to children varies according to the age and maturity of the children involved. The content and form needed for a 9-year-old who has been trafficked is different to the information required by a 17-year-old.

Furthermore every trafficked child is entitled to the services of a legal representative without cost to the child. However, the appointment of a legal representative for the child does not mean that the police or courts can transfer responsibility to the lawyer for presenting information in a way the child understands.

The child's guardian is responsible for appointing a legal representative for the child. The guardian is also responsible for considering, with the child and following advice from a legal representative as appropriate, whether participation in criminal or civil proceedings is in the child's best interests and for deciding, again with the child, whether she or he should provide information to the authorities. In considering whether a child should provide information which might be used in a trial (and consequently might result in the child's identity being revealed or guessed by traffickers or their accomplices), both the child's guardian and her or his legal representative have a responsibility to consider what is in the child's best interests. Might the criminals blame their child victims for passing information to the police, even when they have not done so? Is it clear that the trafficker's influence is not sufficient to pose a threat to the child or her/his relatives, even in their home country? Do the police and courts have a good record for keeping the identity of child victims or witnesses confidential?

Similarly in deciding whether to go to the courts to seek justice for a child who has been trafficked, either to seek the punishment of the child's trafficker or in pursuit of a different remedy, such as compensation, the lawyer and guardian must also assess what is in the child's best interests. In all these cases, children must be told what is going on and their own views must be taken into account in accordance with their age and maturity.

Victims of trafficking are sometimes prevented from getting access to justice by the criminal justice system in their own country. They themselves may be considered to have committed a crime in their own country, for example by leaving the country illegally or by accepting money in return for sexual services (even if they did so while under the control of a trafficker or exploiter). The Ministry of Justice is responsible for proposing new legislation or amendments to existing legislation to remove such impediments to justice.

12.3 Who has responsibility to take action?

The authorities at the *Ministry of the Interior and immigration service* have a responsibility to grant a trafficked child appropriate immigration or legal status to remain in the country until criminal or civil proceedings have been completed and any compensation payments are paid to the child. They must ensure that a child who has been trafficked in a foreign country is given an opportunity to recover sufficiently before asking the child (together with the child's guardian and legal representative) to take part in any criminal proceedings against individuals involved in trafficking or exploiting the child.

The authority responsible for law enforcement is responsible for making suitable arrangements to enable the child to remain safely in the country for the duration of any criminal or civil proceedings.

Judges, magistrates, prosecutors and others involved in the administration of justice have a responsibility to ensure that individual trials and other legal proceedings do not cause harm to children, in terms of prejudicing their rights, undermining their dignity or harming their physical or psychological well-being. All this may require some amendments to the existing penal (criminal) procedure that should be considered.

The national authority in charge of the administration of justice is responsible for ensuring that children and adults who have been trafficked are provided with information about how to exercise

their right to appropriate remedies. The key individuals at the Ministry of the Interior and the national authority responsible for social services or child welfare who are dealing with the case of an individual trafficked child are responsible for ensuring that children who have been trafficked are given information about their right to initiate civil proceedings against traffickers and others involved in their exploitation. This means doing more than telling guardians and lawyers that this right exists in theory. If the child does not already have a legal representative, they, in cooperation with the child's guardian and others in law enforcement agencies and NGOs, should ensure the child has the necessary legal representation.

The prosecuting authority (i.e., Procuracy or Public Prosecutor's Office) is responsible for warning trafficked children and their legal representative and guardian as clearly as possible about the difficulties inherent in protecting the child's identity in the course of legal proceedings.

In addition to information provided to a child in advance of legal proceedings about what might be entailed, the police, prosecutors or court authorities have a responsibility to provide children and their legal representatives promptly with news about developments in a case, before, during and after any trial.

The Ministry of Justice or others in charge of the administration of justice are responsible for looking at policy questions. These include whether the confiscated assets of traffickers or exploiters should be paid into a revolving fund from which courts can make payments of compensation, without leaving trafficked children and other victims of crime dependent on the successful seizure of assets of the individuals who have abused them.

12.4 Who else may take action?

NGOs which are responsible for providing residential care or other services to trafficked children also have to decide how much to cooperate (or to advise a child in their care to cooperate) with police investigations and prosecutions. They can use their influence to persuade children to cooperate with the police, and thereby risk being perceived by the children themselves as agents of the police, or assert the children's right not to cooperate in police inquiries, in which case they risk being criticised by the authorities for not cooperating properly. It is clear that an NGO which is responsible for a child in any way must, like the child's guardian, place the child's best interests in front of other considerations, even if this means advising a child not to give evidence and thereby allowing a child trafficker to escape with impunity.

12.5 Key challenges and examples of good/bad practices

12.5.1 Short-term residence permits and 'right to recovery time'

When foreign nationals are identified, whether adults or children, the norm in many European countries is still to return them to their countries of origin as quickly as possible. This practice means that victims of traffickers do not remain in the country where they could assist the police in obtaining evidence about crimes which have been committed and, as a result, criminals go unpunished.

In an effort to deter traffickers by prosecuting some successfully, the authorities in several countries have adopted special procedures to allow trafficking victims who have agreed to help police inquiries and to testify in court to remain in the country to which they have been trafficked, usually only on a temporary basis.

However, when offered this opportunity to remain on a temporary basis, victims of traffickers were generally expected to reach a decision within days (sometimes within hours). As it was inevitably not possible for the victims of traffickers to recover and to make an informed decision in these circumstances, some countries have introduced an additional temporary residence permit entitling the victims to remain in the country for a finite period during which the victims can begin to recover and to consider whether they want to cooperate with the authorities (and potentially place themselves at risk). This is generally called 'recovery time' or 'a reflection delay'.

