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November 2008

Legislative Reform for the Protection of the Rights of Child Victims of Trafficking

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LEGISLATIVE REFORM FOR THE PROTECTION OF THE RIGHTS OF CHILD VICTIMS OF TRAFFICKING

Legislative reform in the area of trafficking is particularly complex because trafficking itself constitutes an elusive notion. The definition of trafficking revolves around multiple concepts, and their interpretation remains poorly defined and prone to confusion. First, trafficking activities are very diverse. Trafficked children mostly end up in unregulated sectors such as domestic labour or prostitution. They can be sold for adoption or marriage. As a consequence, its components may overlap with other elements. How can trafficking be differentiated from smuggling? What is the boundary between work and exploitation? The constantly changing nature and dynamics of trafficking add to the difficulty of grasping this reality. It is both an international and domestic phenomenon. While trafficking has been most visible at a global level when it involves the crossing of a border, it also occurs within a country's boundaries, making it even more difficult to detect. It affects developed and developing countries. Trafficking trends represent a very complex web of countries of origin, transit, and destination, in which the same country can belong to all three categories and one country can easily switch from one category to another over time. Likewise, new forms of trafficking keep emerging, requiring constant adaptation of responses. Yet, trafficking can and should be addressed through comprehensive legislative reform.

Legislative reform aiming to address child trafficking must encompass the many dimensions of this phenomenon and take into account the existence of child specific forms of trafficking. While most actors, especially governments, tend to focus on the elimination of trafficking, in particular through its criminalization, what matters from a child rights perspective is primarily

prevention as well as the protection of the rights of victims. Therefore, legislative reform must concentrate on the child's experiences and give primary consideration to the best interests of the child.

This may not necessarily require the creation of new laws. Reform of existing laws may ensure adequate protection for child victims, and also avoid differentiated treatment between child victims of exploitation and child victims of trafficking. Laws and institutions may already exist with respect to specific issues related to trafficking such as guardianship when the child is unaccompanied, refugee status, laws and enforcement mechanisms to address child labour, etc. However, it is important that the legal framework be properly equipped to address all situations of trafficking.

The approach to legislative reform in the area of trafficking varies from country to country. Provisions related to child trafficking may be included in one special law on trafficking or incorporated in other relevant codes or laws. For instance, the protection of victims as witnesses in a trial may be included in the criminal procedure code, and issues related to the victims' status addressed in immigration laws. Civil lawsuits, on the other hand, usually belong to civil law. Many States have considered it useful, for the sake of simplicity and consistency, to gather in one Act all the provisions related to victims, even if this Act modifies several other laws.

Regardless of the approach taken, legislative reform should focus not only on the drafting of the law, but also on measures to ensure effective implementation through the establishment of adequate structures, including the attribution of precise responsibilities to relevant actors and institutions.

This chapter will focus therefore on the rights of child victims and the legislative processes for protecting these rights, rather than on criminal/prosecution issues. It should be read in conjunction with UNICEF's Guidelines on the Protection of Child Victims of Trafficking.¹ Like other chapters of the Handbook, this chapter indicates the standards towards which one should aspire. Depending on the level of development of a given country and the state of the rule of law, some recommendations presented here may

¹ Forthcoming.

be more difficult to implement than others. Examples featured were chosen because they constitute good practices on a specific issue.

While international treaties, due to their very nature, tend to focus on international aspects of, and responses to, child trafficking, they draw less attention to trafficking within State borders, is a serious problem in many countries. This type of trafficking is likely to be less visible than international trafficking and is sometimes socially accepted as a necessity, due to poverty. However, the legal framework of the State needs to address these situations and not limit itself to addressing cross-border trafficking. Definitions, guiding principles, rights of victims and prevention strategies are similar for both cross-border and internal trafficking, with the necessary adaptations to be made depending on the context. Wherever relevant, the chapter will allude to the specificity of internal trafficking.

Part 1 DEFINITIONS

The definition of trafficking contains several elements that must be explored in order to ensure that law is comprehensive enough. A proper definition is important, as it may determine the status of a child as a victim and ensure a set of protection measures. It is also important from a criminal law perspective, as it forms the basis for prosecuting and sentencing traffickers. Consistent definitions in various countries, in particular within the same region, are crucial to ensure a common understanding of child trafficking and coordinate responses.

In many countries, laws intended to combat trafficking only tackle trafficking for the purpose of sexual exploitation. A broader definition is needed in order to ensure that all forms of trafficking are prevented. While international treaties that provide the basis for anti-trafficking laws deal primarily with international trafficking – involving the crossing of a border - national laws should also encompass trafficking within the State's territory.

1.1 General Definition

While many international treaties have tackled various aspects of trafficking, the first internationally agreed definition of trafficking is included in the Protocol to Prevent, Suppress, and Punish Trafficking in Persons, Especially Women and Children, adopted in 2000 (Palermo Protocol), supplementing the UN Convention against Transnational Organized Crime. Since it is a binding instrument for governments which have ratified it, and contains an extensive definition of trafficking in persons, it can be used for advocacy and guidance. It has to be highlighted, however, that the Palermo Protocol is not a human rights treaty as such; it was adopted within the framework of the fight against organized crime. As a result, it should be considered along with human rights treaties to ensure the full protection of victims. Its definition of trafficking in persons is 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.

The Protocol adds a specific definition of trafficking in children, which is even broader. While the general definition of trafficking requires the existence of a threat, use of force, other forms of coercion, including abuse of power, or a payment, the definition of trafficking in children suppresses this condition:

- c) The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the means set forth in subparagraph (a) of this article.

The rationale is twofold. On the one hand, it recognises the specific vulnerability of children. On the other hand, it ensures that no child victim is excluded from the protection framework offered by the Protocol.

Box 34: The Anti-Trafficking in Persons Act in the Philippines

The Anti-Trafficking in Persons Act of 2003 in the Philippines (Republic Act 9208) contains a definition of trafficking in persons and child trafficking that reflects virtually word for word the definition adopted in the Palermo Protocol. It goes even further by including persons over 18 who cannot fully protect themselves due to a physical or mental disability or condition in the definition of a child, thus giving access to increased protection.

While adopted in the context of the Convention on Transnational Organized Crime, the definition of the Palermo Protocol can apply to both internal and international trafficking. The adoption of a similar definition in the national legal framework should include the internal dimension and not be conditional on the crossing of a border.

Yet, this definition raises several questions. It focuses on the crime of trafficking rather than on the situation of the child. Therefore, one would have to prove the intention of exploitation if a child is found while transiting from one country to another. Otherwise, the transfer may be qualified as migration or smuggling, and the child will not be afforded protection under the Palermo Protocol. Another set of issues relate to the definition of a child and of exploitation, which will be explored below.

1.2 Regional Instruments

Some regional instruments also contain a definition of trafficking that differs from the definition provided in the Palermo Protocol. This is due to the fact that regional definitions tend to be adjusted to the most pressing issues in the region.

The Inter-American Convention on International Traffic in Minors, adopted by the Organization of American States in 1994 and entered into force in 1997, defines trafficking as:

[T]he abduction, removal or retention, or attempted abduction, removal or retention, of a minor for unlawful purposes or by unlawful means (Article 2).

This definition implies that trafficking may have a lawful purpose but be carried out by unlawful means, for instance in adoption cases, or have an unlawful purpose carried out by lawful means, as would be the case of a minor transported by a legal guardian to be exploited. One concern is that this definition leaves a wide margin of appreciation to national laws of participating States, since what is considered lawful or unlawful varies from one country to another. Proactive measures would therefore need to be taken to ensure harmonisation of laws in the region to ensure consistency.

The African Charter on the Rights and Welfare of the Child, adopted by the Organization of African Unity in 1990 and entered into force in 1999, requires States Parties to prevent:

- a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person including parents or legal guardians of the child;
- b) the use of children in all forms of begging (Article 29).

1.3 Definition of a Child

As stated by the Protocol, the definition of a child is anyone under 18 years old. While the Convention on the Rights of the Child contains the same definition, it adds a limiting condition: “unless under the law applicable to the child, majority is attained earlier” (Article 1). In other words, in some areas, such as minimum age for marriage, voting rights or criminal responsibility, the age of majority can be lower. However, given the definition of the Palermo Protocol, the possibility to lower the age of majority offered by the CRC does not apply to trafficking. Concretely, any anti-trafficking legislation should provide for the protection of every human being under 18 years old, without exception. For instance, provisions for child protection should apply to a girl

victim of trafficking who is married, even though domestic law may regard her as an adult due to her marital status.

However, a practical problem may arise when child victims of trafficking do not have proper documents such as birth certificates – or the documents they do have are not reliable, as is often the case. In such cases the age may be difficult to ascertain. In case there is a doubt as to the age of the victim, the law should establish a presumption that the person is a child and entitled to corresponding protective measures, unless proved otherwise.²

1.4 The Notion of Exploitation

While the Palermo Protocol provides some examples of possible forms of exploitation, it does not give a definition of this term and neither does the CRC. As a consequence, one needs to look at a number of treaties dealing with related issues to construct a spectrum of the many forms child exploitation can take. From a legislative reform perspective, it is essential that not only all these elements be included in the law, but also that the law be broad enough to include new forms of exploitation.

In the context of internal child trafficking, the notion of exploitation is particularly important. Often, indeed, children are trafficked internally and forced into various forms of child labour. In many instances, the trafficker lures families and children by promises of good work and working conditions, to engage children in exploitative activities and/or exploitative conditions. A strong legal and institutional framework addressing child labour is therefore essential to address internal trafficking.

Economic exploitation is mentioned in Article 32 of the CRC, which states:

“States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be

² Guidelines for protection of the rights of children victims of trafficking in Southeastern Europe, UNICEF, May 2003.

harmful to the child's health or physical, mental, spiritual, moral or social development"³.

In 1993, the CRC Committee held a Day of General Discussion on the Economic Exploitation of Children. In the opening remarks, a member of the Committee spelled out a conceptual definition of exploitation:⁴

Exploitation means taking unjust advantage of another for one's own advantage or benefit. It covers situations of manipulation, misuse, abuse, victimization, oppression or ill treatment. [...] We are confronted with a situation of exploitation essentially when the human dignity of the child or the harmonious development of the child's personality is not respected.⁵

The reference to any work that is likely to be hazardous or interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development in CRC Article 32 can also define a standard for determining whether a situation is exploitative or not.

Additional international instruments can also be used to complement the list provided by the Palermo Protocol, and tackle the multiple faces of child exploitation.

Box 35: International instruments providing guidance on child exploitation:

- The sale of children, child prostitution, and use of children in the production of pornography, as defined under the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography;
- The compulsory recruitment and participation in hostilities of children under 18, defined under the Optional Protocol to the CRC on Children in Armed Conflict;
- The worst forms of child labour as defined under ILO Convention 182 (1999): all forms of slavery or practices similar to slavery, such as sale of children, debt bondage and serfdom and forced or compulsory labour, including

³ CRC Article 32(1).

