

Human traffic, human rights: redefining victim protection

Anti-Slavery International



Anti-Slavery International is the world's oldest international human rights organisation and was set up in 1839. Anti-Slavery International is committed to eliminating slavery through research, raising awareness and campaigning. It works with local organisations to put pressure on governments to acknowledge slavery and to take action to abolish its practice.

Anti-Slavery International is a registered charity 1049160

ISBN: 0 900918 55 1

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Layout by Becky Smaga
Indexed by Sandj Information Services Ltd
Cover design by Mike Bailey
Cover photograph by Dominic Ridley
Printed by The Printed Word, Horsham, UK

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Acknowledgements

This report is based on research reports conducted in ten countries, by Stana Buchowska of La Strada Foundation Against Trafficking (Poland), Bruno Moens of Payoke (Belgium), Fanny Polania Molina (Colombia), Usa Lerdsrisantud of Foundation for Women (Thailand) and Inna Shvab of International Women's Rights Centre La Strada (Ukraine). In the Netherlands, Nigeria, Italy, United Kingdom and the United States, Elaine Pearson conducted the research. Anti-Slavery International would especially like to thank Mike Dottridge for his extensive editorial input and who originally conceived the idea of this research. We also thank our volunteers Barbara Heinzelmann and Alice Peycke who assisted on this report.

This report would not have been possible without the assistance and input of many NGOs and individuals who helped us and who are listed in the notes for each chapter. We sincerely appreciate the women and men whose names are not mentioned in this report, but who shared their stories and experiences with us.

Finally, we thank the European Union for their financial support.



This document has been produced with the financial assistance of the European Community. The views expressed herein are those of Anti-Slavery International and can in no way reflect the official opinion of the European Commission.

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1. Executive Summary

Trafficking in persons comprises a range of human rights violations, which sees crimes committed by traffickers compounded by the inadequate and inappropriate response of governments worldwide. Trafficked persons who escape their situation often find themselves victimised again as a result of the treatment they receive at the hands of the authorities.

Daniela¹

Daniela was trafficked from Albania to Italy. Her story is not unusual. She went because she wanted to be able to earn some money for her family, and in Albania there were no jobs for a young woman with little education. A friend from her village helped her emigrate. Once in Italy, the friend sold her to someone else and she was forced into street prostitution. The traffickers forced her to work in prostitution every day and took all her money. She was passed from one trafficker to the next, and finally to one who purported to be her 'boyfriend', and promised to take her away to a better life. He also turned out to be a trafficker and took her to England, putting Daniela to work as a prostitute in a flat. They lived with several other Albanian men and women. Daniela tells how she was beaten by her trafficker and the other men, often with wet telephone wires. One time a client walked out on her when he saw how badly her body had been beaten. She tried to escape once whilst in England, but the traffickers caught her, and as punishment cut one of her fingers to the bone, slowly.

In Italy and in England Daniela never even thought about going to the police for help. She had no faith in the police in Albania, whom she knew were corrupt and complicit in the trafficking of women; why, she thought, would the police be different anywhere else? She was also scared of what would happen to her family. Eventually, the traffickers took her back to Northern Italy. Italian police stopped her while she was working on the streets and asked to see her papers. She did not have any. They served her with a deportation notice and gave her 15 days to leave the country. They made no inquiry into her circumstances or offer of help. If they had asked her simple questions they may have

ascertained she had been trafficked. They did not inform her about a specific law in Italy that gives trafficked persons who provide information to the police about being trafficked the right to stay in that country and participate in a social integration programme. So after her encounter with the police, she went back to the traffickers, showed them the deportation order and they moved her to another city.

Increasingly, governments have responded to trafficking through restrictive immigration policies. These not only render migrants more vulnerable to traffickers, but often lead to trafficked persons being swiftly returned to their home countries as undocumented migrants, returned to the very same conditions from which they left, rather than being identified as victims of crime. This fails to give trafficked persons opportunities for recovery and redress, and further deprives them of access to justice, through the possibility of criminal or civil action against traffickers.

Measures for protection and assistance to trafficked persons are included in the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children supplementing the United Nations Convention Against Transnational Organized Crime (2000). However, unlike the criminal provisions in this Protocol, which are obligatory on State Parties, the human rights protections are discretionary under the Protocol.

How to ensure that governments place victim protection at the core of their anti-trafficking policies was the objective of Anti-Slavery International's two-year research study investigating various measures to protect victims, especially those who act as witnesses in the prosecutions of traffickers. We carried out research in collaboration with local non-governmental organisations in ten countries: Belgium, Colombia, Italy, Netherlands, Nigeria, Poland, Thailand, Ukraine, United Kingdom and United States. Of particular interest to Anti-Slavery International was the effectiveness of providing residency permits to trafficked persons to enable them to access their basic human rights, recover from their situation and secure prosecutions of traffickers. Our research found that the countries which fared better in prosecuting traffickers for various crimes (Belgium, Italy, Netherlands and United States) were the four countries which also had the most comprehensive measures for assisting victims, including temporary residency permits for those prepared to testify against their traffickers.

An important part of this protection has been to ensure that all persons who are suspected of being trafficked have at least a 'reflection delay' of three months, as in the Netherlands. The reflection delay allows trafficked persons to remain in the country legally whilst they recover from their situation and consider their options. Three months is a reasonable time period during which a person can make fully informed decisions about what they want to do next, and if they want to pursue civil or criminal action against their trafficker. The reflection delay must be accompanied by access to specialised services of a non-governmental organisation that can ensure appropriate housing, legal, medical, psychological and material assistance are provided. There is a need for documents authorising temporary residency to be issued immediately (within 24 hours) such as in Belgium to ensure trafficked persons have access to these services straight away; in countries such as Italy and the United States the slow processing of residency permits means that many trafficked persons are dependent upon the good will of individuals and organisations to take care of them. All States need to fund shelters for trafficked persons, and fund and provide victim and witness protection.

Currently, countries such as Belgium, Netherlands, Poland, Thailand, United Kingdom and United States only allow those victims who are willing to assist with investigations and prosecutions the right to temporary stay. This can breach international human rights principles, such as not to expel someone if there are substantial grounds for believing they may be in danger of torture.² We found a better approach was to ensure that temporary residency status should be available to all trafficked persons who have suffered serious abuse in countries of destination, or would suffer harm if they were to return home, or who are assisting in investigations or prosecutions of traffickers. Keeping the issues separate also ensures that receiving residency status will not be used to discredit a victim's testimony at a trafficker's trial, especially in common law legal systems.

For those trafficked persons who seek access to justice and are willing to testify against their traffickers, extensive witness protection measures are required. This means both ensuring police provide protection from reprisals, and that victims are given access to a range of measures and different levels of protection, both formal and informal. In terms of giving evidence at trial, countries need to ensure victim witnesses are able to give evidence safely, and make efforts to reduce the secondary trauma that victims often face in a courtroom, such as through the use of sworn statements, recorded

testimonies, video-links and pre-trial hearings closed to the public. Witness protection measures must balance the rights of the defendant to a fair trial, with the rights of victims not to be traumatised or put in danger again through the experience of testifying. Informal measures such as separate areas in courtrooms for victim witnesses to prevent possible confrontation by friends or family of the trafficker are equally important.

In civil law countries, it is important that the victim has their own lawyer or legal advocate to represent them in the criminal case. Anti-Slavery International found that cases where victim's rights were protected, and there was a successful conviction, were predominantly cases where the trafficked person had legal representation. Lawyers play an important role in all countries in ensuring rights of trafficked persons are protected, particularly their right to information about court proceedings and ensuring a trafficked person is recognised as a victim of crime. This is especially important to ensure victims have access to legal redress and compensation. Compensation for lost earnings, as well as for damage suffered, was an important way of both vindicating victims, making the process of going through the criminal trial worth it, as well as addressing their financial needs.

Anti-Slavery International's research has found there is a growing awareness at all levels of the need for a human rights framework to combat trafficking most effectively. Cases of 'best practice' in terms of successfully protecting victim's rights, exist where there has been a genuine understanding and goodwill on the part of authorities involved. In these successful cases, there have been committed teams of law enforcement officials, prosecutors, lawyers and service providers, who all displayed sensitivity to the needs and rights of trafficked persons in each case. Our research highlights the need to institutionalise the good practices we have seen. The report makes 45 recommendations regarding ten specific thematic areas: general; investigation and prosecution of traffickers; contradiction between laws concerning undocumented migrants and those affecting trafficked persons; residency status for trafficked persons; protection from reprisals; in-court evidentiary protection; recovery and assistance measures; role of lawyers; legal redress and compensation; and return and repatriation.

Unfortunately, the current models of protection offered to trafficked persons too often prioritise the needs of law enforcement over the rights of trafficked persons. Often 'protection' still means repression of victims' rights. We call

for victim protection to be redefined and reworked so that it means supporting and empowering those who have been trafficked. Protection of victims *per se*, is not the same as protection of victims' human rights. The challenge for governments is to live up to their obligations under international law and make protection of all human rights a reality for trafficked persons who escape their situation.

Summary of Recommendations

General

Recommendation 1: Government agencies responsible for administration of justice should develop a law enforcement model for interviewing undocumented migrants to ensure appropriate questions are asked to ascertain if they have been trafficked. Guidelines for interviewing undocumented migrants should be developed by experienced law enforcement officials working on these cases in conjunction with agencies that work with migrants and trafficked persons.

Recommendation 2: Government agencies responsible for administration of justice should train law enforcement officials (i.e. police and immigration) and the judiciary (prosecutors, judges, lawyers) as well as service providers (e.g. medical, migrant, refugee, trade unions) to help them understand the complex situations and decisions trafficked persons face due to their vulnerable situation.

Recommendation 3: Government agencies responsible for administration of justice should develop guidelines and procedures on treatment of trafficked persons by law enforcement officials in conjunction with non-governmental organisations that deal with trafficked persons on a day-to-day basis. These need to be circulated widely and updated regularly.

Recommendation 4: States, inter-governmental organisations and NGOs should raise awareness and sensitise society in general about the violations of human rights that trafficked persons experience, paying particular attention to the effects of their treatment by the State.

1. Investigation and prosecution of traffickers

Recommendation 5: States should adopt legislation setting out a criminal offence of 'trafficking' that covers trafficking for all purposes, in line with the Trafficking Protocol as part of comprehensive anti-trafficking legislation which protects the rights of trafficked persons. Consideration of the United States' criminal definitions of trafficking and forced labour, as a good working model, may be helpful.

Recommendation 6: States should interpret and amend existing provisions of the law punishing slavery and unlawful imprisonment to ensure that clearly identifiable and provable elements of psychological coercion are recognised as a method of constraint. States should apply existing slavery provisions to cover modern forms of slavery such as trafficking, consistent with a new provision against trafficking.

Recommendation 7: At a regional level within countries, justice ministries should create integrated multi-agency task forces to combat trafficking, involving police, immigration officials, labour ministry officials or labour inspectors, prosecutors and non-governmental organisations to co-ordinate their activities in relation to trafficking and thereby to ensure more effective prosecutions of traffickers.

2. Contradiction between laws concerning undocumented migrants and those affecting trafficked persons - the failure to recognise trafficked persons.

Recommendation 8: States should ensure trafficked persons are not punished for any offences or activities under national laws related to them having been trafficked, such as prostitution and immigration violations.

3. Residency status for trafficked persons

Recommendation 9: States should ensure their immigration service establishes a special section to deal with trafficking, issue residency permits to trafficked persons and co-ordinate with the police, prosecution and those supporting trafficked persons.

Recommendation 10: States should require law enforcement officials who come into contact with individuals who are suspected to have been trafficked, to refer such persons to a specialised centre or NGO that can address or assess their mental and physical health needs, inform them of their rights to a reflection delay and explain clearly their legal rights and document details of their personal experience and the specific violations committed against them.

Recommendation 11: States should provide the right to a reflection delay of no less than three months in cases where there are indications that trafficking has occurred.

Recommendation 12: States should ensure that trafficked persons who are in the country during a reflection delay are able to access basic services and support (see part 6. Right to recovery, below).

Recommendation 13: States should provide residency status for a term of no less than three years available for any trafficked persons who have been a victim of serious abuse/harm, or if they are in danger of further harm (through stigmatisation, discrimination, risk of reprisals or likely to be re-trafficked) or who are assisting the investigation or prosecution of traffickers.

Recommendation 14: States should allow trafficked persons who have been resident legally in the country for three years to be eligible for permanent residency.

Recommendation 15: Trafficked persons should be informed of their right to asylum, and be granted asylum in appropriate cases.

Recommendation 16: Immigration services should systematically collect and record information regarding the number and type of residency permits issued to trafficked persons, especially concerning the number of persons who file complaints against traffickers.

4. Protection from reprisals

Recommendation 17: Governments should ensure that appropriate guidelines or regulations are in place to ensure that relevant agencies

automatically provide information about victim or witness protection to vulnerable victims and witnesses, and people close to them. A range of measures and different levels of protection should be made available to victims and witnesses, including both informal (panic alarm, access to police, police escorts) and formal measures (secure housing, confidentiality, change of identity, and, in exceptional cases, relocation of the trafficked person and their relatives).

Recommendation 18: States should fund and provide victim and witness protection, and not rely on non-governmental organisations to protect victim witnesses in trafficking cases.

Recommendation 19: State should fund shelters for trafficked persons.

Recommendation 20: States should ensure that specialised units or task forces, rather than local police forces, deal with trafficking cases, including both trafficking investigations and providing protection from reprisals. Units to investigate reprisals could also be set up within anti-corruption police units.

Recommendation 21: Destination countries should provide for relocation of family members to the destination country where there is a threat of reprisals. States must undertake or assist in relocation of family members in country of origin as well as to the country of destination.

5. In-court evidentiary measures to protect victim witnesses

Recommendation 22: Law enforcement officials should inform trafficked persons of the consequences of giving testimony, such as the possibility of secondary trauma, reprisals, seeing their trafficker and his relatives or associates at court. This should be clearly explained by the authorities (or by an NGO) at the time they are asked to give a statement against the trafficker.

Recommendation 23: The prosecution, police or others responsible for the administration of trials should be required to inform trafficked persons of what, if any, in-court measures for protecting victims and witnesses will be available to the witness at the earliest possible opportunity, in any event before trial.