An EU Council Directive issued in 2004 provides for anyone who has been either trafficked or smuggled into an EU country to be issued with a temporary residence permit to allow them “to reflect on their position.” It does not, however, specify how long this reflection delay should be and leaves it up to individual countries to decide.⁹⁸ The Directive specifies that this is intended to “help put [victims] in a position to reach a well-informed decision as to whether or not to cooperate with the competent authorities, which may be the police, prosecution and judicial authorities (in view of the risks this may entail), so that they cooperate freely.” A group of experts advised that this reflection delay should last for at least three months.⁹⁹ As far as children are concerned, EU states are required to “take due account of the best interests of the child when applying this Directive” and to “ensure that the procedure is appropriate to the age and maturity of the child.”

Children who have been trafficked have as much right to ‘recovery time’ as adult victims. However, public officials (including law enforcement officials and those responsible for the administration of justice) are required to consider what is in the best interests of the child or children involved. This means that at the end of a period of ‘recovery time’, it would not be acceptable to proceed with the expulsion or deportation of a child without taking into consideration whether this is in the child’s best interests. The child’s guardian and legal representative also have an obligation to think through the implications for the child and to decide if cooperating in a prosecution is in the trafficked child’s best interests.

12.5.2 Children who are charged with committing an offence

Children who have been trafficked to make money in criminal activities are bound to be difficult for law enforcement officials to distinguish from other young criminals. The justice principle is clear: trafficked children may not be prosecuted, detained or punished for the illegality of their entrance into a country or residence there, or for the activities they are involved in as a direct consequence of their situation as a victim of trafficking.¹⁰⁰ However, distinguishing crimes which were ‘a direct consequence’ of their situation as a victim of trafficking from crimes committed in other circumstances can certainly be difficult. Similarly it is often hard to find out how foreign children who are suspected of having committed an offence have entered a country, let alone to know whether they have been trafficked.

There is certainly evidence that the number of children being used for criminal activities in Europe has increased over the past decade. Concern has grown over evidence that adults are even using children under the age of criminal responsibility to carry out criminal activities precisely because they know the children cannot be prosecuted and will usually be released immediately after arrest. These activities may range from robbery and housebreaking to the transportation or distribution of illicit drugs.

The most disturbing developments in recent years are the fact that such activities are increasingly orchestrated by organized criminal groups and that they have an ever-growing transnational dimension. A 1992 study in Italy noted that Mafia organizations were recruiting ‘thousands’ of children and young people to carry out front-line criminal activities, including drug distribution and carrying or hiding firearms. In the Russian Federation, the number of adults charged with involving children in criminal activity reportedly tripled between 1989 and 1994 to almost 21,000 cases.¹⁰¹

⁹⁸ Council Directive of 29 April 2004 on the residence permit issued to third-country nationals victims of trafficking in human beings or to third-country nationals who have been subjects of an action to facilitate illegal immigration and who cooperate with the competent authorities, Preliminary paragraph 11 and Article 6. This Council Directive applied to 12 of the European Union’s 15 member states at the time it was issued; it does not apply to Denmark, Ireland or the United Kingdom.

⁹⁹ “Report of the Experts Group on Trafficking in Human Beings”, 22 December 2004, European Commission Directorate-General Justice, Freedom and Security, page 34., http://europa.eu.int/comm/justice_home/doc_centre/crime/trafficking/doc/report_expert_group_1204_en.pdf

¹⁰⁰ Principle 7 of the UN High Commissioner for Human Rights’ Recommended Principles and Guidelines on Human Rights and Human Trafficking establishes the principle that states: “Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in countries of transit and destination, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons,” UN document E/2002/68/Add.1, 20 May 2002.

¹⁰¹ UNICEF, “Juvenile Justice,” Innocenti Digest No. 3, 1998.

In a few cases, it may remain unclear whether the children committed offences primarily to benefit someone else or for their own benefit and whether they were operating under duress. It may look as if some offences were committed as “a direct consequence” of their situation as a victim of trafficking, while others were not.

How should law enforcement officials proceed in these ambiguous circumstances? Some basic principles can help guide this decision making. In the first instance, give priority to action that is in the child’s best interests and protects the child. For example, this may translate into a decision against deporting them into situations where they would be at risk again.

Principles concerning juvenile justice are also helpful, such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’).¹⁰² However, law enforcement officials and others responsible for the administration of justice must bear in mind that traffickers deliberately manipulate standards and rules such as these for their own profit.

The Beijing Rules suggest that the age of criminal responsibility should not be too young. Traffickers are known to have made deliberate use of children who are below the age of criminal responsibility to avoid the children being detained and in the hope that the children concerned will return to their control as quickly as possible. The involvement of young children below the age of criminal responsibility may be an indicator that the children concerned are committing offences on behalf of others. In such circumstances, the question of whether the children concerned are criminal or not is the wrong one to be asking: the priority should be to protect them against further exploitation (as well as to stop further offences being committed).

Traffickers may also manipulate basic procedural safeguards to protect children or adults suspected of committing offences, such as the right to remain silent, the right to counsel, and the right to the presence of a parent or guardian. This is *not* a reason for not respecting these rights in the case of every suspected juvenile offender but it requires law enforcement officials (and others) to be vigilant.

If children are charged and their cases are referred to court when there are some indications that the child concerned was operating under the control of an adult or older youth and had been brought deliberately from one place to another to commit crimes and obtain money for others, it is the responsibility of law enforcement officials and others involved in preparing a prosecution to inform the court of these indications.

¹⁰² United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’) adopted by UN General Assembly resolution 40/33 of 29 November 1985.