⁴ Remarks by Marta Santos Pais (former member of the CRC Committee).

⁵ CRC/C/20, Annex V, available at

<http://www.unhcr.ch/html/menu2/6/crc/doc/days/exploit.pdf>.

forced or compulsory recruitment of children in armed conflict; child prostitution and the use of children for the production of pornography or for pornographic performances; the use of children for illicit activities; and work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children;

- Work done by children below the minimum age for admission to employment as specified in ILO Convention 138 (1973);
- Adoption for financial gain, contrary to the Hague Convention on Inter-Country Adoption;
- Forced or early marriage, defined as a “practice similar to slavery” under the UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery.

It follows from the foregoing that the central elements of a definition of child exploitation that need to be reflected in legislation are:

- the actual harm likely to be caused to the child and his or her development, be it physical, mental or psychological, including interference with the child’s education;
- the fact that a third person is benefiting from that situation;
- labour laws setting limits in terms of the type of work, working age(s), and working conditions for children.

Box 36: The Romanian Law on the Prevention and Fighting of Trafficking

The Romanian law on the Prevention and Fighting of Trafficking in Human Beings (Law 678 of 11 December 2001) defines “exploitation” as performing forced labour in violation of the legal requirements on labour conditions, pay, health and security; keeping a person in a state of slavery or depriving that person of freedom; compelling a person to engage in any form of sexual exploitation including prostitution and pornography; and drawing human organs. Importantly, the law includes in its definition of exploitation “other similar activities that are violating fundamental human rights and freedoms,” thereby paving the way for the inclusion of new forms of exploitation that may emerge, on the basis that they violate human rights.

Part 2 GUIDING PRINCIPLES

As in other areas, the four guiding principles of the CRC should be taken into account and provide a useful framework in legislative reform aimed at addressing child trafficking. In its General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin,⁶ the Committee on the Rights of the Child analyses the importance of each of the guiding principles for the protection of unaccompanied children's rights and this analysis can provide useful guidance to the issue of child victims of trafficking. These principles also apply to internal trafficking.

2.1 Right to Non-discrimination

While national legislations often expressly assert the principle of non-discrimination, frequently inscribed as a constitutional principle, some specific grounds for discrimination must be addressed in anti-trafficking legislation.

Many children who are victims of trafficking often find themselves unaccompanied, in a country of which they are not citizens, in an "illegal" situation. This may prevent them from having access to services and enjoying other rights.

2.2 Jurisdiction

The CRC expressly mentions that the Convention applies to all children in the State Party's jurisdiction. The principle is also contained in the Palermo Protocol. In its General Comment No. 6 on unaccompanied and separated children, the CRC Committee reiterates the importance of this provision:

[T]he enjoyment of rights stipulated in the Convention is not limited to children who are citizens of a State party and must therefore, if not explicitly stated otherwise in the Convention, also be available to all children - including asylum-seeking, refugee and migrant children - irrespective of their nationality, immigration status or statelessness.

Adequate provisions should therefore be included in the law to ensure that all child victims have an equal right to protection and

⁶ CRC/GC/2005/6.

support, regardless of their nationality or immigration status. Legal provisions relating to social benefits such as health, housing and education should be reviewed to ensure that they are not restricted to children who are nationals. Children's specific needs in terms of age and gender should also be addressed.

This principle has broader implications. For instance, the State where a child is located has the responsibility to provide for that child's needs and make arrangements as relevant if return to their state of origin is in their best interests. The issue of jurisdiction is particularly important when negotiating international agreements, as the lack of agreement on which State bears the responsibility – and costs – for the return of the child may lead to endless procedures and negotiations.

2.3 Best Interests of the Child

As stated in the CRC, the best interests of the child should be a primary consideration in all actions concerning children. In the area of trafficking, this provision has even more importance, as many interests are competing with children's best interests. For instance, States may be first and foremost interested in arresting and prosecuting traffickers, who are part of networks of organized crime. To that end, they may pressure child victims to testify, even when it is not in the child's best interests in light of the trauma they have suffered. States may be concerned about illegal immigration, thus preferring to repatriate victims to their country of origin, even if they do not have absolute assurances that they will be safe there.

As explained in this Handbook, a country's legal framework must integrate the best interests of the child as a cross-cutting principle, and in laws related to trafficking issues that principle should be reiterated as superior to all other considerations.

Box 37: The Federation of Russia's Draft Federal Law against Trafficking

The Federation of Russia's Draft Federal law against trafficking in Persons and Measures to Protect Victims of Trafficking states that in the event child victims of trafficking are provided assistance, all measures should be taken in the best interests of the child and in accordance with the CRC.

2.4 Right to Life, Survival and Development

Child trafficking represents a violation of a child's right to life, survival and development, as children forced into exploitation perform tasks that are harmful to their health and harmonious development. Fighting child trafficking is therefore an obligation for States for the fulfilment of this CRC provision. It does not mean prosecuting traffickers at all costs, in particular when it puts children in danger or carries the risk of further traumatizing them. It implies, first and foremost, setting up prevention programmes and policies aimed at addressing the root causes of trafficking. In this regard, the law constitutes a useful tool to mandate specific institutions and ministries with the responsibility for the design and implementation of such programmes (see section 1.4 on prevention).

The implementation of the principle of the right to life, survival and development also implies the obligation for States to ensure that child victims of trafficking have access to appropriate social services, in particular physical and mental health services and education (See section 1.3 on the rights of victims).

2.5 Respect for the Views of the Child

A child victim of trafficking has the right to express his or her views in all matters affecting him or her, including the legal process, interim care and protection and the identification and implementation of a durable solution, in particular in decisions concerning the child's possible return to the family or country of origin. These views must be sought and given due weight in accordance with the child's age and maturity.⁷

Concretely, this means that the legislative framework should require all responsible authorities to seek and consider the views of the child during the decision-making process. The law should explicitly state that principle and indicate at each stage of the process how the views of the child will be sought. The law can provide for possible sanctions, including the nullity of relevant acts, if children's views are not heard – unless adequate justification is provided. For the children's right to participate to be meaningful, processes and procedures should be adapted to create an environment where the child feels free to express him or herself and

⁷ UNICEF guidelines, p. 10.

has the necessary support to do so. Children should have the option not to express their views if they so choose.

Appropriate child-friendly institutional settings should be established by law to ensure the realisation of this right. This implies that courts must be equipped with a special room to receive child testimony and, where possible, video should be used to record these testimonies to avoid repetition of trauma. During administrative or legal proceedings, interviews must be conducted with child victims by specially trained staff, preferably of the same gender as the child, and the views expressed in these interviews must be taken into consideration when decisions are made.

For example, in London, UK, new police headquarters have been established to lead the fight against child abuse in four boroughs. The building has two conference rooms furnished with video and recording equipment as well as toys to create a child-friendly environment. The objective is to allow children to give their testimony in a comfortable setting rather than in an intimidating – and likely traumatizing – court environment.

Part 3 RIGHTS OF VICTIMS

A law on trafficking should aim to ensure that victims are protected. Victims of trafficking are particularly vulnerable as they may find themselves in a country or region they do not know and where they do not speak the language, far from their family, without proper documentation, and may be at risk of re-trafficking and/or stigmatisation back home. The CRC Committee General Comment on unaccompanied and separated children outside of their country of origin, while not addressing only cases of trafficking, provides useful guidance in defining States' obligations with respect to child victims.

Legislative reform for the protection of child victims of trafficking extends to a wide range of areas of law and law implementation. A fully protective legal system may require amending a number of texts, such as family law/civil codes, criminal procedure codes, education laws, immigration laws, etc. As already mentioned, the legal system may already contain adequate provisions in some

areas but not in others. For this reason, a thorough law review is necessary.

See Chapter 2 on law review.

3.1 Guiding Principles Specific to the Rights of Victims

While the guiding principles of the CRC as they relate to legislative reform in the area of trafficking have already been examined, this section presents some of the more specific principles that apply to the rights of victims, which the law should clearly state to ensure that they are respected. As a general principle, it is essential that the situation of each and every child be assessed individually.

3.1.1 *Right to Express Views*

The right of children to express views in all matters affecting them, as provided by the CRC, should obviously apply to child victims of trafficking. Child victims must be able to express their views and concerns related to their involvement in the justice process, in particular regarding their safety, the manner in which they prefer to provide testimony and their feelings about the conclusions of the process. If their requests cannot be accommodated, professionals should explain the reasons to children.⁸

3.1.2 *Right to Information*

Child victims have the right to accessible information regarding their situation and their rights, as mentioned in the Palermo Protocol and in the Optional protocol on the sale of children. This right should be clearly reflected in the law and adequate measures be taken to ensure its realization. Its fulfillment implies an obligation to tell children about available services, the law applicable to them and the various options available in terms of criminal prosecution, immigration status, return, asylum, etc. In the criminal proceedings, providing children with adequate information is crucial to ensure that they fully understand the issues at stake. Child victims must be informed on the services to which they are entitled, including legal representation. They must know about the procedures, their scope and timing, the possibility to obtain compensation, as well as ways to be heard. They must be informed of their role in the process, the way questioning will be conducted, and the availability of protective measures. Throughout the proceedings children are entitled to be notified on the progress

⁸ Ibid., Section 4.

of the case, including the arrest of the accused, the prosecutorial decision, and the outcome of the case. They should also be aware of mechanisms for review of decisions.⁹

The realisation of this right implies making sure that adequate institutional mechanisms are in place. Importantly, information must be explained to children in a manner that is appropriate to their age and maturity and in a language that they understand. The legal guardian of the child should have the primary responsibility for informing the child victim of his/her rights and guide the child in light of his/her best interests. This obligation should be stated in the law that addresses the appointment of legal guardians. With respect to access to services, institutions responsible for the care of child victims should be held accountable for ensuring that children are aware of their rights. This can be done by including relevant provisions within the mandate of the institution. With regard to criminal proceedings, law enforcement personnel should be obligated to inform the child of his/her rights, the proceedings, and the expectations in terms of outcome.

3.1.3 Right to Privacy and Confidentiality

Privacy is essential to protect child victims and prevent them from being stigmatized by society or their communities. Children need to be particularly protected as they are more vulnerable to stigmatization. The publication of information on their situation in the mass media can have a very negative impact on their development and represent a significant obstacle to their reintegration. The Palermo protocol stipulates that the privacy and identity of victims of trafficking should be protected “in appropriate cases and to the extent possible under [the] domestic law” (Article 6.1). The Optional Protocol on the sale of children insists on the importance of protecting the privacy and identity of child victims and taking measures to avoid the dissemination of information that could lead to the identification of child victims. The protection of privacy and confidentiality is vital to guaranteeing the safety of victims and ensuring that they will not be deterred from filing a complaint. One way of doing this is by excluding the public and the media from the courtroom. When children are involved, all information regarding children should

⁹ See Guidelines on Justice for Child Victims and Witnesses of Crime, Section 3.

remain confidential, and violation of this principle should entail civil and possibly criminal sanctions.