Recommendation 24: Whatever practices are now current in their legal system, States should review the need for and possibility of introducing measures to minimise additional trauma being caused to trafficked person who testify against alleged traffickers, such as preliminary deposition of evidence, preliminary hearings and testifying in the absence of the alleged trafficker.

Recommendation 25: States should provide and guarantee legal rights to confidentiality, in particular, this means instructing law enforcement agencies and the courts not to publish names or addresses of anyone who has been trafficked or information that may easily identify a victim and thus jeopardise his or her safety.

Recommendation 26: The Government Ministry responsible for the administration of justice should instruct criminal courts to provide informal protection measures extending down to the most basic level to protect witnesses from intimidation. For example, in courtrooms victim witnesses should be provided different entrances, corridors, waiting rooms, toilets, places to eat - or, where these measures are not possible, different times to enter/exit and escorts to and from the courtroom.

Recommendation 27: States should provide trafficked persons with free access to specialised social workers or counselling post-trial to address any further trauma caused by testifying.

6. Right to recovery (assistance measures)

Recommendation 28: States should provide immediate access to basic support and assistance measures for trafficked persons. Immigration services should process immigration permits within 24 hours to enable this to occur.

Recommendation 29: States should provide and fund shelters and support services for trafficked persons. There should be a range of shelters and secure housing available to trafficked persons.

Recommendation 30: States should provide trafficked persons with access to training and employment opportunities. Work permits should be issued swiftly without complicated procedures.

7. Role of lawyers

Recommendation 31: States should provide trafficked persons with access to free independent legal advice to allow them to exercise their legal rights.

Recommendation 32: Lawyers, on behalf of trafficked persons, should be present in interviews with law enforcement officials and prosecutors.

Recommendation 33: Lawyers, on behalf of trafficked persons, should engage with the prosecution in ensuring the trafficked person is recognised as a victim of crime in the criminal proceedings and, with the trafficked person's knowledge and consent, pass relevant information to the prosecutor to support the criminal case.

8. Legal redress and compensation

Recommendation 34: Law enforcement officials should inform trafficked persons of their right to a lawyer, the possibilities of obtaining compensation, and that lawyers can assist and inform them regarding the related procedures.

Recommendation 35: Law enforcement officials should proactively pursue trafficked persons claims for compensation, especially through providing more in-depth information regarding compensation procedures and assist trafficked persons who wish to claim compensation from traffickers.

Recommendation 36: States should enact or enforce laws regarding immediate seizure and confiscation of assets from traffickers, and ensure that the first priority for such assets, once seized, is to pay any compensation claims of trafficked persons. Seizure laws and practices should be amended so as to be more effective, through international co-operation between police to share models of best practice of seizure.

Recommendation 37: States should ensure in all criminal cases that the status of the trafficked person as a victim of crime is acknowledged (as an injured party in civil law countries) to facilitate orders of compensation.

Recommendation 38: Immigration services should permit trafficked persons to remain in the country whilst pursuing civil claims against traffickers.

Recommendation 39: States should ensure trafficked persons have access to State compensation funds, such as victims of crime funds. The process of claiming money from such funds must be made clearer and more efficient for trafficked persons, especially if they are considering returning home.

9. Return and repatriation

Recommendation 40: The authorities, i.e. immigration and police services should not remove trafficked persons to a country of origin where there is reasonable suspicion they may suffer further harm, through stigmatisation, discrimination or risk of reprisals.

Recommendation 41: Immigration services should support and make use of existing voluntary repatriation programmes involving local organisations in countries of origin. For example, the International Organization for Migration co-ordinates such programmes, characterised by a holistic approach to return and recovery.

Recommendation 42: Immigration and police services in countries of destination should not reveal to authorities in countries of origin that a person has been trafficked, without their explicit consent. This is especially important where there are concerns regarding corruption of local officials or, for those trafficked into prostitution, because of stigmatisation associated with prostitution.

Recommendation 43: Immigration and police services should make available to trafficked persons contact information and telephone numbers of NGOs, lawyers and social welfare agencies that can assist them in their country of origin. This should not only be in the country's capital, but also any relevant regional centres. They must ensure that this information is authentic and up to date (i.e. latest telephone numbers) by reviewing it periodically, by contacting organisations themselves and also through local NGO networks in the country of destination. NGOs should assist the authorities in collecting such information, and ensure that it is given to the authorities, and not simply made available through websites.

Recommendation 44: For trafficked persons who wish to go home, immigration services should ask if they wish to be met by a local NGO and, in accordance with their wishes, contact local NGOs in countries of origin to assist those who return home.

Recommendation 45: In returning trafficked persons who want to go home, immigration and police services should provide them with contact information for a law enforcement office in the country of origin that they can contact if a trafficker threatens them.

Endnotes

¹ All names appearing in case studies throughout the report have been changed to protect each person's identity.

² Article 3 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984).

2. Introduction

I Research aims and objectives

Effective prosecution of traffickers for the crimes they commit against trafficked persons is something that has eluded most countries to date. It was the main impetus for the adoption of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter Trafficking Protocol) supplementing the United Nations Convention Against Transnational Organized Crime (2000) (hereafter Transnational Crime Convention) under which ratifying States must establish trafficking as a criminal offence¹ under their domestic law. The Trafficking Protocol recognises 'protection and assistance to victims with full respect to their human rights'² as one of its stated objectives.

Programmes and policies of many governmental, inter-governmental and non-governmental bodies recognise that, in order to have a comprehensive strategy to tackle trafficking in persons, it is necessary to regard the protection of victims' rights as intrinsic to the process of effectively prosecuting traffickers. However, in recent times it is victim protection *per se* rather than protection of victims' human rights that has dominated. This has led the United Nations High Commissioner for Human Rights to issue some recommended principles and guidelines on human rights and human trafficking, which clearly set out the obligations of States to protect the human rights of trafficked persons, and that this should be at the core of any anti-trafficking strategy.³ The benevolence of the term 'victim protection' is not to be assumed and there are systems of 'victim protection' in place concerning trafficked persons that do not protect their fundamental human rights, as Anti-Slavery International discovered in the course of this research. Over a two-year period, Anti-Slavery International investigated victim protection measures used in trafficking cases in ten countries in order to ascertain what impact such measures have on the process of prosecuting traffickers, and upon the human rights of those who have been trafficked.

The aims of this research were threefold:

1. To identify the obstacles to convictions and prosecutions of traffickers by examining laws used to prosecute traffickers in each country;

2. To assess victim and witness protection measures used in trafficking cases, in terms of their impact on trafficked persons' human rights;
3. To evaluate whether such victim and witness protection measures have the desired effect of encouraging prosecutions and securing convictions of traffickers.

The research findings are targeted at those who are developing laws and policies to deal with trafficking, as well as those who are actively involved in the process of prosecuting traffickers or assisting trafficked persons. The recommendations and findings are broad enough that they may be adapted within different legal systems. The research examines not only the laws and policies of each country related to trafficking but the actual implementation of those laws and policies, by closely analysing a few cases in each of the ten countries.

II Definitions of trafficking in international law and standards for victim protection

Historically, provisions of many international treaties address the various human rights violations that take place in the context of trafficking. Some of the relevant instruments include the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Convention on the Elimination of All Forms of Discrimination Against Women (1979), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment (1984), the Convention on the Rights of the Child (1989), the Slavery Convention (1926), the Convention on the Protection of the Rights of All Migrant Workers and their Families (1990) [adopted by the General Assembly but not yet in force], the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956) and various International Labour Organisation conventions.

The Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of Others (1949) (hereafter the 1949 Convention) consolidated previous treaties⁴ regarding trafficking and exploitation of prostitution. However this treaty was not widely ratified and has been criticised for its lack of definition of trafficking, lack of enforcement mechanisms and for addressing trafficking as solely the cross-border movement of persons into prostitution⁵. Four out of the ten countries chosen

for this research (Belgium, Italy, Poland and Ukraine) have signed and ratified the 1949 Convention. In each of these countries, the laws adopted in line with the convention have focused on criminalising third party involvement in prostitution, such as procuring a person for prostitution, exploiting someone in prostitution (by taking money from him/her) and managing/running a brothel⁶. Due to this convention, 'trafficking' has often been conflated with (seen as one and the same as) exploitation of prostitution, and specific provisions against trafficking in persons were either absent or left undefined, and therefore unusable.

As the scale of trafficking in persons increased and gained more attention in the 1990s, the lack of a clear definition of trafficking in persons in the 1949 Convention led various governmental and inter-governmental organisations to adopt their own definitions of trafficking. For example, the November 1996 European Commission Communication on Trafficking in Women for the Purpose of Sexual Exploitation defined trafficking for sexual exploitation as:

"Trafficking for the purpose of sexual exploitation covers women who have suffered intimidation and/or violence through trafficking. Initial consent may not be relevant, as some enter the trafficking chain knowing they will work as prostitutes, but who are then deprived of their basic human rights, in conditions which are akin to slavery."

The Communication pointed out that women entering the European Union both legally, as well as illegally, could be considered to have been trafficked.

A more recent December 1998 Communication from the European Commission⁷ suggested that the definition should be made somewhat broader, "by including also women who are trafficked abroad and forced to perform other forms of commercialised sex than prostitution, as well as women who are forced into marriage for the purpose of sexual commercial exploitation".

The International Organization for Migration (IOM)⁸ adopted its definition in May 1999. It considered that trafficking occurs when:

"a migrant is illicitly engaged (recruited, kidnapped, sold, etc) and/or moved, either within national or across international borders; [and] intermediaries (traffickers) during any part of this process obtain economic

or other profit by means of deception, coercion, and/or other forms of exploitation under conditions that violate the fundamental rights of migrants."

These definitions show a movement away from the 1949 Convention's approach focusing solely on prostitution, and indeed paved the way for the adoption of a new international standard, the Trafficking Protocol, in 2000.

Anti-Slavery International's current research uses the definition laid out in Article 3 of the Trafficking Protocol:

- (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;
- (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;
- (d) "Child" shall mean any person under eighteen years of age.

The current research considers how anti-trafficking laws, and other laws used to prosecute traffickers, cover the various elements within the Trafficking Protocol definition. The Trafficking Protocol and the Transnational Crime Convention not only redefine the international standard of trafficking in persons, but also establish new standards with respect to protecting the rights of trafficked persons, especially those who act as witnesses.

Whilst a myriad of different international treaties contain provisions relevant to protecting the rights of trafficked persons, Anti-Slavery International was guided by the international community's latest decision in the Trafficking Protocol and Transnational Crime Convention and used their provisions as a baseline. These treaties are the most significant international treaties dealing with trafficking in persons to date, and they clearly set out measures to protect victims and witnesses. Whilst the provisions regarding protection are not binding on State Parties, nevertheless they set a minimum standard that States should follow.⁹

1. Transnational Crime Convention

Article 24 of the Convention addresses protection of witnesses:

1. Each State Party shall take appropriate measures within its means to provide effective protection from potential retaliation or intimidation for witnesses in criminal proceedings who give testimony concerning offences covered by this Convention and, as appropriate, for their relatives and other persons close to them.
2. The measures envisaged in paragraph 1 of this article may include, *inter alia*, without prejudice to the rights of the defendant, including the right to due process:
 - (a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity or whereabouts of such persons;
 - (b) Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.
3. State Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.
4. The provisions of this article shall also apply to victims insofar as they are witnesses.

Article 25 of the Convention covers assistance to and protection of victims:

1. Each State Party shall take appropriate measures within its means to provide assistance and protection to victims of offences covered by this Convention, in particular in cases of threat of retaliation or intimidation.
2. Each State Party shall establish appropriate procedures to provide access to compensation and restitution for victims of offences covered by this Convention.
3. Each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

2. Trafficking Protocol

Article 6 of the Trafficking Protocol provides a clearer indication of what might be considered 'appropriate measures' under Article 25 (1) in the context of trafficking for the protection of victims:

1. In appropriate cases, and to the extent possible under its domestic law, each State Party shall protect the privacy and identity of victims of trafficking in persons, including, inter alia, by making legal proceedings relating to such trafficking confidential.
2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:
 - (a) Information on relevant court and administrative proceedings;
 - (b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.
3. Each State Party shall consider implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including, in appropriate cases, in cooperation with non-governmental organizations, other relevant organizations and other elements of civil society, and, in particular, the provision of:
 - (a) Appropriate housing;
 - (b) Counselling and information, in particular as regards their legal

- rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, education and training opportunities.
4. Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons...
 5. Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.
 6. Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.¹⁰

Article 7 covers the status of victims of trafficking in persons in receiving States:

1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently in appropriate cases.
2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors.

III Structure of this report

In using the Trafficking Protocol and Transnational Crime Convention provisions above as our point of reference for protection of trafficked persons' rights, the report considers what kind of 'appropriate measures' have already been adopted in the different countries. Ten chapters on specific countries evaluate how the measures of protection under the Transnational Crime Convention and the Trafficking Protocol are being implemented, and how government policies and actions protect or violate trafficked persons' human rights. We also evaluate how these measures work in terms of securing convictions of traffickers. In order to achieve the aims of our research, Anti-Slavery International structured each country chapter to look at the following factors:

I Legislation

1. **Criminal laws.** How are traffickers prosecuted in each country? Identification of relevant legislation used to prosecute traffickers, i.e. description of anti-trafficking provisions, other criminal laws used to prosecute traffickers.
2. **Other laws and policies affecting trafficked persons.** In relevant countries only, the report comments on laws and policies affecting trafficked persons, such as those providing a temporary or permanent permit of stay in Belgium, Italy, Netherlands, United Kingdom, United States, a Memorandum of Understanding in Thailand and repatriation procedures in Nigeria.

II General analysis and comparison of cases

This looks at implementation in practice of laws and policies affecting trafficked persons, usually with reference to concrete cases.