3.1.4 Non-refoulement and Internal Displacement

While the principle of non-refoulement can provide guidance to handle cases of international trafficking, internal displacement can help in addressing cases of internal trafficking.

It should be clear at the outset that the principle of the best interests of the child should always prevail. Consequently, the principle of non-refoulement should only be used as a safety net and/or advocacy tool, should the best interests of the child principle not be respected.

While due to immigration concerns, States may be tempted to send children back to their State of origin, they are nonetheless bound to respect international obligations. The principle of non-refoulement represents a key provision of the Geneva Convention relating to the Status of Refugees of 1951. The Geneva Conventions belong to the realm of international customary law, meaning that all States, whether they are party or not, are bound by their provisions, which are recognised as universal. The Palermo Protocol makes express mention of the Refugee Convention and the principle of non-refoulement in Article 14. That Convention defines a refugee as someone who has:

“[A] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it” (Article 1).

According to the principle of *non-refoulement*, when someone is recognized as a refugee, a State cannot expel that person, as he/she would be in danger in his/her home country:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion” (Article 33).

Court decisions in several States have accorded the status of refugee to victims of trafficking, basing their decision on the “membership to a particular group,” a group defined, for instance, as “young women from the former Soviet Union recruited for exploitation in the international sex trade.”¹⁰ Lawyers involved in trafficking cases should be aware of that case-law.

The CRC Committee in its General Comment No. 6 reiterates that principle. It states in particular that:

“States shall not return a child to a country where there are substantial grounds for believing that there is a real risk of irreparable harm to the child, such as, but by no means limited to, those contemplated under articles 6 and 37 of the Convention (...). Such non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of action or inaction. The assessment of the risk of such serious violations should be conducted in an age and gender-sensitive manner (...)”

In the context of internal trafficking, some experts have advocated for an approach drawing on the similarity between the situation and vulnerability of internationally displaced persons and victims of trafficking.¹¹ In this view, human trafficking shares with internal displacement the element of a coerced, forced or involuntary movement – even if the movement is initially voluntary, the exploitative situation is not. Internally displaced persons are vulnerable to trafficking and promises of better situations elsewhere. Displacement disrupts family and community networks which represent key elements of the child’s protective environment.

¹⁰ UK, Immigration Appeal Tribunal, CC-50627-99 (00TH00728), 17 May 2000. Quoted by Kartusch, Angelika, *Reference Guide for Anti-Trafficking Legislative Review* [with particular emphasis on South Eastern Europe], OSCE (September 2001).

¹¹ S. Martin, *Internal Trafficking*, *Forced Migration Review* 25 (May 2006), p.12-3.

In this context, the Guiding Principles on Internal Displacement¹² offer useful and detailed guidance on the measures necessary to protect victims of trafficking. It states the need to provide adequate protection and assistance to children, taking into account their special needs. It refers to family reunification and the right to education. Importantly, it includes principles related to long-term solutions such as return, local integration, or resettlement and assigns responsibility to national authorities. The document is however not child-specific and should therefore be read in conjunction with child rights instruments.

3.2 Concrete Steps for the Protection of Child Victims

3.2.1 Recognition of the Status of Victim

The first step is to have a procedure to ensure that victims have their status officially recognised. There are several means to do so:

1. Allowing courts dealing with trafficking cases to identify victims and certify their status;
2. Allowing a judicial or administrative decision based on reports of law enforcement, border-control or other officials who encounter victims;
3. Allowing a judicial or administrative decision based on the application of the alleged victim or his/her representative.¹³

The recognition of a child as a victim should in no circumstances be linked to his/her willingness to testify or to the arrest of a criminal and/or to the arrest of traffickers or criminal. It should solely be based on the child's experience and this should be explicit in the law.

¹² Special Representative of the Secretary-General on Internally Displaced Persons, Guiding Principles on Internal Displacement, E/CN.4/1998/53/Add.2.

¹³ United Nations Centre for International Crime Prevention, *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*, Draft 3, Vienna (March 2003), p. 38.

3.2.2 Appointment of a Guardian

The law should provide for the appointment of a guardian as soon as a child victim is identified to accompany the child throughout the entire process until a durable solution has been identified and implemented. If a child is not unaccompanied and already has a guardian, the law should require an assessment and include the possibility that another guardian be appointed, should the assessment conclude that the current one may not fully act in the best interests of the child.

These provisions should be accompanied by the designation, in the law, of the authority responsible for appointing the guardian and the establishment of accountability mechanisms for that authority. The authority can be specifically established to deal with trafficking issues, or it can be a child protection agency with a broader mandate (For more information see section VII on institutional reform).

The law should spell out the legal responsibilities and obligations of the guardian, which in civil law countries are often found in the civil code.

3.2.3 Medical and Psychological Care

Trafficking can have serious medical and psychological consequences on children. As discussed in Section II on definitions, child exploitation is defined by the fact that it is harmful to the child's health and development. Access to appropriate medical and psychological care is thus essential for the child's recovery. These services should also address the special needs of girls. States should make sure, through legal provisions, that their health system is open to child victims of trafficking, even if they are not nationals of that State.

3.2.4 Housing

Child victims of trafficking are often separated from their parents and family. They have no place to go, other than to return to their trafficker, which victims sometimes do when they do not receive enough support. Providing appropriate housing that is safe, child-

friendly, and operated by child-sensitive staff is essential. To that end, children should be separated from adults unless these are their parents or care-takers and a gender sensitive-approach to their needs should also be employed, in particular with respect to the gender of the staff that are taking care of them. Furthermore, to remain safe, the existence and location of such housing should be kept confidential.

3.2.5 Education

Victims need to return to a sense of normalcy in their lives. Besides, children who have been trafficked have most likely not had access to education. The right to education of child victims needs to be fulfilled by the receiving State, whatever the nationality of the victim of trafficking. The fulfilment of this right may require the adaptation of education laws to ensure that education is accessible to all children within the State's jurisdiction.

For example, the Russian draft law provides that the Federal Commission, regional commissions, asylums and centres must immediately notify executive authorities in charge of the issues of care and guardianship, if they receive any information about a child victim of trafficking, to ensure and protect the child's rights. The draft law also states that child victims of trafficking must be provided an opportunity to attend school in compliance with the federal law on education.

3.3 Rights of Victims in Judicial Proceedings

3.3.1 Non-criminalization of Victims

Under no circumstances should laws hold children who have been trafficked criminally responsible. Children who have been trafficked and exploited must be treated as victims, not as offenders. Unfortunately, victims of trafficking are often prosecuted, based on legislation on prostitution or immigration, for example. However, the criminal is the trafficker and the law should not be ambiguous in that regard. In the case of child victims, this is even clearer as there is no need to prove the use of coercion, deception or any other means, as per the definition of child trafficking (See section II on definitions).

Therefore, a court considering a child trafficking case should not look at whether the child has given any form of consent. If the child is a victim of trafficking, his/her performing of illegal activities is irrelevant. The responsibility falls with the trafficker(s). For instance, it is irrelevant to consider whether a child has agreed to be smuggled or has accepted a certain kind of employment. Often times however, due to poverty, parents give their consent to send their children to exploitative labour. This situation needs to be addressed, by setting up safeguards against re-trafficking. It is the State's responsibility to provide parents with appropriate support measures to avoid re-trafficking. Parents cannot and should not be held criminally responsible if they gave their consent to exploitative labour conditions for their child because criminal responsibility lies with the trafficker. However, civil sanctions should be provided in the law to deter parents from giving their consent and applied with due regard to the circumstances. Such sanctions should be linked to the exercise of parental authority – and adequate limitations thereof if the child is at risk – but used only in extreme cases.

3.3.2 Right to Assistance

Assistance throughout the proceedings can take many forms. Some legal systems provide that free legal assistance will be afforded to people who do not have a certain minimum of resources. Child victims should always have access to free counsel and this right should be explicit in the law and adequate resources allocated. They should also have access to physical and psychological health services as well as other necessary services, including the presence of the family when appropriate and possible, to accompany the child in the proceedings.

3.3.3 Fair Trial

While taking into account the rights of victims, all proceedings must comply with human rights standards, in particular the right to a fair trial for the suspect or accused.

3.3.4 Right to Safety

All necessary measures should be taken to ensure that law enforcement authorities are aware of the safety risks faced by child victims and take appropriate action. Staff working with children should have the obligation to notify authorities if they suspect that a child victim has been harmed or is at risk. This obligation should be inscribed in relevant legislation regulating the practice of several professions involving work with children, including teachers, social workers and medical doctors.

3.3.5 Right to an Effective Remedy

The right to a remedy for human rights violations is a cornerstone for the implementation of human rights standards. Article 4 of the Convention on the Rights of the Child obliges States to take all necessary measures to implement the Convention. In its General Comment on this issue, the Committee on the Rights of the Child states that this provision includes the obligation for States to ensure that effective remedies are in place for child rights violations and that child-sensitive procedures are available.¹⁴

For the remedy to be effective, several conditions are required. Victims must be informed of their rights, have their confidentiality respected, be protected against retaliation and feel that they will be listened to and that law enforcement authorities are sensitive to their situation. Children are especially entitled to justice mechanisms that take into account their specific needs and give due regard to their age and maturity. One essential condition is that children who do not speak or master the official language be provided with appropriate translation services in their mother tongue, especially for all information regarding the proceedings and their testimony.

The Guidelines on Justice for Child Victims and Witnesses of Crime elaborated by the NGO International Bureau for Children's Rights provide very useful and comprehensive information on ways to ensure that justice procedures are child-friendly.¹⁵

¹⁴ CRC Committee, General Comment on General measures of implementation for the Convention on the Rights of the Child, CRC/GC/2003/5, 3 October 2003.

¹⁵ International Bureau for Children's Rights, *Guidelines on Justice for Child Victims and Witnesses of Crime* (January 2003); available at <http://www.ibcr.org/>.

3.3.6 *Right of Victims to Compensation*

An effective remedy includes the right to seek compensation for the damage suffered. Victims of trafficking have often endured physical and psychological damage, as well as unfair remuneration for their work. Compensation enables them to fulfil their material needs for their rehabilitation. It also provides an acknowledgement of the victim's suffering.

Depending on the legal system, procedures to obtain compensation vary.¹⁶

In countries belonging to the civil law tradition, a civil action for compensation can be joined to the criminal case. The criminal case will establish whether the suspected trafficker is guilty and whether the trafficked person is indeed a victim. The judge will then allocate compensation based on the damage and economic losses suffered by the victim. This way of obtaining compensation is much simpler and faster than seeking compensation in civil courts.