1. **Investigation and prosecution of traffickers.** Does the prosecution of traffickers rely on witness testimony and in what form? What are the problems related to effective investigation and prosecution of traffickers? Conviction/prosecution rates if available. Who is convicted as a 'trafficker' under the law?
2. **Procedures affecting trafficked persons and measures of protection**
 - a) **Residency rights**¹¹ Especially temporary or permanent residency permits.
 - b) **Protection from reprisals and police protection**¹² What witness protection is available to trafficked persons? Also protection of families and others close to trafficked persons in country of origin.
 - c) **In-court evidentiary protection**¹³ Evidentiary rules providing protection to witnesses giving testimony, confidentiality of proceedings, privacy and protection of identity.
 - d) **Right to information regarding court proceedings**¹⁴
3. **Support and assistance to trafficked persons**
 - a) **Right to lawyer/legal advocate in criminal proceedings**¹⁵
 - b) **Right to recovery (assistance measures)**¹⁶ What victim assistance and support is available? Housing/shelter, information (especially concerning their legal rights) in a language the victim can understand,

legal assistance, medical assistance, psychological assistance/ counselling, material (financial) assistance, education/training opportunities, employment opportunities.

4. **Legal redress and compensation**¹⁷ How is the right to compensation addressed in-country in trafficking cases?

Each country report looks with varying degrees of detail at the particular measures relevant or apparent in that country. For example, residency status is not considered in countries of origin since this is not relevant, and not considered in detail in countries that do not apply provisions enabling the trafficked person to acquire residency status.

The key findings and recommendations chapter acts as a synthesis and analysis of emerging themes under each of the subject areas. It indicates which countries dealt with each specific theme and whether this was in a positive or negative way. The recommendations point to solutions from countries that had overcome certain obstacles and illustrated good practice in the subject areas that could be useful for other countries. In addition each country report contains recommendations specific to the situation of that country.

IV Country selection

The ten countries chosen for the research were Belgium, Colombia, Italy, Netherlands, Nigeria, Poland, Thailand, Ukraine, United Kingdom and United States. A combination of countries of origin, transit and destination were chosen to show the treatment of trafficked persons in different contexts. Countries were selected on the basis of having established laws and policies of victim protection for trafficked persons (Belgium, Italy, Netherlands, Thailand and United States). The remaining countries were selected because there are attempts to prosecute traffickers in any case under various laws (Colombia, Poland, Ukraine and United Kingdom). Anti-Slavery International was interested in evaluating whether any attempts were made to protect trafficked persons involved in such cases. Nigeria was selected because a large number of Nigerian women are trafficked for prostitution to three other countries being studied, Belgium, Italy and Netherlands. We wanted to evaluate what happened to such women who return to Nigeria. Countries of origin were selected to evaluate what happens to trafficked persons who return from abroad, especially if they have testified abroad, and what kinds

of protection, if any, are available to them there (Colombia, Nigeria, Poland, Thailand and Ukraine).

V Diversity of legal systems

The research looked at countries with civil law (Belgium, Colombia, Italy, Netherlands, Poland and Ukraine), common law (Nigeria, United Kingdom and United States) and a country with a system that represents legal principles from both (Thailand). Within the civil law systems there were many differences between countries, particularly in terms of application of procedures in trafficking cases. Civil law and common law systems are very different in terms of their investigation and prosecution procedures. For example, the civil law system places more emphasis on the written procedures, statements and investigation, whereas the common law system generally places most emphasis on what is heard (i.e. said) at the actual trial. In general, the civil law system is more 'victim-friendly' than the common law system.

In all the civil law countries, trafficked persons as victims of crime have the possibility to 'join' themselves to the criminal action as an injured party, and thus have legal representation in the criminal proceedings. This gives the trafficked person's lawyer access to the prosecution's file, as well as opportunities to interject in the criminal proceedings by providing additional evidence and examining witnesses. This aims to ascertain the damage done to the victim by the defendant to assist in calculation of damages. In common law countries there is no such right to legal representation in the criminal proceedings, although damages may be awarded for certain crimes at the discretion of the judge.

The civil law system provides more 'protection' to the victim in terms of the actual trial procedure, not only because they have legal representation, but also various evidentiary procedures are in place to protect victims. For example, it is possible in most civil law jurisdictions to take a preliminary deposition of evidence from the victim, such as a sworn statement of the trafficked person in front of an instructing magistrate, which is admissible evidence at the trial (e.g. Poland, Belgium and Thailand). This protects the trafficked person from being confronted by the trafficker in person in court, and reduces the period in which a trafficked person may be threatened with reprisals for agreeing to give evidence. Another example with the same

objective, is the giving of evidence at pre-trial hearings that are closed to the public (though in the presence of the defence) and take place well before the actual trial, as in Italy. Such measures only have the desired effect if accompanied by adequate measures to continue to protect the trafficked persons' safety. It can have a negative effect, as we heard in Poland and Thailand, if judges use this measure simply to obtain evidence and then ensure swift deportation, potentially straight back into the hands of traffickers.

VI Research methodology

This research was a qualitative study, based on information provided during in-depth interviews in each of the countries. The research used specific case studies in each country to highlight good and bad practices related to protecting rights of trafficked persons and prosecution of traffickers. An analysis of various written sources such as the legislation, policies, government and non-governmental (NGO) reports was undertaken, followed by interviews with people working on the ground to gain a complete picture of implementation.

In five of the ten countries, partner organisations or consultants located in that country conducted the research according to research guidelines and standard guide questions concerning six categories developed by Anti-Slavery International, with input from the partners. The research partners were Foundation for Women (Thailand), Payoke (Belgium), and La Strada (Poland). Two consultants were selected for two other countries, La Strada (Ukraine) and Fanny Polania Molina (Colombia). In these countries the researchers were entirely responsible for collecting information on relevant laws, cases and other details. The researchers prepared extensive reports for Anti-Slavery International, on the basis of which these chapters were written.¹⁸

In Italy, the Netherlands, Nigeria, United Kingdom and United States, Anti-Slavery International conducted the research itself, mostly with the assistance of local non-governmental organisations assisting trafficked persons. Anti-Slavery International's researcher spent approximately two weeks conducting interviews in each of the five countries. In all of the ten countries, a minimum of twelve interviews were conducted with people from the following categories:

- Law enforcement: police, prosecutors, judges, magistrates, and other court officials, especially those who judge cases (including investigative judges), immigration service officials (involved in law enforcement);
- Legal advisers/defenders (those who critique and look for ways to use/ improve the law): defence, asylum, immigration and criminal lawyers, legal academics;
- Officials of relevant government departments dealing with trafficking, State policy makers, consular officials e.g. Department of Immigration, Social Welfare, Labour, Equal Opportunities etc;
- Persons providing direct assistance to trafficked persons i.e. specialised non-governmental organizations, service providers, social/health care workers, persons working in shelters;
- Trafficked persons themselves;
- International and inter-governmental organizations directly involved in cases regarding issues of prosecution and victim protection.

The interviews were designed to provide a close analysis of the obstacles to effective prosecution and the measures of victim and witness protection from the various perspectives of law enforcement, immigration and victim's rights, with reference to specific cases. We wanted to ascertain the treatment of trafficked persons who testified throughout the process of investigation and prosecution and also in the long term; we asked what their needs were throughout the process and how these were met (or not met). We were particularly interested to learn what impact the process of testifying had upon witnesses, and how it could be made easier for them.

VII Selection of cases

The research sought to look at the application of procedures in specific cases. Cases included were required to fit the following criteria:

- i) Trafficked persons were 18 years or older;¹⁹
- ii) Trafficked according to the UN Trafficking Protocol definition;
- iii) Trafficked persons who:
 - have acted as witnesses in cases prosecuting traffickers or are currently assisting criminal investigations/prosecution of traffickers or
 - who were unable or unwilling to testify, assist in the investigation

- and prosecution or report the trafficker;
- iv) Cases that illustrate the treatment of the trafficked person by the authorities, especially through the judicial process (preferably including positive and negative examples of treatment by authorities and in terms of impact on the victim's human rights)
 - v) Cases should reflect trafficking for different purposes (where possible)
 - vi) Cases occurring since 1996.

VIII Working definitions for the purposes of this research

1. Trafficked persons

Any adult person i.e. person 18 years or older²⁰ who is trafficked according to the Trafficking Protocol definition.

2. Support and assistance to trafficked persons

As mentioned, the measures laid out in Article 6 (3) of the Trafficking Protocol.

3. Witness protection

A range of measures relating to the security of those who give testimony and those close to them. Any measures that make witnesses and those close to them feel safe before, during and after testifying or making statement about their experience. This ranges from formal witness protection such as police protection, confidentiality, anonymity, relocation and evidentiary measures in the courtroom as well as any informal measures such as separate waiting rooms and corridors in courts, panic alarms, mobile phones.

4. Victim protection

Victim protection covers both support and assistance to trafficked persons and witness protection.

5. Debt bondage

Article 1 of the United Nations Supplementary Convention on the abolition of slavery, the slave trade and institutions and practices similar to slavery (1956) defines debt bondage as, "The condition arising from a pledge by a debtor of his/her personal services or those of a person under his/her control as security for a debt. If the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length or nature of those services are not respectively limited or defined." Many trafficked persons find themselves in situations of debt bondage, where once they are in the destination country they have to work to pay back exorbitant amounts for travel and/or living expenses.²¹ They may submit to these conditions, under the belief that they will eventually be able to pay back the debt,

however, often traffickers find new expenses, or if the debt is finally paid, sell the person again, or report them to the immigration authorities. See, for example; Nigerian women trafficked to Italy for prostitution.

IX Limitations of the research

The research is limited in that it considered approximately 30 cases in total; these cases cannot be regarded as indicative of every situation of trafficking, but represent a range of situations and treatment of trafficked persons. Indeed since access to cases was through organisations supporting trafficked persons (and several cases through law enforcement officials), they are cases where people have been identified as 'trafficked' in the first place and thus received assistance in some form. In the same vein, it must be noted that those who agreed to be interviewed (especially prosecutors, police, immigration officials) were those who were to some degree already aware of the problems, and willing to speak about them. The attitudes, for example, of immigration officers who refused to be interviewed, citing a lack of cases of trafficking or lack of willingness to speak about certain cases, are not reflected here. It was outside of the scope of this report to collect information about the situation of trafficked persons who did not receive assistance. However, it became apparent during the course of the research that this is a key area for future investigation.

In some of the countries where Anti-Slavery International's staff conducted the research, especially in Italy and the Netherlands, due to issues of language we were reliant on interviews and informal translations by NGOs or by Anti-Slavery International staff because of the difficulty in obtaining official translations of all documentation.

In order to keep with the spirit of this research (i.e. protect rights of trafficked persons) strict confidentiality has been observed throughout the research. We have altered all the names used for cases in this report and, where necessary or requested, have omitted particular information that could be used to identify an individual who had been trafficked. Thus, there are few case citations or named defendants in this study. The case studies presented depend on information provided by our sources, although we have attempted to interview three different persons involved in each case in order to build up a more complete picture.

This also illustrates the great paradox regarding victim protection in terms of protection of people's safety, which is that the best protection measures are, in fact, the practices that are not reported here and that are entirely confidential. This is precisely because in cases that have 'worked' in terms of protecting and safeguarding trafficked persons, law enforcement officials are reluctant to disclose sensitive information about the case, which may then jeopardise the safety of the individuals concerned. For example, in regard to reprisals, we were often told that police did 'something' to stop the reprisals, and trafficked persons reported that the reprisals stopped, but police would not identify the nature of the action taken. Other unrecorded cases of best practices occur where trafficked persons have managed to 'disappear' and successfully integrate into a community so well, that they have not needed further support from service providers. These are some of the key issues to bear in mind when reading the report.

Endnotes

¹ Article 5 (criminalisation).

² Article 2.

³ United Nations Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council, Addendum E/2002/68/Add.1, 20 May 2002.

⁴ Such as the International Agreement of 18 May 1904 for the Suppression of the White Slave Traffic, International Convention of 4 May 1910 for the Suppression of the White Slave Traffic, International Convention of 30 September 1921 for the Suppression of the Traffic in Women and Children, and the International Convention of 11 October 1933 for the Suppression of the Traffic in Women of Full Age.

⁵ United Nations Economic and Social Council, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Violence Against Women, its cause and its consequences, Ms Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with the Commission on Human Rights Resolution 1997/44, E/CN.4/2000/68*, February 2000.

⁶ Article 1 and 2.

⁷ Communication from the Commission to the Council and the European Parliament, *For Further Actions in the Fight Against Trafficking in Women*, COM (1998) 726, Brussels, 1998.

⁸ *Trafficking in Migrants: Policy and Responses*, May 1999.

⁹ The Trafficking Protocol and Transnational Crime Convention are not yet in force.

¹⁰ Article 6 conditions such actions, however, by requiring such steps only in appropriate cases and to the extent possible under domestic law.

¹¹ Article 7(1) Trafficking Protocol.

¹² Article 24 and 25 Transnational Crime Convention.

¹³ Article 24 (2) Transnational Crime Convention, Article 6(1) Trafficking Protocol.

¹⁴ Article 6 (2)(a) Trafficking Protocol.

¹⁵ Article 6 (2)(b).

¹⁶ Article 6 (3).

¹⁷ Article 25 (2) Transnational Crime Convention and Article 6 (6) Trafficking Protocol.

¹⁸ The full reports are available from the organisations involved and from Anti-Slavery International upon request.

¹⁹ This report does not focus on trafficking of children i.e. under 18 years of age.

²⁰ The standard laid down in Article 1 of the UN Convention on the Rights of the Child (1989).

²¹ GAATW, *Human Rights and Trafficking in Persons: A Handbook*, GAATW, Bangkok, 2000, p.36.

3. Context

1. Trafficking: a form of slavery occurring as part of migration

People are driven to migrate for a multitude of reasons, largely economic and environmental. The tightening immigration policies of many countries mean people take incredible risks to move. The Trafficking Protocol states that trafficking is essentially the facilitated movement of someone through deceptive or coercive means for the purpose of exploitation. However, measuring the exploitation that constitutes trafficking is extraordinarily difficult. The line between migrant worker exploitation and trafficking is blurred. The simple answer that Anti-Slavery International has been advocating until now, is that migration becomes trafficking when there is exploitation of a person akin to forced labour, slavery or servitude. However, it is difficult to identify an individual as a victim of forced labour, slavery or servitude when that individual does not believe it. Many migrants appear to regard a period of servitude as an acceptable cost to bear in order to establish themselves in a new country.