However, the civil action is not systematically linked to the criminal case in these countries. It requires that victims take specific separate legal action. Yet, victims are not always informed of this possibility, as public authorities tend to focus on criminal aspects and lawyers may not deem it necessary, including because chances to actually collect compensation are usually slim. While it is true that traffickers' insolvency often makes it difficult to obtain compensation, the recognition of the right to be compensated often operates as a form of recognition for the victim and is important for the healing process.

In common law countries, a civil claim cannot be linked to criminal action. However, judges have discretion to award compensation to victims as part of sentencing.

Another possibility in both systems is to bring separate civil actions against traffickers before civil courts. Civil lawsuits tend to be lengthier and often require the criminal case to be completed first.

¹⁶ The following information is based on: Anti-Slavery International, *Human traffic, human rights: Redefining victim protection* (2002), p. 57-9, available at <http://www.antislavery.org/homepage/resources/humantraffichumanrights.htm>.

One general problem related to civil lawsuits, whether or not linked to a criminal lawsuit, lies in the notion of compensation for the unfair retribution of work performed. In many instances, activities performed by victims were illegal. However, victims did work, often in exploitative circumstances. Can a court recognise a right to fair retribution for an illegal activity and/or exploitative situation? One approach to this question is to consider that child victims of trafficking are entitled to compensation for the pain they suffered, rather than remuneration for the actual work performed.

In practice, however, the fact that many traffickers may not be arrested and prosecuted or are not solvent makes it difficult to obtain compensation. As mentioned in the section on criminalization, assets and materials seized and confiscated by the State should be used for victims' compensation. This implies that mechanisms for seizure and confiscation should be quick and effective so as to ensure that the trafficker does not have time to make arrangements.

One solution to ensure compensation is to create a trust fund for victims. For example, such funds were created in the Netherlands and in the UK. Yet once again, victims need to be informed of its existence and amounts awarded are usually low compared to the damage suffered by the victim.

3.4 Status of Victims in Receiving States

For child victims, the best interests of the child should always guide decisions related to the victim's stay in the country or return to the country of origin. While States often link the residency status of victims to victims' willingness to testify against their traffickers, for children the condition of cooperation with law enforcement authorities should never play any role in the decision to grant a residency permit.

3.4.1 Reflection Delay

The reflection delay is a mechanism instituted by some States as a middle ground between respect for the rights of victims and States' need to arrest and prosecute traffickers. It is supposed to ensure that victims of trafficking can recover from their trauma, have

access to support and assistance including medical care and legal advice, and can thus make an informed decision about whether they want to testify against the trafficker. Anti-Slavery International has concluded that those who benefit from the reflection delay are more likely to press charges against their trafficker, as right after their interception by authorities, victims are still under the influence and fear of their trafficker, who can be someone they know well – a “boyfriend”, a “protector”, an “employer”, or someone who has threatened them and their families if they talk to authorities.¹⁷ After some time and when they feel supported, they will be more willing to testify against their traffickers.

However, as repeatedly stated, only the best interests of the child should guide decisions regarding child victims. The notion of “delay” should in no case entail that protection mechanisms will be lifted at the end of the “delay.”

3.4.2 Long-term Residency Permits

Long-term residency permits are delivered by some States if the victim is likely to be harmed back in the country of origin and/or if he/she cooperates with the justice system. However, when it comes to children, it should be clear in the law that the best interests of the child is to be the primary consideration for the attribution of long-term residency permits. As a consequence, consideration of requests from children for such permits should be dealt with on a case by case basis, and decisions duly motivated. The process for making long-term arrangements for children should be subject to a judicial decision, and the views of the child must be heard and given due weight. Such provisions must be included in the law so as to limit the discretionary power of relevant authorities.

In this context, several aspects must be taken into consideration, including their degree of integration in the receiving State and the fact that if they remain in the country of destination, they will probably be separated from their parents. However, in some instances, they may be rejected or stigmatized by their parents/family if they return, because they have been obliged to participate in “shameful” activities such as prostitution, or because

¹⁷ Ibid., p. 41-2.

their family cannot offer them financial and other necessary support.

3.4.3 Long-term Arrangements

If a child is granted long term or permanent residency status in the State of destination, arrangements need to be made to ensure his/her protection in the long term. In many cases, the child is unaccompanied and separated from his/her family. If so, relevant authorities should assess the child's situation and determine the appropriate long-term arrangements, in consultation with the child and his/her guardian.¹⁸ The law should designate the authority responsible for making such arrangements and adequate resources should be allocated to that end.

3.4.4 Repatriation of Victims¹⁹

The question of repatriation is very sensitive. Receiving States tend to prefer that victims return to their country of origin, where victims may end up in the same situation that led them to be trafficked in the first place. The ability of the country of origin to protect them is key, as repatriated victims are at high risk of being re-trafficked or retaliated against. At the same time, family reunification, when possible, is the best solution to ensure the child's harmonious development.

The Palermo Protocol tries to balance these imperatives. It provides that the State of origin should facilitate and accept the return of victims of trafficking. Conversely, the receiving State should pay due regard for the safety of the victim and legal proceedings underway, and it is preferable that the return be voluntary. Consequently, national laws should make it clear that the best interests of the child should prevail.

Should repatriation be deemed in the child's best interest, one serious issue encountered is that countries of origin may re-victimize trafficking victims upon entry into their territory, by detaining them, forcing them to take HIV/AIDS tests and prohibiting them from travelling abroad again. The law should

¹⁸ CRC Committee General Comment no. 6.

¹⁹ This section is informed by the Anti-Slavery report, p.60-2.

make it clear that victims of trafficking should have their rights, including their right to privacy, respected, and should have access to basic services. Children should be reunited with their parents and family if it is in their best interests, or taken care of by experienced and recognised organizations.

The protection system can indeed rely on NGOs and associations on the ground, which have experience in supporting and protecting the rights of trafficking victims. The role of organisations involved in the protection and rehabilitation of victims is recognised in the Optional Protocol on the sale of children. It provides that States should adopt measures to protect these persons and/or organisations. This recognition is important as States may not have the expertise or the capacity to care for victims. The special status of such organisations should therefore be reflected in the law. The law can provide for a process of accreditation by the State of the capacity of specific organisations to care for victims and designate institutions responsible for monitoring the work of these organisations.

Non-governmental organisations could be contacted by the country of destination prior to the repatriation of victims, to ensure that they provide appropriate care when victims arrive. NGOs offer a good alternative when it is not appropriate for the country of destination to inform officials in the country of origin that a person has been trafficked, as corruption of officials and possible collusion with traffickers may put the victim at high risk. Likewise, victims of trafficking who remained in their home country may find it safer to turn to non-governmental organisations. In fact, The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution stipulates that States Parties may authorise recognised NGOs to provide homes and shelter for victims of trafficking and should encourage them in their efforts.

With respect to repatriation, one problem arises when victims do not have documentation proving of which country they are nationals or have permanent residence. In this case, in accordance with the Palermo Protocol, a receiving country can ask for verification to another State, and, if confirmed, that State should issue appropriate travel documents to the victim.

UNICEF's Regional Office for CEE/CIS has elaborated *Guidelines on determining whether a return to family and/or country of origin is in the child's best interests*,²⁰ based on the Committee on the Rights of the Child's General Comment No. 6 on the treatment of unaccompanied and separated children outside their country of origin. The Guidelines include a step-by-step description of the requirements for repatriation. These include taking into account the general principles of:

- Safety, security and conditions, including socio-economic conditions, awaiting the child upon return;
- Availability of care arrangements for that particular child;
- Views of the child expressed and those of the caretakers;
- Child's level of integration in the host country and duration of absence from the home country;
- Child's right to preserve his/her identity, nationality, name and family relations (Article 8 of the CRC);
- The desirability for continuity in a child's upbringing (Article 20);
- Tracing suitable caregivers;
- Preventing further harm to the child;
- A security assessment focussing on possible threats from the traffickers to the child or her or his relatives;
- A risk assessment assessing the circumstances of the home and community to which the child is likely to return;
- Bilateral cooperation in responding to information requests in the country of origin;
- The duty of the country of destination to inform the country of origin of the decision made.

Part 4 PREVENTION

Prevention of trafficking involves many policy tools. Prevention implies addressing the root causes of trafficking, on both the demand and the supply sides. On the supply side, vulnerability to trafficking mainly lies in poverty and lack of opportunities. Measures to prevent trafficking include education, information and

²⁰ See *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, UNICEF (2006); available at http://www.unicef.org/ceecis/UNICEF_Child_Trafficking_low.pdf.

media campaigns, aimed at the whole population, but also adapted to those who are most vulnerable, especially children. Legislation can further address the demand for trafficking, through the prohibition of advertisement, direct or indirect, of trafficking and exploitation and the punishment of possible customers. It can also favour the organisation of awareness-raising activities.

Major treaties related to child trafficking, in particular the Palermo Protocol, the Optional Protocol on the sale of children and ILO Convention 182, contain provisions related to prevention. They all emphasise the importance of international cooperation and assistance to address the root causes of the problem.

4.1 Action on Demand

The Palermo Protocol provides that States should adopt or strengthen legislative or other measures to discourage the demand that fosters all forms of exploitation in persons, such as the demand for cheap labour and services, some of which is being met by persons, including children, who have been trafficked.

4.1.1 Prohibition of the Production and Dissemination of Material Advertising the Offences

The Optional Protocol on the sale of children obliges States to take measures to effectively prohibit the production and dissemination of material advertising the sale of children, child prostitution and child pornography. Concretely, this implies that the legislation should make the production and dissemination of such material a criminal offence, and provide that prohibited materials be seized.

4.1.2 Criminal Responsibility and Awareness-raising of Employers and Customers

Employers, or customers in the case of sexual exploitation, represent the demand for labour and services that involve trafficking in children. The criminal responsibility of employers and customers is only one side of the coin. There are indeed many obstacles to the enforcement of legislation in this regard. When a customer uses the sexual exploitation of children outside of his/her country of nationality – as in cases of “sex tourism” – it may be

difficult to gather evidence. These behaviours should be discouraged in the first place. One way to do so is to make tour operators and travel agencies responsible for informing their clients on the illegality of sex tourism, refrain from using messages suggesting such behaviours, and train their staff on their obligations.