The answer, as some governments are starting to recognise, is not simply to 'rescue' people out of their situation and return them to their country of origin, often to the very same conditions from which they originally left and back into the hands of the same or other traffickers. The answer lies in making options available to trafficked persons, providing them with services and support and in empowering them to make decisions for themselves over their own lives. Anti-Slavery International's research indicates the best strategy to combat trafficking is to ensure that 'victim protection' means assisting and supporting, and, ultimately empowering those who have been trafficked, and enabling them to address the violations they have suffered. Only one of the human rights to be protected is access to justice, others include the right to be free from reprisals, rights to recovery and rights to legal redress.

While some countries of destination - Belgium, Italy, the Netherlands, Thailand and the United States - have made attempts to address these rights of trafficked persons by changing laws and policies in regard to trafficking, the improvements for most trafficked persons, so far, are limited. Even in the

countries where there are good laws protecting trafficked persons, implementation has been patchy. Many trafficked persons in such countries are still unaware of their rights. They do not have access to the assistance measures that exist on paper to assist and support them, such as residency permits, shelters, police protection, counselling, medical care and legal assistance.

Most of the poor practices relating to the treatment of trafficked persons by authorities stem from lack of identification of trafficked persons as such by the authorities. Trafficked persons are still identified as 'undocumented (and therefore illegal) migrants' or, for those trafficked into prostitution, simply as 'prostitutes'. The scope of this report, which analyses treatment of trafficked persons in specific cases, is limited in that it only reviews cases where people were actually identified as trafficked, and thus received some assistance, whether the assistance was good or bad. It says nothing about cases in which trafficked persons were not identified as such and were not provided any assistance or any help. NGOs play a crucial role in intervening to protect the rights of trafficked persons, informing them of his/her rights and liaising with the authorities on their behalf, for example, so as to prevent deportation or detention. Still, there is an urgent need for sensitisation on a much broader scale of all officials and others who might come into contact with trafficked persons, but may not recognise their predicament. Law enforcement officials, in particular, need to be able to identify if someone might have been trafficked, and then inform that person of his/her rights.

One of the main problems in identifying trafficked persons and treating them as such is that often they do not see themselves as 'victims'. Despite their experience of being trafficked they generally see themselves as migrants or workers who have had some bad luck as a result of a bad decision or a bad contract. So, while the term 'migrant worker' does not encapsulate the experience of being trafficked, the term 'victim' may equally be inappropriate. In this sense a victim approach may not necessarily be appropriate in all cases.

"I'm not a victim; I'm a person who's been fucked over. Sometimes I feel like the stupidest person in the world that I could get myself into a situation like this." (Trafficked Woman, interviewed in Italy 2002).

Although the term 'trafficked person' also has shortcomings because it seems somewhat neutered, it seems to be the only expression that adequately encapsulates both the exploitation to the degree of being trafficked (that distinguishes it from the general experience of migrant workers) and that is closer to the person's experience than that associated with the term 'victim'. People who migrate in search of employment or a better life, and end up being trafficked, tend to be those who had the initiative and courage to change their situation, by seeking better fortune and opportunity in migration. These are not people who will always blame others for misfortune, and they certainly do not start by seeing themselves as victims.

For many trafficked persons, they are not 'rescued' from their situation, but are 'captured' by the authorities. The authorities were not regarded initially as saviours, but oppressors. This tells us that trafficked persons do not always behave in the ways in which officials would like them to, but that this should not affect their ability to exercise their basic rights. For example, in Nigeria, women trafficked into the sex industry abroad, who are deported back to Nigeria do not fit within the usual image of a 'victim'. They return angry about what has happened to them and do not trust the authorities or service providers in what is widely regarded as one of the world's most corrupt countries.¹ One of the aspects that has been highlighted in this report, is the need to address trafficked persons who are 'hostile' victims and witnesses, in the sense of being unwilling to co-operate with authorities. This hostility is a direct result of the situation of abuse they have suffered, and treatment by authorities generally compounds rather than overcomes this. Since trafficked persons are rarely treated or identified as victims of crime, they are unlikely to be helpful in assisting in prosecutions straight away. Wrong expectations of how a 'victim' should behave often leads to misinterpretations by both the authorities and service providers, which may often shift blame onto the trafficked person.

There is a spectrum of abuse between trafficking cases, ranging from those who have been completely physically controlled, raped and beaten to those who were restrained through some form of psychological pressure. For example, trafficked persons may believe that, after a period of abuse, they will eventually pay off a debt and be able to earn money for themselves; they may fear that their families will be harmed if they seek help or that they will be imprisoned if they go to the police for assistance. They may think that no one else but the trafficker is in a position to help them, or believe that they

are somehow stupid and naïve for making a bad decision in the first place and that things could be worse. They are likely to feel that they will be stigmatised or seen as 'failures' if they return home empty-handed.

The complexity of the relationship between traffickers and trafficked persons is not to be underestimated. As fast as countries change their laws to criminalise trafficking, smart traffickers deftly change their behaviour to sidestep the new laws, for example by becoming less physically aggressive, adopting a seemingly romantic relationship with the trafficked person, marrying the trafficked person in order to legalise their status or providing small amounts of money to trafficked persons. Such people, especially women trafficked into prostitution by their 'boyfriends', are even less likely to see themselves as 'victims'.

Our key findings indicate that law enforcement agencies cannot fight trafficking effectively by simply moving trafficked persons from one system of control into another - that is, from being controlled by traffickers to being controlled by law enforcement officials. Our findings indicate that the effective way of combating trafficking is to ensure trafficked persons are provided with the necessary support and assistance to make informed decisions about their lives. It is to empower those who wish to, to seek access to justice from the State including obtaining compensation and legal redress and at a minimum, to provide services to all trafficked persons to enable them to recover and put them into a situation where they can sustain themselves and their families.

Endnotes

¹ For example, ranked number 90 out of 91 countries in Transparency International's Corruption Perceptions Index, 2001, at <http://www.transparency.org/cpi/2001/cpi2001.html>

4. Findings and recommendations*

Below are the emerging themes from the research, with summaries of the main findings, under eight specific thematic areas: investigation and prosecution of traffickers; contradiction between laws concerning undocumented migrants and those affecting trafficked persons; residency rights for trafficked persons; protection from reprisals; in-court evidentiary protection; role of lawyers; legal redress and compensation; and return and repatriation. It appears to be no coincidence that the countries which fared better in prosecuting traffickers for various crimes (Belgium, Italy, Netherlands and United States) were the four countries which also had comprehensive measures for assisting victims, including temporary residency permits for those prepared to testify against their traffickers.

General

The current models of protection offered to trafficked persons prioritise the needs of law enforcement over the rights of trafficked persons. The report's findings indicate that law enforcement officials have tended to be the most successful in securing convictions when trafficked persons' rights have been respected rather than disregarded. Cases of best practice exist where there has been a genuine understanding and goodwill on the part of authorities involved. In these successful cases, there have been committed teams of law enforcement, prosecutors, lawyers and service providers, who all displayed sensitivity to the needs and rights of trafficked persons in each case. However, in the vast majority of cases, the trafficked person is seen primarily as a witness, and as a tool of law enforcement. If this continues to be the case, the right of victims to have access to justice will continue to be denied, and prosecutions will fail because trafficked persons will be neither willing nor able to testify.

Despite the Trafficking Protocol, the Transnational Crime Convention and the adoption of some good national laws and policies to punish trafficking and protect the rights of trafficked persons, there is a need everywhere to institutionalise good practice; that is to say ensure uniform implementation by issuing clear guidelines that are regularly evaluated and reviewed, and disseminating these by means of training and sharing of good practices. The most essential need, once laws are in place, is for training for law

enforcement officials, service providers and the judiciary at a variety of levels to ensure trafficked persons are correctly identified. Improved awareness of a wide range of issues related to trafficking is needed at every level. This should include informing officials and others of the psychological impact on trafficked persons of the experience of being trafficked - the fact that trafficked persons may tell lies initially due to fear, guilt or trauma; the medical needs of trafficked persons; the relationship of dependency and sometimes romantic relationships with traffickers; the vulnerability of undocumented migrants; cultural differences; attitudes regarding gender; and the economic needs of trafficked persons. These are some examples to illustrate the complexities of trafficking cases. Training needs to be more than just dealing with prostitution, vice and human smuggling issues.

There is also a need for training and awareness-raising in the broader community, so that everyone who potentially comes into contact with trafficked persons (including those who buy their services or the products of their labour), is aware of the human rights aspect of the problem and is able to act or refer a trafficked person to a place where they may receive assistance.

Recommendation 1:

Government agencies responsible for administration of justice should develop a law enforcement model for interviewing undocumented migrants to ensure appropriate questions are asked to ascertain if they may have been trafficked. Guidelines for interviewing undocumented migrants should be developed by experienced law enforcement officials working on these cases in conjunction with agencies that work with migrants and trafficked persons.

Recommendation 2:

Government agencies responsible for administration of justice should train law enforcement officials (i.e. police and immigration) and the judiciary (prosecutors, judges, lawyers) as well as service providers (e.g. medical, migrant, refugee, trade unions) to help them understand the complex situations and decisions trafficked persons face due to their vulnerable situation.

Recommendation 3:

Government agencies responsible for administration of justice should develop guidelines and procedures on treatment of trafficked persons by law

enforcement officials in conjunction with non-governmental organisations that deal with trafficked persons on a day-to-day basis. These need to be circulated widely and updated regularly.¹

Recommendation 4:

States, inter-governmental organisations and NGOs should raise awareness and sensitise society in general about the violations of human rights that trafficked persons experience, paying particular attention to the effects of their treatment by the State.

1. Investigation and prosecution of traffickers

Our analysis of the criminal legislation in ten countries showed that there is a distinct lack of unified laws against trafficking between countries, even when there are known to be established patterns of trafficking between specific countries. All of the countries had specific provisions making trafficking in persons a crime, except for Italy, Nigeria and the United Kingdom (all of which had draft Bills waiting to be adopted). In Belgium, the anti-trafficking law was used to prosecute both trafficking and smuggling in persons. In the Netherlands and the United Kingdom draft Bill, 'trafficking in persons' referred only to trafficking for prostitution. In Thailand, the law only applied to trafficking in women and children.

The existence of a trafficking provision in the law was no indication of whether or how many prosecutions of traffickers occur, since traffickers commit various other offences in the course of trafficking for which they can be prosecuted. In some of the countries, such as Poland, Thailand and Ukraine, the anti-trafficking provisions were rarely used. These countries, as well as Nigeria, identified key obstacles to prosecuting traffickers as: corruption, lack of clarity in the law, lack of resources and lack of understanding by law enforcement officials and ineffectiveness of the judiciary in applying the law.² Failure to exchange information between law enforcement agencies (within a country) and between countries of origin and destination were also obstacles to effective prosecution (for example, in Belgium, Netherlands and Nigeria). The two countries that showed concerted efforts to prosecute trafficking for all purposes, using anti-trafficking laws with some degree of effectiveness, were Belgium and the United States. In the United States, offences of forced labour, involuntary servitude, peonage (similar to debt bondage) and unlawful possession of documents are also

used to prosecute traffickers. Italy uses existing provisions against slavery with some degree of success to prosecute trafficking.

a) Use of anti-prostitution laws to combat trafficking

In the absence of adequate anti-trafficking legislation, laws against prostitution, or against the exploitation of prostitution of others, are the laws most frequently being used to prosecute those who traffic women into prostitution. This was prevalent especially in Italy, Poland, Thailand, Ukraine, United Kingdom and to an extent, Belgium.³ The use of these laws has several effects. In several countries, such as Italy and the United Kingdom, exploitation of prostitution laws are generally used to target the 'worst cases' i.e. where deception, coercion and threats occur. The authorities have made a decision, formally or informally, not to focus on all cases of prostitution but rather the 'worst' cases. However, this continues the past practice of seeing trafficking as the same thing as the exploitation of prostitution. It would be clearer and more effective to have laws that reflect deception, coercion and threats to penalise trafficking rather than using exploitation of prostitution laws.

The use of anti-prostitution laws to combat trafficking is problematic because of traditional, discriminatory attitudes of most law enforcement officials against sex workers. Attitudes towards prostitution may prevent many law enforcement officials from regarding women trafficked into prostitution as victims of a crime. Women trafficked into prostitution, are often treated instead as criminals to be prosecuted, rather than assisted, as was found to be the case in Colombia, Nigeria, Poland, Thailand and Ukraine. Equally, since prostitution tends to be seen as a crime against public order, if traffickers are penalised under anti-prostitution laws, those who are trafficked into prostitution are less likely to be able to seek legal redress or compensation because they are not regarded as victims of a crime. The use of laws punishing the exploitation of prostitution often means that traffickers higher up the chain in organised crime remain unpunished (see Chapter on Italy).

Considering trafficking as one and the same as prostitution clearly has a negative impact also on those trafficked into other forms of exploitation, as in Italy, Poland, Thailand, Ukraine and the United Kingdom. While it may be that other provisions under the criminal code are available to prosecute such traffickers (facilitating illegal migration, forgery offences, assault, rape, unlawful imprisonment) the fact that trafficking tends to be seen as one and the same as prostitution, means that these cases may not be identified as

trafficking. Charges of forgery and facilitation of illegal migration do not reflect the human rights abuses inflicted on a trafficked person. Individuals exploited by traffickers charged with these offences may not be recognised as victims of crime. This has important implications for their treatment by the authorities and access to services and support for trafficked persons, residency permits and so on.

b) Good practice

The most comprehensive criminal legislation against trafficking in persons encountered during the study, and the one reported to be most effective in prosecuting traffickers appeared to be that used in the United States. It not only sets out a definition that in practice seems simple and straightforward for prosecutors to use, but also introduces various ancillary offences such as forced labour and unlawful confiscation of documents. The fact that the definition of forced labour in the United States law includes the element of psychological coercion i.e. "any scheme, plan, or pattern intended to cause a person to believe that failure to perform an act would result in serious harm to or physical restraint against any person"⁴ is very significant because it ensures traffickers who have not engaged in explicit acts of violence or threats can also be punished.

Due to the fact that trafficking is an extraordinarily complex crime and an ever-changing phenomenon, the use of an integrated multi-agency approach, i.e. specialised task forces of police, immigration, labour ministry officials or labour inspectors, prosecutors and NGO's to prosecute traffickers has proved effective in Belgium and the United States. This proved important also in enhancing the co-operation between immigration officials and police, which appeared to be an obstacle elsewhere in effective prosecution (for example in the United Kingdom). A multi-agency approach, piloted in Los Angeles in the United States, which includes Government ministries (departments) of labour, justice and specialised NGOs, was particularly successful. Exchange of information between law enforcement agencies in different countries worked best where personal relationships were developed between individuals in each of the countries (Italy, Nigeria and Ukraine).

Recommendation 5:

States should adopt legislation setting out a criminal offence of 'trafficking' that covers trafficking for all purposes, in line with the Trafficking Protocol as

part of comprehensive anti-trafficking legislation which protects the rights of trafficked persons. Consideration of the United States' criminal definitions of trafficking⁵ and forced labour, as a good working model, may be helpful.

Recommendation 6:

States should interpret and amend existing provisions of the law punishing slavery and unlawful imprisonment to ensure that clearly identifiable and provable elements of psychological coercion are recognised as a method of constraint. States should apply existing slavery provisions to cover modern forms of slavery such as trafficking,⁶ consistent with a new provision against trafficking.

Recommendation 7:

At a regional level within countries, justice ministries should create integrated multi-agency task forces to combat trafficking, involving police, immigration officials, labour ministry officials or labour inspectors, prosecutors and non-governmental organisations to co-ordinate their activities in relation to trafficking and thereby to ensure more effective prosecutions of traffickers.⁷

2. Contradiction between laws concerning undocumented migrants and those affecting trafficked persons - the failure to recognise trafficked persons.

The contradiction between laws concerning undocumented migrants (which usually require deportation) and laws affording protection and residency permits to trafficked persons is especially apparent in Italy and to a lesser extent in Belgium and the United States. Those who are not readily recognised by law enforcement officials as possibly having been trafficked, face immediate deportation and possibly detention in an immigration facility. The contradiction is also apparent in the Netherlands, where law enforcement officials have guidelines concerning the information they should give to persons who could have been trafficked about their rights. In practice these are not followed because law enforcement officials do not recognise such people as possible victims, but see them as undocumented migrants. As such, many trafficked persons remain uninformed about their rights and are often deported.

In addition, those trafficked into the sex industry may suffer discrimination at the hands of authorities because they are sex workers. For example, in

Nigeria, Thailand and Ukraine trafficked women have been criminalised themselves, arrested and punished for being prostitutes despite the crimes committed against them and fact that they were trafficked into prostitution.

Recommendation 8:

States should ensure trafficked persons are not punished for any offences or activities under national laws related to them having been trafficked, such as prostitution and immigration violations.

3. Residency status for trafficked persons

Four countries, Belgium, Italy, the Netherlands and the United States, have specific legislation to address the protection of trafficked persons, such as providing residency permits for trafficked persons. In each case there is a dual objective of encouraging the victim to testify and protecting the victim's human rights.⁸ This report's findings highlight the stark contrast between what was offered in theory in the law versus what was happening in practice, particularly in Italy, the Netherlands and (to a lesser extent) in Belgium. In the United States it was impossible to measure the implementation against the law, since at the time the research occurred no T visas (visas for trafficked persons assisting the prosecution) had yet been offered.

a) Reflection delay

A crucial aspect of residency status is the immediate period of recovery, 'reflection delay', available in Belgium and the Netherlands and recommended in the proposed EU Directive on short-term permits.⁹ In the Netherlands the period is for three months under the B9 regulation, in Belgium 45 days under the 1994 Circular, the proposed EU Directive suggests a period of 30 days. The reflection delay is the most positive (and crucial) aspect of the Belgian and Netherlands' systems concerning residency because it enables victims of abuse to recover somewhat from their ordeal, during which time they have access to support and assistance including shelter, legal advice, medical care and counselling. The reflection delay is needed to ensure that individuals who have been trafficked can recover sufficiently from the trauma of their experience to be willing and able to talk about it. It affords the time to ensure that the person is making an informed decision about whether or not they want to testify against the trafficker.

According to the NGOs assisting trafficked persons in these countries (STV in

the Netherlands and Payoke for Flanders region, Belgium) those who are granted the reflection delay are more likely to press charges against their trafficker. This is also indicated in Italy. Despite the fact that NGOs, lawyers and law enforcement officials recommend the use of reflection delays, in Belgium and the Netherlands there is no recorded statistical information available indicating how many persons who use the reflection delay actually file complaints against the trafficker. In fact, both countries suffer from a lack of centralised statistics concerning the number of people who receive any type of residency permits.

In both Belgium and the Netherlands there are problems with the operation of the reflection delay in practice. Law enforcement officials in both countries seem unwilling to inform possible trafficked persons about the right to a reflection delay, because they feel it interferes with swift investigation or because they simply do not recognise people who have been trafficked as such. Trafficked persons are rarely informed of their rights to the reflection delay if their first point of contact is with a law enforcement official. This is especially apparent if the person has been trafficked for purposes other than prostitution.

The findings in the other countries similarly indicate the need for a reflection delay and that the decision to report a trafficker is not an easy one. For example, in the United Kingdom trafficked persons rescued by police are given the choice of returning to their home country immediately or staying and testifying against traffickers. Police state that in nearly all cases victims say they would rather return home. However, in light of the experience in Belgium, Italy and the Netherlands, the 'choice' to return home more likely reflects that such a decision is made under a great deal of stress, within a very short time period and in what the trafficked persons sees as a hostile environment (an interview by authorities in custody or at least in a police station, where they may fear prolonged imprisonment). Without a reflection delay, there is no time for trafficked persons to consider the realities of returning home, such as: the likelihood of being re-trafficked (especially if they still owe a debt to their traffickers or others), reprisals by traffickers and possible stigmatisation by family/community, particularly in the case of women trafficked into prostitution. They may also not yet understand the consequences of what will happen to them if they decide to stay, nor be aware that support and assistance will be provided to them.

During the period of immediate interception by authorities, some trafficked persons make decisions that are still heavily influenced by the trafficker. For example, in cases of Chinese nationals trafficked to the United States for exploitation in factory or restaurant work, traffickers arrange for lawyers to represent victims and coach them into submitting false asylum applications. In some cases of eastern European women trafficked into prostitution involving Albanian traffickers, where there is relationship in which the woman perceives the trafficker as her boyfriend, such women rarely consider their 'boyfriend' to be a trafficker. Similarly, West African men trafficked to Europe under the guise of playing football, who end up unpaid in factory work, still tend to believe that one day their dream to play football will be realised by their 'agent'/trafficker. What is key in such cases is the way that traffickers manipulate the isolation and vulnerability of trafficked persons and use and exploit current legal systems, especially the migration laws, to further marginalise and exploit trafficked persons. In these cases, such individuals may need some time to recognise they have been trafficked/exploited/abused.

The Italy chapter supports the argument for a reflection delay. The residency permit in Italy does not require the trafficked person to report the trafficker immediately to receive the permit (though in practice trafficked persons usually do so). In the cases where women did not immediately report their trafficker, NGOs working with trafficked women in Italy indicated that in most cases they eventually had the courage to co-operate with authorities. As in Belgium and the Netherlands, it appeared that the stability offered by the combination of safe housing, counselling, and the company of women who have shared similar experiences and who may be testifying against their traffickers gives trafficked persons who have not reported their trafficker the encouragement and support to do so. It takes some time for victims to start to feel angry about what has happened to them, and actually to address that anger by seeking justice for the abuse they have experienced.

b) Temporary residence permits and the willingness to testify

Residency after the reflection delay in Belgium and the Netherlands, and in the United States under the 'T visa' or 'continued presence' residency provision, is contingent on an individual's willingness to participate in criminal proceedings against the trafficker. Residency status for trafficked persons is limited to those who are willing to testify, and consequently run an increased chance of reprisals against themselves and their families e.g.

Belgium, Netherlands and United States.

In Italy, information concerning the fact of being trafficked must still be submitted to authorities, though it may not need to have the status of a formal complaint. Thus residency permits are available to trafficked persons who are considered 'in danger' (as a result of leaving their situation of exploitation) and who are willing to engage in a 'social integration programme'. These programmes are State-funded, co-ordinated by State-recognised NGOs who provide specialised programmes for trafficked persons, including training, education, counselling, etc. The separation of the residency procedure from participation in criminal proceedings has focused support on the trafficked person's needs, rather than the need to obtain evidence for a prosecution. Like the reflection delay, this has had the beneficial consequence that more victims towards the end of their initial residency period, are willing to testify, as well as providing better social support for trafficked persons. However, there is a gap between the law and its actual implementation. In practice, there is still pressure upon trafficked persons to report their traffickers to the police or act as witnesses in trafficking cases, to ensure their application for a residency permit is granted. The residency permit in Italy is available to any migrant in danger as a result of leaving a situation of severe exploitation. However, because funding for social assistance and reintegration programmes is all channelled to projects dealing with sexual exploitation, people trafficked into other sectors are often unable to access the residency permit due to a lack of appropriate services catering to their needs. The emphasis on sexual exploitation marginalizes other trafficked persons and there is a failure to inform them of their rights to a residency permit.

In the Netherlands particularly, there are many administrative problems relating to lack of information about the issuing and renewal of residency permits, stemming from poor co-operation between the police, prosecutors, immigration officials and NGOs supporting trafficked persons. These have been overcome in Belgium, through several measures to enhance co-operation, but particularly the establishment of a specialised section of the immigration service to deal exclusively with trafficking cases. In several other countries, such as Poland and Thailand, the law contains the possibility of granting residency status to individuals who agree to act as witnesses, but this is rarely available in practice.

c) Good practice

A trafficked person's residency status should not be dependent upon their participating in criminal proceedings. Decisions on residency status should be based on an assessment of whether the trafficked person has suffered serious harm or abuse in the country where they are located and also the risk of further harm if they return home. This is more in line with general humanitarian principles and international human rights, such as not to expel someone if there are substantial grounds for believing they may be in danger of torture.¹⁰ Keeping the issues separate also ensures that receiving residency status will not be used to discredit a victim's testimony at a trafficker's trial, especially in common law legal systems.

The term for temporary residency should be for several years, rather than tied to the duration of criminal proceedings. As a representative of STV stated in regard to the Netherlands' system, where protection is dependent on, and limited to, participation in criminal proceedings against traffickers; "I find the term 'protection' almost misleading, because what we call protection measures is only a stay of deportation in the interest of the Netherlands' Government, which needs the trafficked women as witnesses. Protection in favour of the women are measures which would make them more confident and less vulnerable to reprisals, for example, opportunities to receive an education here, from which they would profit after they return to their home countries."¹¹ A set period of time also reduces the stress that trafficked persons experience on account of the uncertainty of their situation and ensures service providers are able to provide assistance with a long-term perspective.

d) Permanent residence

Measures for permanent residency in the four countries were applied extremely narrowly, meaning most victim witnesses are protected only for the purposes of a suspected trafficker's trial and not in the long-term. For example, although in the Netherlands permanent residence could be granted on humanitarian grounds, in practice this was given only in exceptional circumstances. Thus, for many trafficked persons the reality after testifying was that they either had to return home and suffer the consequences, or to take other steps to remain, for example, by marrying a local citizen or simply remaining without proper authorisation as an illegal migrant and therefore without State protection or support. Anti-Slavery International was unable to contact many trafficked persons who returned home after testifying abroad

because they simply disappeared from view, probably out of fear for their own safety. In Thailand, in one case it was known that a trafficked woman, who reported traffickers abroad, also reported and brought about the successful prosecution of traffickers in Thailand. In Poland, a trafficked woman who reported her traffickers in Germany and was deported, subsequently also reported her traffickers in Poland. She suffered threats which forced her to move home three times in one year. The criminal case against the traffickers in Poland was closed after four months due to lack of evidence.

Among the countries that have specific residency permits for victims, Belgium offers the best possibility of permanent residence. Although the law states that permanent residence is dependent upon the significance of the information received from a trafficked person and the outcome of the criminal case, in practice the authorities also look at whether there are humanitarian grounds to justify the person remaining based on information supplied by the NGO assisting them. In cases where the person has been in Belgium for more than two years, they take account of her or his degree of integration into Belgian society.

Recommendation 9:

States should ensure their immigration service establishes a special section to deal with trafficking, issue residency permits to trafficked persons and co-ordinate with the police, prosecution and those supporting trafficked persons.¹²

Recommendation 10:

States should require law enforcement officials who come into contact with individuals who it is suspected may have been trafficked, to refer such persons to a specialised centre or NGO that can address or assess their mental and physical health needs, inform them of their rights to a reflection delay and explain clearly their legal rights and document details of their personal experience and the specific violations committed against them.¹³

Recommendation 11:

States should provide the right to a reflection delay of no less than three months in cases where there are indications that a person may have been trafficked.¹⁴

Recommendation 12:

States should ensure that trafficked persons who are in the country during a reflection delay are able to access basic services and support (see part 6. Right to recovery, below).

Recommendation 13:

States should provide residency status for a term of no less than three years¹⁵ available for any trafficked persons who have been a victim of serious abuse/harm, or if they are in danger of further harm (through stigmatisation, discrimination, risk of reprisals or likely to be re-trafficked) or who are assisting the investigation or prosecution of traffickers.

Recommendation 14:

States should allow trafficked persons who have been resident legally in the country for three years to be eligible for permanent residency.¹⁶

Recommendation 15:

Trafficked persons should be informed of their right to asylum, and be granted asylum in appropriate cases.

Recommendation 16:

Immigration services should systematically collect and record information regarding the number and type of residency permits issued to trafficked persons, especially concerning the number of persons who file complaints against traffickers.

4. Protection from reprisals

The research indicated that there are substantial reasons to fear reprisals by traffickers and their associates against trafficked persons and their families. Belgium, Italy, Netherlands, Poland, Thailand and United States all had experience of cases where trafficked persons who had testified against traffickers suffered increased incidences of reprisals, either against the trafficked persons themselves or against their relatives or others close to them in the countries of origin.