Box 38: The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act

The Nigerian Trafficking in Persons (Prohibition) Law Enforcement and Administration Act of 2003 constitutes a good example of the use of legislation to place obligations on tour operators, travel agents and airline companies to discourage demand for trafficking for sexual exploitation. The Act stipulates the following:

Article 30

“Every tour operator and travel agent shall:

notify its client of its obligation under this Act not to aid and abet, facilitate or promote in any way the traffic in any person,

(b) notify their clients of their obligations under this Act not to aid and abet, facilitate or promote in any way, any person’s pornography and other person’s exploitation in tourism,

insert in contracts with corresponding suppliers in destination countries, clauses requiring them to comply with the obligations stated in the preceding paragraphs of this subsection, refrain from utilizing messages on printed material, video or the Internet that could suggest or allude to behaviour incompatible with the objective of this Act, inform their staff of their obligations under this Act, and include clauses regarding their obligations under this Act to their staff in new employment contracts.

Article 31

Every airline company shall promote through every possible means, public awareness of the guiding principles of this Act in in-flight magazines, ticket jackets, internet units and video on long flights.

Another issue concerns the case of child domestic workers. In this highly unregulated segment of the labour market, children remain invisible. They are often exploited by their employers while being considered as “part of the home.”²¹ In this context, employers do not perceive themselves as exploiters but rather as benefactors. Racism and prejudice against migrants and ethnic minorities also increases children’s vulnerability to trafficking. People from these groups are more easily trafficked because they tend to be marginalized and considered as “different” by their employers. As a result, usual social norms that regulate – and limit – the behaviour

²¹ Anderson, Bridget and Julia O’Connell Davidson, *Is trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study*, IOM (December 2003).

of employers do not apply. That is why legislative measures should be accompanied by awareness-raising activities, addressing the discrimination and prejudice against migrants and ethnic minorities. The aim of such measures is to set not only legal but also social limits to exploitative behaviours and promote the integration of marginalised groups, including through social and economic means.

4.1.3 Travel Documents

The first step towards increased and more effective border control is ensuring the quality of travel or identity documents, so as to prevent their falsification or alteration. In addition, international cooperation may be necessary with regard to the verification of the validity of such documents. As stated in the Palermo Protocol, States should provide assistance to one another in this respect. However, the verification procedure should be expedited within a reasonable time. If children are held at the border, child-friendly facilities should be available and their care and medical needs addressed.

4.1.4 Training of Immigration and Other Relevant Officials

As stated in Article 10 of the Palermo Protocol, law enforcement, immigration and other officials should be trained in the prevention of trafficking. This training should include not only methods to detect and prosecute traffickers, but also ways to protect the rights of victims, including addressing the special needs of women and child victims.

4.1.5 Liability of Commercial Carriers

The Palermo Protocol provides that States should take measures to ensure the obligation of commercial carriers to ascertain that all passengers are in possession of the necessary travel documents for entry in the receiving State. This provision is aimed at offering an additional level of protection to potential victims of trafficking, although many of them travel with valid documents.

4.1.6 Revocation of Visas, Denial of Entry of Traffickers

Immigration laws should contain provisions forbidding traffickers or their accomplices who have been identified and sentenced to enter the State.

4.2 Addressing Factors of Vulnerability to Trafficking

4.2.1 Effects of Immigration Laws and Policies

Immigration laws and policies can have a significant impact on trafficking by moving the frontier of illegality. Migration restrictions may render children and adults more vulnerable to exploitative situations, including trafficking, when they resort to forms of illegal border crossing. When immigration policies are very restrictive, more people enter in a country illegally, hence invisibly.

4.2.2 Birth Registration

Birth registration is vital for the prevention of trafficking. It ensures that children have an identity and are recognised by the State as citizens, which is essential in cases of international trafficking. It also helps provide evidence that children have “disappeared” and are unaccounted for, and it is critical for correct age determination.

4.2.3 Education and Awareness-raising

Awareness-raising and educational activities must not be left out of the legislative framework. They are the most powerful tools to prevent trafficking. Traffickers often use deceptive means to lure their victims by promising a good job and a better future. Communities, parents and children, especially those in a vulnerable situation, must be informed about these techniques. From a legislative perspective, this can be achieved by entrusting an institution with the task of carrying out and promoting such activities. The institution may be an independent agency, as will be examined in the following section, a ministry or a ministerial office. In any case, it is important that these activities be included in the mandate of such institutions and that they be required to report on them.

In Romania, for example, the anti-trafficking law provides that the Ministry of Education, with support from the other relevant ministries and in cooperation with relevant NGOs, shall develop educational programs for parents and children, especially groups highly at risk of becoming trafficking victims, with a view to preventing trafficking in human beings. It recognises the special vulnerability of women in very poor areas. In Bulgaria, it is the responsibility of the National Commission against trafficking to initiate and take part in the implementation of educational programs for parents and students in schools, for unemployed and illiterate individuals, high risk groups, and victims of trafficking. It is also in charge of providing public information regarding risk situations for becoming a victim of trafficking.

4.2.4 Social Policies and Incentives for the Employment of Persons at Risk of Trafficking

One way to address the vulnerability of certain segments of the population to human trafficking is by offering opportunities for a living wage that will prevent them from being lured by promises of a job elsewhere for them or their children, thus finding themselves in exploitative situations. For example, Romanian Law 678 on the Prevention and Fighting Trafficking in Human Beings entrusts the Ministry of Labour and Social Solidarity with the task of working out and enforcing special measures for the integration into the labour market of persons highly at risk of becoming trafficking victims, especially women in poor areas and social outcasts. The Law also requires that Ministry, jointly with the Ministry of Finance, explore possible measures to provide incentives to companies to hire persons at high risk of being trafficked and trafficking victims. Under the same Law, the National Employment Agency must develop information programmes for persons at risk and for potential employers.

4.2.5 Prevention from Abuse, Violence and Neglect at Home

Preventing child trafficking also requires ensuring the protection of children where they live, by building a protective environment.

Children, especially adolescents, who are victims of domestic violence or experience violence in their homes, are more likely to be

willing to leave the family home. They may be more sensitive to the arguments of traffickers who promise a better place to live. They may also be reluctant to return home after they have been found and more likely to be re-trafficked. Laws protecting children from violence in the family are therefore a key tool for prevention. They should be accompanied by other measures such as the creation of hotlines and procedures for addressing violence within the family.

4.2.6 Free Consent for Marriage

Marriage is a technique often used by traffickers to abduct women and girls, and exploit them. It provides a legal basis for transporting them, both within a country and outside of the country. In many countries, marriage is considered a passage to adulthood, even if the person is under-eighteen. As a result, the special protection measures recognised for children may not apply to those who are married. However, the Palermo Protocol clearly applies to anyone under eighteen years of age, without exception, therefore anyone under eighteen years of age, married or not, is protected by its provisions.

With respect to the freedom of marriage, in accordance with the International Covenant on Civil and Political Rights, “No marriage shall be entered into without the free and full consent of the intending spouses” (Article 23). It can be argued that “consent” is not genuine, if the spouse is, as a result of marriage, trafficked and exploited. The law should provide that if marriage is performed for the purpose of trafficking, it is void. When an officer has reasons to think that marriage is performed for trafficking, he/she has the duty to postpone the marriage until proper investigations have been conducted. Adequate protection, in particular against possible retaliation, should be available for victims of such marriages or attempts of such marriages.

Proper legislation should also be adopted to prohibit early marriage and set relevant safeguards to ensure implementation of the law.

4.2.7 *Research on the Root Causes of Trafficking*

Research and data collection should be conducted to better understand the root causes of trafficking and fine-tune interventions to address them. Specific efforts should be made at regional and international level to elaborate child protection indicators and harmonise indicators and data collection methods with a view to ensuring comparability. Laws can contain provisions requesting a specific institution, such as the commission established to monitor trafficking-related issues, participate in international cooperation and disseminate findings.

In Yemen, the draft National Plan of Action to Combat trafficking and Smuggling in Children has been elaborated through extensive consultations with a wide range of stakeholders, including government officials, community representatives, civil society representatives, academic institutions, universities and national and international NGOs. One of the priorities set out by the draft Plan of Action is prevention through research, initiatives addressing the economic and social vulnerability of children, awareness and a mass media campaign. These efforts are accompanied by a campaign to promote free and accessible birth registration.²²

Part 5 CRIMINALIZATION

As already stated in this chapter, from a child rights perspective, the primary concern is to care for the rights of victims of trafficking and prevent children from being trafficked. In this context, criminalization of human trafficking is an important aspect, but should not be considered as the only response to child trafficking. Too often indeed, States are primarily concerned with arresting and prosecuting traffickers as part of their fight against crime, including transnational and organized crime. Here again, the principle of the best interests of the child should rule States' actions. Prosecution of traffickers should never come at the expense of children's rights.

²² Belbase, K., G. El-Khoury, D. Fall, K. Hirabayashi, N. Izumi and J. Kunugi, *Combating Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options*, UNICEF and University of Maastricht Learning Programme on Public Policy, Advocacy and Partnerships (draft).

The purpose of this section is to present issues related to the criminalization of human trafficking, which are most often part of legislative reform debates in this area.

Criminalization is indeed an important element of treaties related to trafficking. Virtually all of them contain provisions obliging States Parties to make trafficking or related activities criminal offences in their national legislation.

The offence of trafficking needs to be clearly established in the law, and distinct from other offences related to trafficking. Often, only offences related to trafficking are criminalized, and because the sanctions are not adapted to the gravity of the crime they present a human rights violation. The punishment is minimal and as a result not dissuasive.

There are several ways by which trafficking can be criminalized. Either provisions can be incorporated into the penal code, as is often the case in countries of the Roman legal tradition, or a special law on trafficking can be adopted, typically in common law countries. While provisions to be incorporated in the penal code are usually brief and often contain only criminal dispositions, a special law is more likely to be comprehensive, including provisions related to civil law, protection of victims and witnesses, residency, etc.

In accordance with international treaties, criminal provisions should have a broad jurisdiction addressing the national or international nature of the crime, enable prosecution by legal entities and make provision for serious sanctions.

5.1 Jurisdiction

The question of jurisdiction is essential for a crime often involving international elements. Traditionally, a State's criminal jurisdiction is spatial – it is limited to the territory over which it is sovereign. This means that the law of the State will only apply to criminal acts performed on the territory of that State. The Optional Protocol on the sale of children extends the jurisdiction to the persons involved – it is not only territorial anymore. The nationality or residence of the offender, as well as the nationality of the victim, also enable

application of the law of that State, even if the offence was committed elsewhere. This considerably expands the scope of the law.

The reference to the nationality of the victim clearly aims at protecting children whose country of nationality is party to the Optional Protocol. This means that the crimes committed against children nationals of the State Party are punishable, including when children are sold from a neighbouring country to a neighbouring country for instance. Very often indeed, children are trafficked through countries of transit. Even when the State of which the child is citizen has not ratified the Optional Protocol, various legal instruments such as bilateral agreements, mutual legal assistance agreements and other forms of extraterritorial jurisdiction may be used as legal frameworks.

The offender is obviously the trafficker and his or her accomplices, but also the customer in the case of sexual exploitation. "Sex tourism" is thus punished not only in the country where the offence occurred, but also in the country where the customer is from. This is especially important when law enforcement mechanisms in the country of the offence are weak.

The extra-territorial jurisdiction allows that evidence against traffickers be sought in many countries, relying on cooperation between law enforcement institutions.

5.2 Criminal Liability of Legal Entities

Criminal liability should not only concern individuals but also legal entities used for the purpose of trafficking. Often, individuals may set up or use a company to cover and/or pursue their activities. The Optional Protocol on the sale of children obliges States to establish the criminal liability of legal entities, subject to their national legislation. The UN Convention on Transnational Organized Crime also contains provisions related to the liability of legal persons for participation in serious crimes involving criminal organized groups.

The criminal liability of legal persons is a concept that distinguishes the liability of the legal entity from the liability of the individuals. It

is used when a criminal act was performed under the name and/or for the profit of a legal entity. Precise definitions and conditions vary from State to State. Sanctions include the payment of fines, usually much higher than for individual liability, restrictions of activity, confiscation of proceeds illegally earned, and dissolution.

It has to be noted, however, that corporate liability does not exclude individual criminal liability. Particularly in the case of trafficking, if a legal entity has been involved in such activities, it is expected that the individuals who have taken decisions and other employees involved in committing the crime will be held criminally responsible.

5.3 Activities Related to Trafficking

Criminalization should account not only for trafficking but also for complicity and all other activities linked to trafficking. Complicity of trafficking should include anyone who knowingly contributed to the commission of the crime and/or benefited from it. In particular, customers engaged in sexual exploitation should be held criminally responsible.

Other pieces of legislation related to trafficking, such as labour laws, adoption laws, provisions on slavery, debt bondage, etc. should also be criminalized, both separately and in conjunction with trafficking. The objective is to ensure that offenders be prosecuted and punished, even if the crime of trafficking per se cannot be proved.

5.3.1 Trafficking and Adoption

Laws on adoption are essential to prevent illegal adoptions and punish those who sell children or participate in the trafficking of pregnant women for the purpose of selling their newborn babies.

5.3.2 Trafficking and Child Labour

Laws on child labour must attempt to identify exploitative situations. These laws must make it a crime for an employer to hire children younger than the minimum age of legal admission to work and under-age children with working hours exceeding the limit set

by the law and/or make them perform hazardous tasks or tasks that impair their development, in accordance with Article 32 of the CRC and ILO Convention 182 on the Worst Forms of Child Labour.

5.4 Sanctions

Sanctions need to be dissuasive, and include fines and imprisonment for traffickers and for customers. The seriousness of the crime should be taken into account. For instance, many States have laws that impose harsher sentences if the child was younger than a certain age, usually 14 or 15, if the child has a disability, if the trafficker was a person close to the child such as a parent, guardian or law enforcement official, or if the perpetrator was an organised criminal group. Aggravating circumstances should be part of the sanction framework in order to further protect vulnerable children.

Yet sanctions should not be too harsh, as they may deter police officers and judges from prosecuting and condemning traffickers.²³

5.5 Evidence

Because trafficking is often a crime committed across several countries, evidence from all these countries needs to be gathered for the prosecution and conviction of offenders. This implies that effective and swift mechanisms of international judicial cooperation for gathering evidence need to be in place.

Another possibility is for the law to resort to a system of presumption. In this system, if certain conditions are established, even if there is no substantial evidence against a particular person, that person is presumed guilty. For instance, if someone lives or frequents a victim of trafficking, and cannot provide justification for his/her resources, that person can be presumed to be guilty of the crime of trafficking. In this case, it is up to the alleged offender to prove he/she is innocent. Presumptions significantly broaden the scope of the law and are a useful tool to arrest criminals, provided that they are used as part of a fair trial.

²³ See Dottridge, M., *Kids as Commodities? Child trafficking and what to do about it*, Terre des Hommes (2004), p. 54.

5.6 Extradition

Extradition is an essential element of international judicial cooperation and is particularly relevant in the case of trafficking, as traffickers may try to take refuge in countries where the law enforcement system is weak and where the legislation is less severe.

Extradition is the process by which one State (the requested State) surrenders an individual found on its territory to another State (the requesting State) where he/she is wanted either to stand trial for an offence he/she is alleged to have committed, or to serve a penal sentence already pronounced against him/her.²⁴

Extradition can find its source either in international courtesy, bilateral extradition treaties, multilateral extradition conventions, which are most often concluded at the regional level, or other treaties that contain provisions related to extradition, such as the Optional Protocol to the CRC on the sale of children, child prostitution and child pornography. One traditional limitation to extradition is the refusal by many States to extradite their nationals. In that case, under the Optional Protocol, they have the obligation to prosecute and try themselves the suspected individual.

Most often, extradition agreements contain a “double incrimination” clause, which requires that the offence be criminalised in both the requested State and the requesting State. This can be an obstacle to extradition if one of the States does not recognise the crime of trafficking or an equivalent that can be assimilated to the crime of trafficking. For that reason, criminalization of trafficking in national laws – in accordance with international standards – is key to ensuring effective international judicial cooperation. The European arrest warrant, applicable to European Union Member States, is a good example of an effective extradition agreement, as it waives the double incrimination condition for a number of serious crimes, including trafficking, sexual exploitation of children and child pornography.

With a view to facilitating extradition, the Optional Protocol on the sale of children provides that when there is an extradition request

²⁴ Interpol, Legal Fact Sheets, Extradition – Some benchmarks, available at <http://www.interpol.int/Public/ICPO/LegalMaterials/FactSheets/FS11.asp>.

between two States Parties to the Protocol, this treaty is a sufficient ground for extradition. In addition, the Optional Protocol specifies that the jurisdiction to take into account for the purpose of extradition is not only the territory of the State – which is the usual jurisdiction in criminal law – but also the nationality/resident status of the offender or the victim, even if the crime was committed outside of the requesting State’s territory. Concretely, it means that Country A can request the extradition of one of its nationals located in Country B, because it suspects that this individual has been linked to child sexual exploitation activities in Country C.

Most extradition treaties, including the UN model treaty on extradition adopted in 1990 that is the basis for most extradition treaties, define extraditable offences according to their gravity and the penalty which may be incurred. One criterion is often the minimum duration of a prison sentence. Specific offences are usually not mentioned. However, the criterion of the gravity of the crime can be used to include trafficking or related offences such as child sexual exploitation and slavery. This is one more reason why it is important that serious sanctions be established for the crime of trafficking and related activities.

In conclusion, extradition treaties are key instruments for both international cooperation and efficient justice and law enforcement mechanisms in the fight against trafficking. When they are negotiated, attention should be paid to including either a list of crimes that does not require double incrimination, or ensuring that the two countries have laws that would allow the extradition of an individual prosecuted for trafficking in human beings. Advocacy for the ratification of the Optional Protocol on the sale of children, child prostitution and child pornography is also an important activity to promote extradition in certain cases of trafficking.

Part 6 INSTITUTIONAL REFORM

6.1 Creation of a Specific Institution

As shown in this chapter, trafficking in human beings is a complex issue that involves many different aspects, from prosecution to

protecting the rights of victims, to prevention and international cooperation. These dimensions are strongly interrelated. Yet, they are often dealt with by different institutions in a given State. In broad lines, prosecution is a function of the judiciary, protection of the rights of victims involves law enforcement officials and welfare institutions, and international cooperation is usually the prerogative of the Ministry of Foreign Affairs. For the implementation of anti-trafficking legislation, it is thus not sufficient for the law to comprehend all aspects and attribute specific responsibilities to institutions for its implementation. Effective coordination between all sectors is essential to ensure that there are no gaps in the process.

In Pakistan, for effective coordination and enforcement of the Prevention and Control of Human Trafficking Ordinance, 2002, several coordination mechanisms have been created at different levels. At the policy level, a Ministerial level National Committee regularly holds meetings to review progress. At the administrative level an Anti-Trafficking Unit (ATU) Coordination and Monitoring Cell has been established in the Federal Investigation Agency's headquarters, with sub-offices in the four zonal Directorates. At the law enforcement level, an Inter-agency Task Force (IATF) consisting of all the Law Enforcement Agencies including the Federal Investigation Agency, Frontier Constabulary Baluchistan, Coast Guards, Maritime Security Agency and the Police has been created.

One way of guaranteeing the coordination among all actors and ensuring the design of sound policies is to create an institution – be it an agency, a department, a commission or a council – with the mandate to coordinate all anti-trafficking activities and more broadly, ensure the implementation of the law in all its aspects. The format of such institutions varies from State to State, but some common aspects, in terms of structure, mandate, and accountability can be drawn.

6.2 Structure

The institution should be an entity able to effectively coordinate several ministries or other actors. Depending on the administrative system of the country, several options can be envisaged. An independent body can be created but it risks having limited

authority in guiding national institutions, especially such powerful ministries as the Ministry of Interior, of Justice or Foreign Affairs. One other possibility is to set up a special office within a relevant Ministry. This option enhances the authority of the body, including financial and human resources. It also tends to concentrate the responsibility to fight trafficking within one ministry. While an institution should be set up at the national level, institutions can also be established at the local level in order to work in closer contact with the population and local institutions, particularly in geographic areas at higher risk.

The institution should be composed of people or representatives of institutions and organisations with various skills who work on trafficking from different perspectives, thereby covering all of the different aspects of anti-trafficking activities. It is useful to include representatives from various ministries, the Government, the judiciary, teachers, psychologists, lawyers and doctors, as well as non-governmental organisations or other civil society institutions. Overall, the functioning should be transparent and participatory.

Adequate resources, both human and financial, should be allocated for the institution to accomplish its tasks. Such resources should also be available in all sectors involved in addressing child trafficking. One way to accomplish this is to require that each ministry or institution working on this issue allocate a portion of its annual resources to anti-trafficking activities by law.

In Bulgaria, the law establishes both a National Commission and Local Commissions for Fighting Trafficking in Human Beings. The National Commission is composed of high level representatives from the ministries of labour, interior, justice, health, and education, as well as the State Agency for Child Protection and the Commission for counteracting the Anti-Social Behaviour of Juveniles and Minors. The National Commission also includes members of the Supreme Court, Prosecutor General and National Investigative service, as well as representatives of NGOs and international organisations represented in the country working in the area of preventing and combating human trafficking. Local commissions are composed of three to seven members appointed by the Mayor and involving representatives of the local government involved in education, health issues and social policy,

departments for child protection, representatives of the police, NGOs, teachers, psychologists, lawyers, doctors, etc. A representative of the Regional Prosecutor's Office must attend the sessions of the Local Commission. The law also provides that Local Commissions shall be funded by the budget of the municipality.