Although fully comprehensive police witness protection was available in some countries, such as Colombia, Italy, Ukraine, United Kingdom and United States, most aspects of that protection were found to be unsuitable

for trafficked persons as they are premised on the assumption that the individual concerned will be able to blend into a new environment (see United Kingdom and United States). The difficulty arises because trafficked persons are migrants, and may, for example, not speak the language and may wish to socialise with others from their home country. Victims must be kept fully-informed about what measures of victim witness protection are available and have a right to make informed choices about which victim witness protection measures suit their own circumstances.

Despite effective action to ensure the safety and confidentiality of trafficked persons in various countries of destination (in Belgium, Italy, United Kingdom and United States), reprisals were found to be more likely to occur in the country of origin, either against the trafficked person or others close to him or her, especially relatives. In Nigeria, Poland, Thailand and Ukraine, there was a clear lack of police protection for trafficked persons who had returned home and who were assisting police in investigations against traffickers. This lack of protection from reprisals meant trafficked persons were unlikely to report traffickers and to give evidence in court. The lack of protection was exacerbated in some countries, such as Colombia and Poland, by corruption of public officials.

The reprisals against family members in countries of origin generally consisted of intimidation by traffickers or alleged officials, threats, bribes, violence and damage to property. Local police seemed ill-equipped to deal with the protection issues involved, and corruption was a particular issue in Nigeria and Poland. In countries of origin, reprisals were not limited to witnesses and families of witnesses but extended also to those who had not paid back debts owed to the trafficker, notably in Nigeria.

The most effective way of protecting family members from reprisals was to relocate them either within their own country or to the country of destination (see Belgium and United States). However, not all families are likely to want to be relocated, and their wishes need to be considered. In countries of origin, protection and relocation in shelters was often provided by NGOs (Colombia, Thailand and Ukraine) on a temporary basis. NGOs should not be expected to provide the sort of protection from reprisals that only the police can arrange. NGOs are not law enforcement bodies that can deal with situations of violence and are evidently not mandated nor equipped to do so. There is a need for much stronger witness protection laws in countries of

origin, such as those currently being considered in Thailand, with sufficient resources to implement them.

Good practice

Protection of trafficked persons was most effective where the police were aware of the complex issues involved, recognised the risks to trafficked persons and were able to find secure and/or secret and culturally-appropriate housing in which the trafficked person felt comfortable and safe (see cases in Italy and United States). Culturally-appropriate housing should take into consideration basic cultural differences that affect how people live their daily lives, such as religion, food and language. Informal measures such as 24-hour telephone access to police officers, police escorts and panic alarms were particularly important in ensuring safety and peace of mind for trafficked persons (see lack of protection in Poland, Thailand and United States).

Recommendation 17:

Governments should ensure that appropriate guidelines or regulations are in place to ensure that relevant agencies automatically provide information about victim or witness protection to vulnerable victims and witnesses, and people close to them. A range of measures and different levels of protection should be made available to victims and witnesses, including both informal (panic alarm, access to police, police escorts) and formal measures (secure housing, confidentiality, change of identity, and, in exceptional cases, relocation of the trafficked person and their relatives).¹⁷

Recommendation 18:

States should fund and provide victim and witness protection, and not rely on non-governmental organisations to protect victim witnesses in trafficking cases.

Recommendation 19:

State should fund shelters for trafficked persons.¹⁸

Recommendation 20:

States should ensure that specialised units or task forces, rather than local police forces, deal with trafficking cases, including both trafficking investigations and providing protection from reprisals. Units to investigate reprisals could also be set up within anti-corruption police units.¹⁹

Recommendation 21:

Destination countries should provide for relocation of family members to the destination country where there is a threat of reprisals.²⁰ States must undertake or assist in relocation of family members in country of origin as well as to the country of destination.

5. In-court evidentiary measures to protect victim witnesses

Trafficked persons, like many victims of serious crime, often suffer severe psychological trauma in anticipation of and as a result of giving testimony at the trial, especially when that testimony is given in the presence of those who have abused them. Trafficked women, police and NGOs in Italy, Ukraine, United Kingdom and United States all stated that the experience of testifying at court was the most difficult part of the victim's ordeal, second only to the abuses suffered at the hands of traffickers. Testifying in the presence of the defendant did affect some victims' ability to give evidence and answer certain questions, for example, in the United Kingdom. The process of interrogation and cross-examination means the trafficked person often has to repeat their story several times in detail in court, to a hostile defence lawyer or judge, jury and public, often in the presence of the trafficker and the trafficker's family or friends. Defence lawyers try to discredit and unsettle victim witnesses in many ways. For example, they may use evidence of the victim's moral character (such as their past history as a sex worker) or suggest that the witness' residency permit and various rights and benefits are the real motivation for testifying against the trafficker (see United Kingdom and United States). Such tactics add to the trauma of the legal process for the victim. It is intensified further if the end result is an acquittal of the trafficker or a light sentence.

Protection of trafficked persons cannot infringe on the rights of defendants to a fair trial or the needs of trials to be open, at least in principle. Since there are different legal systems in the various countries covered by this report, it is difficult to recommend standard evidentiary rules to protect witnesses (see Introduction). Belgium offers the most complete evidentiary protection to victim witnesses, because they rarely have to testify at trial. This is because it is a written, not oral, procedure, and due to the positive application of judicial discretion in trafficking cases. Payoke reported that of 500 cases they have dealt with in the past five-year period, in only two cases has the victim had to testify in court in Belgium.

The use in Italy of pre-trial hearings, which are closed to the public, seemed successful in reducing trauma for victims, and enabling them to move on with their lives. There was no indication that this is 'unfair' to the defendant, since the trial itself is public. This also was clear in the preliminary deposition of evidence (practised in Poland and Thailand). The preliminary deposition of evidence (in the form of a written statement) means trafficked persons are free to return home or move elsewhere and, though they may be asked to give evidence orally at the trial, if this is not possible the written statement can also be used as evidence. This has been successful in a few cases in reducing reprisals by traffickers, where reprisals were evidently intended to dissuade the victim from giving testimony. However, in both Poland and Thailand, this measure is also being used against the interests of trafficked persons, because they can be deported immediately after giving evidence. It also does not necessarily address reprisals that may be more closely related to the non-repayment of an alleged debt, as in Nigerian cases.

Confidentiality, in terms of protecting the victim's identity from the public and the media, is maintained in countries in different ways. Closed courtrooms are used in Italy in trafficking cases, and in a few cases in Ukraine, but a victim's identity can be protected in other ways. For example, in most countries in-court protection measures are possible, such as use of screens (to shield a witness from public view) and testimony by video. Screens have been used in some trafficking cases in the United Kingdom. In the United Kingdom, confidentiality also prevents public disclosure of the names of victims of sexual offences. However, in Nigeria and Thailand no such measures are in place, and names and even photographs of trafficked persons have been published in local press, in some cases provided by authorities themselves.

Anonymity or non-disclosure of the witness's identity to any party other than the prosecution is rarely practised in trafficking cases, though it has occurred in three prosecutions in Poland. Although complete anonymity is now available in Belgium in trafficking cases, maintaining anonymity is felt to be not particularly useful unless the case involves a large number of victims, because generally the defence (and alleged trafficker) is able to identify the trafficked person from the evidence presented to them.

Research from the United Kingdom and United States indicated that it is a

mistake to believe witness protection has to be 'all or nothing'. The priority seems to be for simple, practical measures to protect victims. The Netherlands, Thailand and Ukraine highlighted the need for additional informal and formal witness protection measures, in cases where witnesses were intimidated outside the courtroom. Even in a closed trial, for example, in Ukraine, victim witnesses have encountered the relatives or associates of traffickers outside the courtroom.

Recommendation 22:

Law enforcement officials should inform trafficked persons of the consequences of giving testimony, such as the possibility of secondary trauma, reprisals, seeing their trafficker and his/her relatives or associates at court. This should be clearly explained by the authorities (or by an NGO) at the time they are asked to give a statement against the trafficker.

Recommendation 23:

The prosecution, police or others responsible for the administration of trials should be required to inform trafficked persons of what, if any, in-court measures for protecting victims and witnesses will be available to the witness at the earliest possible opportunity, in any event before trial.

Recommendation 24:

Whatever practices are now current in their legal system, States should review the need for and possibility of introducing measures to minimise additional trauma being caused to trafficked person who testify against alleged traffickers, such as preliminary deposition of evidence, preliminary hearings and testifying in the absence of the alleged trafficker.²¹

Recommendation 25:

States should provide and guarantee legal rights to confidentiality, in particular, this means instructing law enforcement agencies and the courts not to publish names or addresses of anyone who has been trafficked or information that may easily identify a victim and thus jeopardise his or her safety.²²

Recommendation 26:

The Government Ministry responsible for the administration of justice should instruct criminal courts to provide informal protection measures extending down to the most basic level to protect witnesses from intimidation. For

example, in courtrooms victim witnesses should be provided different entrances, corridors, waiting rooms, toilets, places to eat - or, where these measures are not possible, different times to enter/exit and escorts to and from the courtroom.²³

Recommendation 27: States should provide trafficked persons with free access to specialised social workers or counselling post-trial to address any further trauma caused by testifying.

6. Right to recovery (assistance measures)

In addition to being given a residency permit, trafficked persons need access to extensive support and assistance measures in countries of origin, transit and destination, as provided for under Article 6 of the Trafficking Protocol. Such measures include housing, medical care, legal assistance, education/training and employment opportunities, access to information about their rights and interpreters. Trafficked persons reported that housing and opportunities to be financially independent were their greatest needs. Access to appropriate shelters and housing (i.e. secure and culturally sensitive) was found to be a problem in every country. In countries such as the United States, trafficked persons often did not rely on the State but were dependent on the goodwill of people who helped them. Good shelters, funded by the State, which specialised in the needs of trafficked persons, existed in Belgium, Italy and the Netherlands. In Colombia and Nigeria the complete lack of shelters was a significant problem for returning trafficked persons, and made them vulnerable to be re-trafficked or otherwise abused.

Employment continues to be a crucial factor for successful recovery. However, this need is only addressed in Belgium, Italy and the United States. Education, employment and training are crucial for ensuring financial independence, emotional stability and empowerment of the individual. Italy's 'social integration' programmes were most successful in terms of providing trafficked persons with genuine access to education, training and employment. In Belgium and the United States, the practical obstacles in finding work for trafficked persons, with limited language and specialised skills, impeded successful insertion into the labour market. In Belgium, the bureaucracy associated with employing persons who have been trafficked and have temporary residence documents meant that many employers are unwilling to employ them. Remaining countries of destination (Netherlands,

Poland, Thailand and United Kingdom) generally did not enable trafficked persons to work or enter any formal education/training programme in the period of temporary residency, up to and including the trial of the trafficker.

The needs of trafficked persons vary according to individual circumstances, so appropriate support and protection needs to be designed on a case by case basis. Support and assistance measures such as those stipulated by the Trafficking Protocol were carried out in some of the countries by NGOs, and each country illustrated its own positive aspects of support and assistance along with various obstacles and gaps. Access to interpreters for social assistance was difficult in all the countries.

The shortage of State funding for basic support and assistance measures caused difficulties everywhere. In destination countries, provision of State-funded services for trafficked persons was generally dependent on their having already been formally identified as 'trafficked'. Those perceived to be 'only' undocumented migrants, had extremely limited access to assistance. Bureaucratic delays in such procedures (experienced in the Netherlands, Italy and United States) had a negative impact by delaying the provision of all services. It also increased pressure on NGOs to fill the gap by funding basic services, such as shelter and financial assistance during this period. Access to non-emergency medical care during the 'gap' was also a problem in most countries, since many trafficked persons needed prompt medical treatment. Access to public funds for provision of accommodation and basic assistance to trafficked persons was particularly problematic in the United Kingdom. NGOs assisting trafficked persons recognised legal advice to be especially important to trafficked persons. Counselling was important, but often regarded as secondary, due to more pressing immediate practical concerns. Counselling was also difficult due to cultural differences and language.

Recommendation 28:

States should provide immediate access to basic support and assistance measures for trafficked persons. Immigration services should process immigration permits within 24 hours to enable this to occur.²⁴

Recommendation 29:

States should provide and fund shelters and support services for trafficked persons. There should be a range of shelters and secure housing available to trafficked persons.²⁵

Recommendation 30:

States should provide trafficked persons with access to training and employment opportunities. Work permits should be issued swiftly without complicated procedures.²⁶

7. Role of Lawyers

Trafficked persons who have their own legal advocate are clearly better off in terms of obtaining access to proper immigration status, compensation and criminal proceedings against traffickers. Lawyers play a crucial role in supporting, informing and advising trafficked persons and in facilitating their co-operation with law enforcement in the criminal prosecution of traffickers, so that the process is less traumatic for the trafficked persons. However, trafficked persons did not always have access to free legal services. In Colombia, the State does not provide free lawyers. In Ukraine, NGOs pay for legal services to assist trafficked persons. In the other countries it is generally possible for trafficked persons to find free legal assistance through NGOs. In Belgium, Italy and the Netherlands there is a right to free lawyers paid by the State for those who formally take part in the criminal case as an injured party. For trafficked persons, the sense of having someone who is on their side was found to be very important (this is shown especially in cases in Italy, Thailand and the United States). A good rapport, sensitivity and level of trust between the lawyer and the trafficked person is essential for the role of the lawyers to be most useful in protecting trafficked persons' human rights. A reflection delay is necessary for trafficked persons to have access to a lawyer.

In all countries, lawyers can improve criminal cases by ensuring victim witnesses are well-prepared for the experience at trial, such as the hostile or intimidating questions they may be asked in the courtroom by both prosecution and defence (Italy, Ukraine, United States). In the Ukraine and United States, findings show that the presence of lawyers during interviews with police and immigration was helpful. This is not in terms of preventing victims from speaking about their experiences, but actually in ensuring all relevant information is provided accurately. This is particularly important in trafficking cases, where the complexities of events in several countries over an extended period of time, combined with the trauma trafficked persons experience, means they may leave out vital information. The trauma trafficked persons go through related to these offences often means that

trafficked persons are unable to recall the exact timing or sequence of events or details, because this is a normal psychological response to stress and violence. This role of support may also be provided by a caseworker who has worked closely with the trafficked person (Poland). In Italy, Thailand and the United States it was felt lawyers are particularly adept in this function because they have a good understanding of the criminal procedure and thus can understand more clearly the needs of police and prosecution to ensure a successful prosecution of the trafficker, whilst ensuring that the trafficked person's rights are protected.