The mandate of the institution should be broad enough to ensure it encompasses all dimensions of the implementation of the law. Following are the potential major areas of activity for such institutions.

One of the main roles of the institution should be the coordination of the activities of all actors involved in combating trafficking. It should aim at facilitating the exchange of information between various ministries and institutions, encouraging collaboration of these bodies in undertaking activities for the implementation of the law as well as communicating on the implementation of national policies. As a coordination mechanism, it should also ensure that there is a coordinated and effective response to cases of trafficking.

The mandate of the institution should include research activities and data collection and analysis in order to inform policies on trafficking and to facilitate monitoring and evaluation of the implementation of national laws and policies.

Based on its coordination and research functions, the institution should be in charge of advising on and developing comprehensive and integrated policies to address trafficking in human beings and should monitor their implementation. It should be mandated to formulate strategies and adopt specific measures as necessary for the implementation of the law. This should include the design of programmes aimed at the reintegration of victims of trafficking.

One of the obstacles to international cooperation is the difficulty to identify the appropriate counterpart in another State. The institution should thus deal with international requests, by directing them to the appropriate department as relevant and following up on them. It should also facilitate the exchange of information and overall collaboration between States. For example, the bilateral agreement between Côte d'Ivoire and Mali provides for the creation of a Permanent Commission for follow-up on the

implementation of the agreement. The agreement stipulates that the Commission will meet at least once a year.

The institution should be responsible for the training of law enforcement officials and other relevant actors on trafficking and children's rights issues.

The institution should be mandated to undertake communications campaigns to sensitise the population, especially those most at risk and potential offenders, on trafficking issues.

6.3 Accountability

Like all institutions, the anti-trafficking institution should be accountable and its actions monitored. The standard procedure is the submission of an annual report to the government and the parliament presenting activities undertaken and results achieved.

6.4 Strengthening Law Enforcement

Strengthening the country's institutional capacity implies setting up efficient systems of accountabilities of all actors, in particular law enforcement officials. To that end, appropriate trainings and capacity-building activities should be undertaken and aimed at improving the skills of police officers, judges, social workers and other actors involved with child victims to take into account their specific situation.

For example, the government of Yemen, with support from UNICEF and IOM, trained police officers on techniques to recognise and properly handle trafficking cases. Security officials working in border areas and international airports acquired skills on victim identification, registration and monitoring of child trafficking. Government officials were trained on shelter management and assistance to victims of trafficking.²⁵

²⁵ See *Combating Child Trafficking in the Gulf Countries, Yemen and Afghanistan: Policy Options* (draft). Op.cit.

Part 7 PROCESSES AND ENTRY POINTS FOR LEGISLATIVE REFORM IN THE AREA OF TRAFFICKING

As in other areas, a participatory and open process, involving all stakeholders, is essential to ensure that the law responds adequately to the challenges posed by trafficking in a specific country. Such a process also helps raising awareness of issues related to trafficking, including the situation of victims, and contributes to training those who will be on the frontline for the implementation of the law.

7.1 A Human Rights-based Approach to Legislative Reform in the Area of Trafficking

The principles of a human rights based approach to legislative reform can be applied as follows in the case of trafficking.

7.1.1 Accountability

Advocacy efforts should focus on ensuring that States have ratified relevant international treaties to combat trafficking, including regional treaties and agreements.

The implementation of these instruments should then be promoted with the government, and emphasis be placed on the legal obligations they entail. As highlighted in this chapter, these instruments provide a strong basis for advocacy for legislative reform addressing all the dimensions of child trafficking. Law review and legislative reform should therefore be conducted in light of these treaties. It should be made clear that for a law to contribute to fulfilling the State's obligations, it must be enforced and implemented.

7.1.2 Universality

The principle of universality implies that the law must address the rights of all children, in particular the special needs of girls. As

highlighted above with respect to the principle of non-discrimination, it is especially important with respect to international trafficking that children who are not citizens of the country have their rights protected like the nationals of that country, and enjoy even greater protection due to their situation and the fact that they are often unaccompanied. The universality principle further implies that measures aimed at preventing child trafficking take into account the most marginalized and excluded, who are the most vulnerable to trafficking.

The principle of universality also means that the process of drafting of the law should involve all stakeholders, with a particular attention to including sectors of the population that are traditionally marginalized, excluded and discriminated against.

7.1.3 Indivisibility

As indicated throughout this chapter, legislative reform on trafficking should take into consideration the entire legal framework of the country. It should build on, and strengthen, existing laws and institutions that are indirectly related to trafficking, but are key to combating child trafficking and caring for victims, preventing proliferation of laws and institutions, and integrating existing laws and institutions into a comprehensive approach to safeguard children's rights.

7.1.4 Participation

Participation and transparency are essential for drafting a law that is sound, informed, and effective. As in other areas, participation in the elaboration of the law and its implementation should be as broad as possible. While a full overview of participation mechanisms are provided in Chapter II, in the area of trafficking, particular attention should be placed on including at least the following:

- **Relevant ministries.** The drafting and implementation of the law and accompanying policies addressing child trafficking should not be prepared only by the Ministry responsible for children's issues, most often the Ministry of Social/Family Affairs. The Ministry of Labour, the Ministry

of Justice, the Ministry in charge of the police such as the Ministry of the Interior, and the Ministry of Foreign Affairs should be actively involved as well. The Ministry of Finance also represents an essential partner to allocate resources and implement economic policies aimed at addressing the root causes of trafficking, in particular poverty, which makes some groups of the population vulnerable to trafficking.

- **Members of Parliament.** The Parliament should contribute to the drafting of the law, even if the law is eventually presented by the Head of Government's office. More specifically, relevant parliamentary Committees should be consulted, such as the Committee dealing with children's rights, the Committees on labour, justice, internal security, criminal matters, civil matters, foreign affairs, etc.
- **Members of the judiciary.** Judges and prosecutors can identify legal gaps in the legislation and inform the drafting of the law to make sure it is effective, applicable in legal cases, and legally coherent.
- **Lawyers.** Lawyers can also provide useful legal expertise. Lawyers involved should have experience in the areas tackled by the law, in particular in children's rights, women's rights, criminal law, and civil law, as well as private international law.
- **Children and youth.** Children and youth should be consulted in the preparation of the law and in the implementation. Children and youth who have been victims of trafficking should be listened to, especially with respect to the protection and care of victims. Yet, appropriate measures should be taken to ensure that their participation does not put them at risk.
- **Community leaders.** Community, traditional or religious leaders, in particular in areas particularly affected by trafficking can be instrumental in preventing trafficking and ensuring the reintegration of children victims of trafficking.
- **Non-governmental organizations.** Both domestic and international NGOs working in the area of trafficking should be consulted. In particular, associations running care centres for victims should be involved.
- **Inter-governmental organizations.** UN agencies and regional organisations present in the country and/or in the

region and working in the area of trafficking should be consulted.

- **Media.** The media plays an essential role in sensitising the population on trafficking and deconstructing the myths of a better life promised by traffickers. Public authorities should partner with the media for public awareness campaigns. It is particularly important that appropriate media of communication be chosen depending on the groups most at risk. In areas with high illiteracy rates, for example, radio spots may be more efficient than newspapers to convey a message. In addition, messages should be tailored to the language and culture of the communities in which they are broadcast. When minority groups speaking a different language from the official language of the country are vulnerable to trafficking, information should be communicated in that language. Receiving countries should also ensure that information reaches child victims in a language they can understand, especially when trafficking trends show that child victims come from a specific country/region. Furthermore, some communication strategies should be specifically addressed at children, taking into account their special communication needs to ensure that they understand the message.

7.1.5 Training and Capacity Building

Training and capacity-building are critical to ensure that participation is genuine and informed, and that the law is implemented. Training and capacity-building activities can even take place before the law is adopted, during the preparation phase. Once the law is adopted, such activities are important to ascertain whether it will indeed be applied, or if it is misinterpreted. Training is often a component of the mandate of national/local commissions in charge of dealing with trafficking.

7.1.6 Training of Judges and Lawyers

Judges and lawyers should be trained both on the international legal framework and on the content of the law. Where appropriate, they could be given examples of jurisprudence in countries with a similar legal tradition. The focus should be placed on the

experience of child victims and the human rights violations they have suffered. Emphasis should be placed on the need to adapt judicial proceedings to the fact that victims are children and tools provided to do so, in line with relevant international guidelines in this area, as mentioned above.

7.1.7 Training of Staff Dealing with Victims

Training of all staff dealing with victims is essential in order to avoid dealing with victims in an inappropriate way that may deepen their trauma. Often times indeed, law enforcement officials consider victims as criminals, or want to use them as witnesses and put them under pressure to speak. This may be due to a lack of understanding of issues related to trafficking. Training of staff dealing with children is also crucial. While it should already be part of the training of law enforcement officials and other staff dealing with children, it is key that this aspect be taken into consideration with respect to trafficking.

7.1.8 International Cooperation

As mentioned throughout this chapter, international cooperation is critical for addressing international child trafficking. International agreements, either bilateral or multilateral, constitute both important elements of the legislative framework and at the same time entry points for legislative reform at national level.

Bilateral and regional agreements are multiplying around the globe. The South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, for example, while limited to trafficking for prostitution, was adopted in 2002 and provides a good example of international cooperation at sub-regional level. It focuses on common responses and mutual assistance in fighting trafficking and protecting the rights of victims.

The six nations of the Greater Mekong Sub-Region signed an agreement in 2004, committing themselves to coordinated action on trafficking prevention, law enforcement, the prosecution of traffickers, and the recovery, reintegration and support of trafficking victims.

Likewise, a sub-regional agreement for West and Central Africa was signed in July 2006 under the auspices of ECOWAS to address child trafficking through strengthened cooperation in the region.

Glossary

Note from the author – The definitions of the following concepts are tailored strictly to the use and context in the text of the Handbook.

Affirmative action – A mechanism for promoting equal access by actively promoting the interests of people from groups that have traditionally experienced discrimination.

Automatic incorporation – A constitutional provision by which international treaties or conventions are automatically incorporated directly into domestic legislation, becoming immediately and fully justiciable. (See **Monist system** below).

Case law – In the common law system, law which is created by arguments and judicial decisions relating to specific cases. (See **Common law system** below).

Child-friendly court procedures – Processes and procedures which are designed to make the court accessible to and less intimidating for children who appear as witnesses or victims. Such measures include courtrooms specially designed to put children at ease, legal and support staff trained to prepare children by explaining the process to them in ways that they will understand, and provisions to involve family or other trusted individuals in both the court proceedings, in support of the child, and in follow-up and recovery programmes.²⁶

Child trafficking – Any act which involves the illicit transportation of children from one place to another. International trafficking is defined by the crossing of international boundaries.

Children born out of wedlock – Children whose parents at birth are not legally recognised as being married to each other under the law application to these children.