Lawyers played a crucial role in ensuring that trafficked persons were kept well-informed about the court proceedings against traffickers and proceedings regarding their residency status. This is particularly important in the Netherlands where there was poor information flow between prosecutors, immigration officials and NGOs. In civil law jurisdictions, lawyers representing victims may play a more direct role in the criminal proceedings against traffickers by adding the victim to the case as an injured party (Belgium, Italy, Netherlands, Thailand and Poland). This has proved to be particularly effective, as it means the trafficked person then has access to the file and can inform the prosecution directly about certain aspects of the case. In Thailand, the fact that a victim's lawyer acted as joint prosecutor with full rights of examination in the courtroom had positive results for the criminal case against the trafficker. In Italy, NGOs stated that the obstacles regarding criminal prosecutions where traffickers were acquitted or received light sentences were often caused by trafficked persons not being represented by lawyers. Lawyers also play an important role in improving the victim's access to legal redress and compensation.

Recommendation 31:

States should provide trafficked persons with access to free independent legal advice to allow them to exercise their legal rights.²⁷

Recommendation 32:

Lawyers, on behalf of trafficked persons, should be present in interviews with law enforcement officials and prosecutors.²⁸

Recommendation 33:

Lawyers, on behalf of trafficked persons, should engage with the prosecution

in ensuring the trafficked person is recognised as a victim of crime in the criminal proceedings and, with the trafficked person's knowledge and consent, pass relevant information to the prosecutor to support the criminal case.²⁹

8. Legal redress and compensation

Many trafficked persons are interested in the possibility of claiming back from their trafficker money they have earned. Traffickers continue to generate huge profits by exploiting trafficked persons, yet few trafficked persons are ever actually compensated for the losses suffered, the money they earned and the damages (physical and mental) they have suffered. Trafficked persons are rarely able to collect compensation because assets are rarely recovered from traffickers. Many trafficked persons are unaware of their rights to legal redress and compensation, because they have no access to lawyers, or are not informed by their lawyers or law enforcement officials of the possibilities to exercise these rights. In most countries trafficked persons cannot stay in the country simply in order to pursue a civil action against traffickers, again limiting their actual ability to claim damages.

Ways to obtain legal redress again varied between different legal systems. Receiving compensation alleviated somewhat the trauma suffered through participating in the criminal process. Even in cases where money was not actually paid to the trafficked person, an order that compensation should be paid was seen as an acknowledgement that they had been wronged, especially for trafficked persons interviewed in Italy and the United States.

In civil law countries, the ability to join a civil action for compensation to the criminal case is extremely important, not only because it gives trafficked persons additional rights in the criminal process, but also because it is far simpler than pursuing claims in civil courts. In joining the action to the criminal case, compensation is ordered if the trafficked person is deemed to be a victim of the crime, and the trafficker is found guilty. The judge will take into consideration the damage and economic losses suffered by the trafficked person. The prosecutor or victim's lawyers must request compensation, thus reinforcing the need for sensitisation and good relations between the trafficked person's lawyer and the prosecutor. In Belgium many trafficked persons join the criminal case as an injured party (see above regarding increased role of lawyers) and compensation orders are often made and,

sometimes paid. This is increasingly also the case in Italy. However, in the Netherlands this opportunity was hardly ever used.

In common law countries, namely Nigeria, United Kingdom and United States, while it is not possible to formally link a civil claim to the criminal action, judges do have a discretion to award compensation to victims as part of sentencing. The United States ensures restitution (i.e. damages to compensate victims' losses) is mandatory to trafficked persons as part of the criminal sentencing of traffickers.

It is also possible to bring separate civil actions against traffickers or to refer them to industrial tribunals for non-payment of wages or abusive working conditions. In Thailand, in two cases, payments were obtained from traffickers to victims in this way. This is an area where, potentially, trade unions can be supportive in assisting trafficked persons. Civil actions are more lengthy, often requiring the criminal case to be completed first, and affected by the slow pace of civil litigation everywhere. The research did not find any cases of successful separate civil actions, although such action was pending in Poland and the United States. In countries of origin, where many trafficked persons did not have access to lawyers, such as Colombia and Ukraine, they were not informed about the possibility of obtaining compensation.

An impediment faced everywhere was the actual enforcement of payment of compensation, due to traffickers claiming insolvency. This also inhibited law enforcement officials and some lawyers from informing trafficked persons about their rights, since they perceived little chance in reality of the trafficked persons ever receiving money. Consequently, more effective seizure laws and tracing mechanisms are needed, so assets can be seized immediately upon the traffickers' arrest. The United Kingdom and United States had the best record of successful confiscation and seizure of traffickers' assets; for example, in one case in the United States \$3 million worth of property was seized.³⁰ However, money confiscated presently goes to the Federal Treasury, rather than to pay civil claims of trafficked persons. In Belgium, compensation can and is granted from confiscated assets of traffickers. In the United States it was unclear if forfeited property could be used to pay compensation claims.

Trafficked persons in the Netherlands and United Kingdom have access to State funds set up for victims of crime. However, in the United Kingdom no trafficked person has ever lodged a claim with this fund, and likewise in the

Netherlands few claims are lodged due to a lack of awareness of the possibility. Amounts awarded by such funds are generally low, and do not reflect the full loss/damages experienced by the victim, since the payment is by the State rather than the trafficker.

Recommendation 34:

Law enforcement officials should inform trafficked persons of their right to a lawyer, the possibilities of obtaining compensation, and that lawyers can assist and inform them regarding the related procedures.

Recommendation 35:

Law enforcement officials should proactively pursue trafficked persons claims for compensation, especially through providing more in-depth information regarding compensation procedures and assist trafficked persons who wish to claim compensation from traffickers.

Recommendation 36:

States should enact or enforce laws regarding immediate seizure and confiscation of assets from traffickers,³¹ and ensure that the first priority for such assets, once seized, is to pay any compensation claims of trafficked persons.³² Seizure laws and practice should be amended so as to be more effective, through international co-operation between police to share models of best practice of seizure.

Recommendation 37:

States should ensure in all criminal cases that the status of the trafficked person as a victim of crime is acknowledged (as an injured party in civil law countries) to facilitate orders of compensation.³³

Recommendation 38:

Immigration services should permit trafficked persons to remain in the country whilst pursuing civil claims against traffickers.³⁴

Recommendation 39:

States should ensure trafficked persons have access to State compensation funds, such as victims of crime funds.³⁵ The process of claiming money from such funds must be made clearer and more efficient for trafficked persons, especially if they are considering returning home.

9. Return and repatriation

Although not a key area of this study, the phase of repatriation has important implications as it exposes trafficked persons to the risk of further reprisals at home. The authorities in destination countries need to bear in mind when repatriating trafficked persons to their countries of origin that, in many cases, they are sending those concerned straight back into the hands of traffickers, or again placing them at risk. Anti-Slavery International is aware of some cases of women who have been re-trafficked after being returned or deported home. In most cases trafficked persons who were returned home were not afforded any protection by the authorities of their country of origin (see Colombia, Nigeria, Poland, Thailand and Ukraine) and they were exposed to reprisals (see Nigeria, Poland and Thailand).

This forced many trafficked persons straight back into the hands of traffickers, especially when they had a debt to repay, no protection from intimidation from traffickers and no likelihood or means of sustaining themselves in their country. Trafficked persons were often too afraid to contact police and report incidences of reprisals because they believed the police could do little to assist their situation, or might make it worse. This fear was well-founded, since cases were reported in Thailand of increased reprisals against women who had reported traffickers. In addition, especially in cases regarding trafficking for prostitution, women did not inform their families of what had happened to them when they were abroad, fearing stigmatisation; and consequently they were even less likely to go to the police. In the United Kingdom, law enforcement officials informed some trafficked persons who were returned to their country of origin about support and assistance available from NGOs there; however, in other cases, women who returned home were given no such information and had little possibility of contacting an agency which might assist them.

For deported trafficked persons, the situation was even worse. In Nigeria, trafficked persons who are deported home (often from Italy) were revictimised as a result of the procedures followed. They are detained on arrival, subjected to forced HIV/AIDS tests and their personal details are recorded to prevent them from legally travelling abroad again. This further abuse is so serious that it means trafficked persons must not be deported back to Nigeria. Programmes regarding reintegration, such as that offered by the IOM, were effective in alleviating some of these difficulties, and also in

creating micro-credit opportunities and sustainable employment opportunities. However, this only assisted a tiny number of trafficked persons returning to Nigeria.

Recommendation 40:

The authorities, i.e. immigration and police services should not remove trafficked persons to a country of origin where there is reasonable suspicion they may suffer further harm, through stigmatisation, discrimination or risk of reprisals.

Recommendation 41:

Immigration services should support and make use of existing voluntary repatriation programmes involving local organisations in countries of origin. For example, the IOM co-ordinates such programmes, characterised by a holistic approach to return and recovery.³⁶

Recommendation 42:

Immigration and police services in countries of destination should not reveal to authorities in countries of origin that a person has been trafficked, without their explicit consent. This is especially important where there are concerns regarding corruption of local officials or, for those trafficked into prostitution, because of stigmatisation associated with prostitution.

Recommendation 43:

Immigration and police services should make available to trafficked persons contact information and telephone numbers of NGOs, lawyers and social welfare agencies that can assist them in their country of origin. This should not only be in the country's capital, but also any relevant regional centres. They must ensure that this information is authentic and up to date (i.e. latest telephone numbers) by reviewing it periodically, by contacting organisations themselves and also through local NGO networks in the country of destination. NGOs should assist the authorities in collecting such information, and ensure that it is given to the authorities, and not simply made available through websites.

Recommendation 44:

For trafficked persons who wish to go home, immigration services should ask if they wish to be met by a local NGO and, in accordance with their wishes, contact local NGOs in countries of origin to assist those who return home.

Recommendation 45:

In returning trafficked persons who want to go home, immigration and police services should provide them with contact information for a law enforcement office in the country of origin that they can contact if a trafficker threatens them.

¹ Anti-Slavery International thanks Stana Buchowska, Melissa Ditmore, Jo Doezema, Mike Dottridge, Bruno Moens and Cathy Zimmerman for reviewing and critiquing the draft findings and recommendations.

Endnotes

¹ E.g. Belgium. In each of the footnotes following the bolded recommendations, there are countries listed as examples that illustrate where the recommended practice is already carried out and more information can be found in the relevant country chapters.

² Anti-Slavery International's preliminary study for this report, Pearson, E. *Whose interests served? A review of the obstacles to prosecution and measures to protect victims, especially those who act as witnesses, in the context of trafficking in persons*, Anti-Slavery International, 2001, gives a broader indication of the types of obstacles encountered in prosecuting traffickers and is available upon request, from Anti-Slavery International.

³ In Belgium, although laws against exploitation of prostitution are used, in addition laws against abusing vulnerability of migrants are used to prosecute those who traffic into other sectors.

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⁴ §1589 United States Code.

⁵ §1590 of the United States Code i.e. "whoever knowingly recruits, harbours, transports, provides, or obtains, by any means, any person for labour or services" for peonage (holding another against their will to pay off a debt), slavery, involuntary servitude (holding another in service through force or threats of force) or forced labour.

⁶ E.g. Italy.

⁷ E.g. United States and Belgium.

⁸ In-depth analyses of each of these models can be found in the country chapters.

⁹ Commission of the European Communities, *Proposal for a Council Directive on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities*, Brussels, COM(2002) 71 final.

¹⁰ Article 3 United Nations Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment (1984).

¹¹ Anti-Slavery International interview, STV, Utrecht, 5 October 2001.

¹² E.g. Belgium.

¹³ E.g. Belgium and the Netherlands.

¹⁴ E.g. Netherlands.

¹⁵ E.g. United States T visa.

¹⁶ E.g. Belgium and Italy.

¹⁷ E.g. United Kingdom and United States.

¹⁸ E.g. Belgium.

¹⁹ As proposed in Italy.

²⁰ E.g. United States.

²¹ E.g. Italy, Poland and Thailand.

²² E.g. United Kingdom.

²³ E.g. United Kingdom.

²⁴ E.g. Belgium.

²⁵ E.g. Italy.

²⁶ E.g. Italy.

²⁷ Belgium and Italy.

²⁸ Ukraine and United States.

²⁹ Italy, Thailand and United States.

³⁰ As stated in Reuters Business Briefing, EFE News Service, *Three men found guilty of enslaving workers in Florida*, 29 June 2002, <http://www.efenews.com>.

³¹ E.g. United Kingdom and United States.

³² E.g. in some cases in Belgium.

³³ E.g. Belgium and Italy.

³⁴ E.g. Nigeria's proposed law.

³⁵ E.g. Netherlands and United Kingdom.

³⁶ E.g. Nigeria.

5. The Netherlands¹

I Legislation

1. Criminal Laws

a) Article 250a

The Netherlands has a specific criminal provision against trafficking in persons only when it relates to prostitution. Article 250a of the Penal Code was introduced on 1 October 2000 and replaced the older 'trafficking' articles 250ter and 250bis (ban on brothels) of the Penal Code. Article 250(1)(a) considers trafficking as "using force, threats of violence, abuse of authority or deception to induce another person to engage in prostitution". Under section 1(2) article 250a, the movement of persons to another country for the purpose of prostitution does not require force, deception or coercion; "The simple abduction and/or recruitment of people to a different country, in the knowledge that they will enter into prostitution there, is sufficient to make it a case of trafficking in humans, even if this takes place with the free will of the party who is taken or recruited".² However, in practice, prosecutions tend to focus on cases where force, coercion or deception are involved. This is in accordance with the intention expressed by legislators and the earlier 1994 trafficking article (250ter) which prosecuted cases of forced prostitution, and with the Prosecutor's Guidelines which aimed at prosecuting cases where force, coercion or deception were involved.