²⁶ RESOLVE Manitoba, “Child Victim Support Service”, *Resolve News*, Winnipeg, Manitoba, Research and Education for Solutions to Violence and Abuse, Volume 7, Number 2, June 2005.

Children in conflict with the law – Children who are suspected or accused of infringing criminal laws.

Children's codes (also known as children's acts or children's statutes) – Comprehensive legislation covering a wide range of aspects of the lives of children, usually including name and nationality, family relations, standards of care and protection measures.

Civil law – A system of law derived mainly from Roman law, emphasising the arrangement of laws into comprehensive national codes. Civil law relies heavily on written law.²⁷

Codex Alimentarius – A food code established by the World Health Organization (WHO) and Food and Agriculture Organization (FAO), defining quality standards to be met for food that has been fortified.

Common law – A system of law derived from English tradition, in which law is determined not only through written legislation (Statutes) but also by court decisions through the creation of judicial precedent from decisions on specific cases tried before the courts.²⁸ (See also **Case law** above).

Constitution – The fundamental law of a State, typically outlining the structure of government and the means by which the government will operate; may also include the principles of human rights which are intended to guide all government action, including legislation.²⁹

Criminal code – A body of law that defines criminal acts and the application of criminal justice.

Customary law – Usually unwritten, the system of law which has developed over time in specific communities or social groups, derived from long-established practices that have acquired the force of law by common adoption or acquiescence; customary law is sometimes

²⁷ See Chapter 2 for more details.

²⁸ See Chapter 2 for more details.

²⁹ See Chapter 3 for more details.

administered by traditional chiefs and their councils, often dealing with matters relating to children and family.³⁰

Dualist system – Usually found in common law regimes, a system in which international treaties or agreements are not automatically incorporated into national or domestic law; such incorporation requires specific legislative measures to be accomplished. National laws need to be passed to incorporate the principles behind these treaties or agreements. (Contrast to **Monist system**, below).

Duty bearers – Those who are responsible for ensuring that the rights of designated groups are protected, promoted and fulfilled; for the rights of children, the State is the primary duty bearer and is responsible for creating conditions in which other duty bearers, such as parents, service workers, community leaders, the private sector, donors and international institutions, can meet their responsibilities for also protecting, promoting and fulfilling the rights of children.³¹

Effective remedies – Judicial or administrative remedies intended to restore to a victim or victims of human rights violations those rights and entitlements which were denied and, in cases where this is deemed necessary by the authorities mandating the remedies, to extend compensation for losses sustained in the violation of the victim's or victims' rights.

Enabling legislation – In dualist countries, the means by which international agreements are incorporated into national law, through constitutional amendment, law or decree. (See **Dualist system** above).

Equal protection clauses – As a complement to non-discrimination provisions, these human rights provisions provide for equal access or equal opportunity for all.

Extra-territorial jurisdiction – The capacity of a State to apply law and exercise authority through the application of national legislation to criminal acts involving their nationals (as perpetrator or victim) and/or

³⁰ Heritage Community Foundation, "Nature's Laws: Customary Law", at Albertasource.ca, viewed 10 June 2008. See Chapter 2 for more details.

³¹ Thies, Joachim, "Introduction to Rights-based Programming", *Part 1: Rights Based Programming – An Evolving Approach*, Save the Children, Sweden, 2004, p.3.

criminal acts prejudicial to the interests of the country or of its nationals committed outside the territory in which the law is enforced and of which the accused is a national. The exercise of extra-territoriality may be limited by the sovereignty of the State in the territory where the acts take place.³²

Family law – The body of legislation which addresses all aspects of family relations, including marriage, divorce, custody of children, responsibility for the upbringing of children, adoption (where permitted) and inheritance.

Female genital mutilation – Customary activities which entail mutilation of female genitalia (i.e. partial or complete removal of the clitoris, or the *labia minora* (excision) or of any external genitalia, with stitching or narrowing of the vaginal opening (infibulation)), often performed on women and girls.

Food fortification – The addition of micronutrients or other essential elements that may have been removed in processing to commonly used foods, in order to combat widespread micronutrient deficiencies.

Gender-sensitive court procedures – Procedures and processes which take into account their impact on women, men, boys and girls, including the special circumstances of women and girls, designed to overcome the marginalization of and discrimination against women and girls.

Good governance – The process by which public institutions conduct public affairs, manage public resources and guarantee the realisation of human rights in a manner essentially free of abuse and corruption, and with due regard for the rule of law.

Holistic approach (to legislative reform) – An approach which encompasses all the dimensions of the situations being addressed, for example taking into account the entirety of children's lives in revising legislation that affects children and addressing the issues in terms of

³² Coughlan, Steve; Currie, Robert J.; Kindred, Hugh M.; and Scassa, Teresa, *Global Reach, Local Grasp: Constructing Extraterritorial Jurisdiction in the Age of Globalization*, Dalhousie Law School, Prepared for the Law Commission of Canada, June 23, 2006, pp. 4-8.

both the legal areas involved and the measures needed to ensure effective application and enforcement of the law.³³

Homogeneous system – A legal system based on a single legal tradition, either civil law or common law.³⁴

Human rights-based approach (HRBA) to legislative reform – An approach based on international standards and norms and on the full recognition of the equal rights of children, boys and girls, men and women and the realisation of State obligations under the international human rights instruments to which the State is party.³⁵

Indirect discrimination – Discrimination which does not occur by explicit prohibitions or restrictions, but rather by creating conditions in which certain groups are nevertheless effectively prevented from exercising all their rights; for example, by structuring voting in elections in such a way that people who cannot read are unable to participate, thereby effectively excluding a category of persons (illiterate, with disabilities etc.) from voting.

Inter-Convention approach – An approach which uses the broad spectrum of human rights instruments for the formulation of constitutional provisions, national legislation or government programmes.

International instruments – Internationally adopted treaties, conventions, covenants, protocols and declarations, including those that come under the United Nations, its Specialized Agencies or regional organisations.

International law – The body of norms and standards contained within international human rights and humanitarian instruments, including the human rights conventions and covenants of the United Nations system, the conventions of the International Red Cross, and the jurisprudence of the international courts and special tribunals that have been constituted by international agreement.

³³ See Chapter 1 for more details.

³⁴ See Chapter 2 for more details.

³⁵ See Chapter 1 for details.

Islamic law – A system of civil and penal laws that is predominantly based on *Shari'a*, with a body of interpretation and jurisprudence that may be informed by local experience.

Justiciable – Subject to due process in a court of law.

Juvenile justice – A special dimension of the justice system which recognises the needs and rights of children who may come into conflict with the law.

Law – With regard to human society, the body of rules, regulations and prohibitions, developed through custom, or adopted and promulgated by the government, which guide the conduct of individuals, organisations and the government in relation to others with whom the political, civic, economic and social environment is shared.

Law reform commissions – Permanent standing bodies used in some countries to review existing legislation and make recommendations on new measures or revision of existing legislation in order to bring the expression of law up to current standards.

Legal illiteracy – Lack of knowledge of laws or of the legislative process.

Legal reform – Reform of the legal system, including the judiciary, police and custodial institutions.

Legal system – Encompasses all the rules and institutions, based on its legal tradition, which determine how the law is applied.³⁶

Legal tradition – The cultural perspective under which the legal system is created, providing the philosophy for how the system should be organised and how law should be formed and implemented.³⁷

Legislation – All acts of the legislature, including formal laws, government action plans, budgets, and administrative measures.

³⁶ See Chapter 2 for more details.

³⁷ See Chapter 2 for more details.

Legislative reform – Reform of the whole body of legislation, including Constitutional laws, acts of the legislature, formal laws, decrees and administrative measures as well as legal institutions.

Local or domestic law – Law that is adopted by and prevails within a specific country, as opposed to international law. (See above).

Mainstreaming – Applying programmes or approaches which have been tried and tested in a small representative region to the entire country.

Micronutrient malnutrition – Caused by the lack of essential micronutrients (such as iodine, iron, folic acid, or vitamins A or D) in the diet, resulting in developmental deficits or vulnerability to particular ailments.

Minority group – Any group which, by virtue of its ethnic composition, place of origin, traditional practices, or language or culture is marginalized in society and effectively deprived of rights; the term may also be applied more generally to groups which, although not a numerical minority in society, are nevertheless treated by law or custom as if they were less significant than others, as women are in many countries.

Mixed systems – Legal systems which involve combinations of more than one legal tradition often involving some form of customary or traditional law or Islamic law combined with civil or common law.³⁸ (Contrast to **Homogeneous systems**, above).

Monist system – A system in which national and international law are viewed as a single legal system, and international treaties, once ratified or acceded to, automatically become part of national law.

Non-discrimination – One of the fundamental principles of human rights, which prohibits and condemns any distinction, exclusion, restriction or preference based on grounds such as “race, colour, sex,

³⁸ See Chapter 2 for more details.

language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.’ (CRC, Article 2.1).

Non-refoulement – A principle of customary international law which opposes any measure attributable to the State which could have the effect of returning an asylum seeker or refugee to the frontiers of territories where his or her life or freedom would be threatened, or where he or she is at risk of persecution, including interception, rejection at the frontier, or indirect *refoulement*.³⁹

Penal reform – Reform of the penal system (i.e. court system, prisons, and other penal institutions).

Personal law – Law which relates to the status of persons, in particular regarding adoption, marriage, divorce, burial, and devolution of property on death in some constitutional regimes.

Plural systems – see **Mixed systems** (above).

Positive discrimination – See **Affirmative action** (above); this term is not generally used in contemporary discussion.

Reflection delay – A mechanism instituted by some States as a middle ground between respect for the rights of victims of trafficking and States’ need to arrest and prosecute traffickers, to ensure that victims can recover from their trauma, have access to support and assistance including medical care and legal advice, and can thus make an informed decision about whether they want to testify against the trafficker.

Rule of law – A principle according to which laws have the ultimate authority over the actions of all individuals (including government representatives). Government authority is exercised only in accordance with publicly disclosed laws and regulations, and is subject to the normal checks of an independent judiciary.

³⁹ Global Consultations on International Protection, Cambridge Roundtable, 9- 10 July 2001, organised by the United Nations High Commissioner for Refugees and the Lauterpacht Research Centre for International Law, *Summary Conclusions - The Principle of Non-Refoulement*.

Self-executing – Of international treaties and conventions, becoming part of domestic law as a consequence of ratification or accession (in monist systems).

Statutes – Laws enacted by the legislature, subject to judicial review and interpretation.

Supremacy clauses – Constitutional provisions which affirm the supremacy of the Constitution over all other legislation or regulations.

System of presumption – In criminal law, if certain conditions are gathered, even if there is no substantial evidence against a particular person, that person is presumed guilty.

Traditional law – See **Customary law**, above.