Since the Dutch law is restricted to trafficking for the sex industry, for the purposes of this chapter, references to 'trafficking' and 'trafficked persons' will refer to those trafficked into the sex industry under article 250a. Anti-Slavery International looked for cases of trafficking for other purposes, but local NGOs were unaware of prosecutions of exploitative employers that might fall within the international definition of 'traffickers'. The Netherlands is scheduled to change its trafficking article to include other purposes following ratification of the UN Trafficking Protocol. A draft law regarding other forms of socio-economic exploitation is currently being drafted.

b) Other related articles

According to STV, other relevant articles of the Penal Code used to prosecute traffickers are article 242 (sexual violence/rape), article 231 (forged travel

documents) article 140 (participation in a criminal organisation), article 282 and 283 (deprivation of freedom), article 284 (coercion), article 285a (threats/intimidation), article 300 (abuse), article 317 (extortion), article 326 (fraud). Article 274 regarding slave trading is used very rarely.³

2. Other laws and policies affecting trafficked persons

a) Residency status - B9 regulation

The Netherlands was the first country to adopt a specific policy providing temporary residency rights to persons trafficked into the sex industry. This is laid down in the circular for immigrants, regulation B9 (2000) (formerly B17 (1988)). The aim of the B9 regulation is both to facilitate the investigation and prosecution of trafficking cases and to offer support and protection to trafficked persons.⁴ The B9 consists basically of three parts. If there is a slight indication that the person involved might have been trafficked, they should be offered a period of three months to make an informed decision on whether they want to press charges.⁵ This is generally now referred to in Europe as a 'reflection delay'. If they file a report, they are entitled to a temporary permit to remain in the Netherlands during the period of criminal investigation and the criminal trial.⁶ Finally, if the case is dismissed or the criminal trial is completed, the person is entitled to apply for a permanent residence permit on humanitarian grounds.⁷

i) Reflection delay

This first phase of the B9 regulation enables those who may have been trafficked to recover from their ordeal and decide whether they wish to report their trafficker to the police. Police should inform any undocumented migrant working in the sex industry of this right.⁸ The law states that the reflection delay is granted because victims of sexual violence (non-consensual acts of a sexual nature) can often only describe their experiences after a period of recovery. This period is available only once to each individual and cannot be extended. During this period the person will be provided appropriate housing, medical assistance and legal assistance and counselling.⁹

The decision to grant the reflection delay is dependent upon a police officer or lawyer interviewing the individual concerned. However, the ultimate decision is made by the senior police officer. The police officer notifies the Immigration and Naturalisation Service (IND) and STV that the person has a suspension of deportation order for three months.¹⁰ The individual must

report to the IND office, and STV is responsible for co-ordinating 'reception and accommodation' for the person, as well as arranging a case manager for the case. This person ensures medical assistance and legal aid are available, and that the financial assistance, to which the victim is entitled, is paid. During the reflection delay a victim receives a monthly allowance through the Reception of Asylum Seekers Agency (COA), which provides for their cost of living, enables them to be housed in a shelter and pays insurance for medical costs.

ii) Temporary residence permit

If the victim presses charges against the trafficker by reporting them to the police before the expiry of the reflection delay, she or he is entitled to a temporary permit to stay during the criminal investigation and trial. This does not oblige the witness to stay in the Netherlands upon pressing charges.¹¹ There is a difference between law and practice. According to the text of B9, the moment the trafficked person presses charges, their report must also be considered as an application for a temporary residence permit. In principle, the IND must make a decision within 24 hours whether to grant the permit (as is the practice in neighbouring Belgium). This means that the issue of the temporary permit is not dependent on the prosecutor's decision to start a criminal investigation, although the permit can be withdrawn if the prosecutor decides not to instigate criminal proceedings.¹²

In practice, IND or police often consider the issue of the temporary permit to stay dependent on the decision of the prosecutor to initiate proceedings against the trafficker. As the Clara Wichmann Institute¹³ states, this is problematic for various reasons, because it contradicts the very essence and intention of the B9, which is to reduce obstacles to reporting traffickers and to make the victim feel safer to testify. It is essential that the individual can trust that if s/he presses charges against the trafficker, s/he will not be confronted with immediate deportation. The permit also needs to be issued as soon as possible, because it affects access to services such as housing and medical care.¹⁴

If trafficked persons are not willing to testify or when the case is completed, they are generally requested to leave the Netherlands unless they have applied for permanent residency on humanitarian grounds (see below). The request to leave is issued by the IND, dependent on information from the Prosecutor's Office. If the request is ignored and the trafficked person is

found in the Netherlands after the permit expires, s/he are deported as an undocumented migrant.

There are two other significant problems with the B9 regulation. The reflection period only covers those trafficked into prostitution in the Netherlands, and not those who may have first been trafficked to another country, then escaped their exploiter and fled to the Netherlands. According to TAMPEP,¹⁵ given the current system whereby trafficked women are moved frequently between different EU States, this seems to unnecessarily limit the B9 procedure.¹⁶ Secondly, those who have not actually been forced into prostitution yet, but are in the process of recruitment, can report their trafficker and obtain temporary residence under the B9 regulation, but are not entitled to the reflection delay.¹⁷

iii) Permanent Residency

When the B9 temporary residence permit expires, a trafficked person may apply for a permanent residence permit on humanitarian grounds. This is dependent upon the risk of reprisals, risk of prosecution in the country of origin for example for prostitution, and lack of possibility of reintegration into society in the country of origin.¹⁸ IND is responsible for deciding whether to issue a permanent residence permit. They are granted to trafficked persons very rarely, where circumstances have been exceptional.

II General analysis and comparison of cases

1. Investigation and prosecution of traffickers

According to the National Rapporteur Office,¹⁹ at least 756 police reports were filed in regard to trafficking at Prosecutors' Offices between 1995 and June 2000. Seventy one per cent of cases were summoned to court i.e. went to trial, and of these, 88 per cent resulted in convictions. In 85 per cent of cases the court imposed a prison sentence. The length of a criminal case varies between a few months and several years. According to the prosecutor interviewed, cases regarding article 250a are prioritised amongst other criminal cases and cases usually last approximately one year.²⁰ A police officer interviewed said that criminal investigations are usually suspended after two years if they are unsuccessful in apprehending the trafficker.²¹ However, STV reported several cases that were pending for more than two years.

According to the B9 regulation trafficking is a crime that can be prosecuted regardless of whether there is a complaint. Apart from victim or witness testimony, other evidence includes telephone taps, surveillance, eye-witness reports, investigation of money laundering activities and the financial status of the suspect. Dutch police rarely engage trafficked persons in their investigation process since it is felt to be too dangerous for the victim and may be regarded as entrapment by the defence.²² Whilst the law states that a victim's complaint is not necessary to prosecute trafficking, police, prosecutors and STV interviewed all agreed that cases lacking witness testimony tend not to be successful.

Katya and Anna

Two women, Katya and Anna from Eastern Europe were trafficked to the Netherlands and forced to work in prostitution. After several months, they were found in a police raid. Although the police offered them the reflection delay, they did not use it and reported the traffickers immediately. They were both very co-operative with the police and were ready to report the traffickers because they were angry that they had been deceived and forced into prostitution. They were provided with shelter and counselling co-ordinated through STV. They testified against their traffickers at the Prosecutor's Office and again during the trial in the presence of the defendant. Other victims of the same traffickers also testified. Most of their traffickers were convicted; one was charged under article 250ter and article 242 (rape) and sentenced to five years. The investigation was completed within two months, and the trial of the first traffickers took one year. The statements of Katya and Anna were crucial to the success of this case.

This illustrates how close co-operation between different police departments in the Netherlands resulted in a swift and successful prosecution of the traffickers. Interviews with various sources confirmed that co-operation between prosecutors, various police departments, immigration and NGOs is needed for efficient and successful investigation and prosecution. Co-operation between countries of origin, transit and destination is also necessary. One NGO criticised Dutch police as "often (publicly) criticized for their sluggish inquiries [...] and for their reluctance in collaborating internationally in the prosecution of traffickers."²³ Police and prosecutors themselves admit that co-operation with other countries, especially non-

European countries, is poor.²⁴ Co-operation between EU States is improving.

One major obstacle to successful investigation is the fact that many trafficked persons are unwilling to make a statement to the police and do not want to press charges. The B9 procedure attempts to alleviate this difficulty. For prosecutors and police a lack of 'credibility' in the trafficked women's statements is a further difficulty for the investigation of a case: "Sometimes the women don't tell us the complete story. So during the trial the judge may have doubts because they tell only half of their story".²⁵

2. Procedures affecting trafficked persons and measures of protection

Natasha and Angelina

Natasha and Angelina from Ukraine were both trafficked into forced prostitution in the same club in the Netherlands. The police found them during a house search as part of a large-scale investigation. The police failed to inform them of their right to the reflection delay under the B9 regulation. Both women did not want to report the traffickers, fearing reprisals. They were particularly worried about the safety of their children in Ukraine. Natasha's first priority was to get home as fast as possible to be with her child. Five days after the police raid, both Natasha and Angelina individually gave information to the police that formed the basis of their criminal complaints against the trafficker. The police contacted STV as part of arranging the B9 procedure for the women. Natasha and Angelina were shocked to learn that telling parts of their stories to the police was considered making a sworn statement against her trafficker. Although they had been speaking to the police, it was not fully clear to the women what that meant. They were not given information about their rights and the reporting procedures. They both signed a paper (their statement) that they did not understand. Natasha did not want to stay in the Netherlands, however the police were not willing to let her return, as they wanted her testimony in court. Due to the intervention of STV and eventual police co-operation, Natasha was able to return to Ukraine the same week. She may have to return to the Netherlands to give evidence at the trial.

Masha

Masha, who comes from an ex- Soviet Union country, thought she was going to waitress in the Netherlands, but instead was forced to work in a sex club in debt bondage. After four months, Masha was found in a police raid. She was given the option of reporting her trafficker and obtaining temporary residence for the duration of criminal proceedings or returning home immediately. Masha was not informed of her right to a reflection delay. Masha was scared to return home because her family did not know what had happened to her and she was supposed to be saving money for them. If they knew she had been forced to work as a prostitute they would not accept her back into the family. Likewise, she still owed a large 'debt' to the trafficker and he knew where she lived in her own country, so she was scared he would find her and traffic her again. She spent a night at the police station severely traumatised and told her story to the police in this state. The next day some more people interviewed her from the Prosecutor's Office, however Masha did not understand at the time what this signified.

The police then contacted STV. STV was not told that she had been heard by the prosecutor. STV gave her social support and assistance and found her a lawyer to work on her claim for compensation. The lawyer was not able to get much information from the case, but was told it was pending. STV also attempted to obtain information about the status of the case but was unable to discover anything.

a) Residency rights**i) Temporary Residence**

The B9 residency permit is intended to provide some form of protection, but in reality is fraught with difficulties. STV estimate that the number of women who press charges at once without using the reflection delay is around 70 per cent. This raises the question as to whether the reflection delay is actually granted to trafficked persons in the Netherlands (as illustrated in Natasha, Angelina and Masha's cases). STV consider that many police are afraid that granting the three-month period will interfere with their investigation, so police rarely inform trafficked persons about the right to the three-month stay.²⁶

STV state that in most cases they deal with, the trafficked person is only given

the three-month reflection delay when their first point of contact is a lawyer or a service provider. STV estimate 50 per cent of cases of trafficking they deal with are reported by the police, 30 per cent through welfare organizations and service providers and 20 per cent through private persons, customers, other sex workers and brothel owners. This means that possibly only half of those trafficked are actually informed about the reflection delay. Conversely, a police officer interviewed stated they did offer the reflection delay in all cases.²⁷ Anti-Slavery International was unable to obtain any statistics regarding the number of trafficked persons using the reflection delay, receiving temporary residence permits under the B9 or the number of persons returning home, as it appears there is no central agency collecting such information. There is clear evidence of several cases in which trafficked persons either had not been offered the reflection delay, or had not understood the implications of the choice between the reflection delay and making a statement, such as Angelina.

There is also concern that the residency permit is being used to coerce trafficked persons to stay and give evidence in the Netherlands when actually they desire to return home. This is explicitly not permitted under section 4.3 of the B9 Regulation regarding the request for departure after report. As indicated in Natasha's case, the procedure is not always followed by police who are more eager to encourage the woman to testify at trial and secure a prosecution. This indicates the tension between law enforcement's objectives of securing prosecution of traffickers and the trafficked person's right to decide in her own best interests.

Masha

Four years later, Masha was still in the Netherlands on the legal entitlement of having applied for the B9 though she never actually received the permit. She changed immigration lawyers and discovered that the criminal case against her trafficker had been dismissed six months after it was filed, but she was never informed. Masha is now claiming permanent residency on grounds that she has been in the Netherlands for three years or more as a result of the failure of the Government, and thus has the right to permanent residence. The Government has argued against this for various reasons²⁸ and the case is still pending, now seven years after she filed her initial criminal complaint at the Immigration Court.

Katya and Anna

One trafficker that escaped prosecution allegedly started to threaten Katya's grandmother and Anna's daughter. Dutch police were unable to get local police in the country of origin to co-operate sufficiently to either address the threats or protect the grandmother and daughter's safety. Due to fear, Katya's grandmother and Anna's daughter fled to another country for six months. Both Katya and Anna were eventually granted a permanent residence permit for the Netherlands on humanitarian grounds, three years after their rescue.

ii) Permanent residence: 'humanitarian and compassionate factors'

The fact that the victim, in this case, Masha, is not informed about the dismissal of the case also deprives her of the right to file a complaint against the decision to dismiss the case (article 12 Code of Criminal Procedure). No statistics are available on the number of permanent residence permits that have been issued. According to the National Rapporteur on Trafficking, approximately five per cent of applications for a permanent residence permit are successfully granted.²⁹ STV believe that approximately 15 to 20 out of 250 to 300 cases have been successful in gaining permanent residence since the B17 regulation was introduced in 1988.³⁰ The B9 Regulation lists humanitarian factors to be considered including risk of reprisals and lack of formal protection, risk of prosecution and possibility of reintegration in country of origin.³¹ However, these humanitarian factors are construed extremely narrowly, and the few cases that have succeeded were largely due to years of intensive lobbying by STV. STV believe that the mediation of an organisation like theirs is crucial to the success of an application. In Katya and Anna's case the application for permanent residence was further supported by the police who gave evidence regarding failed co-operation with police in the country of origin to protect the women and their relatives. Despite the full support of the Dutch police, it still took three years for the permanent residency permit to be granted to the two women. With a narrow opportunity for permanent residency under humanitarian grounds in the Netherlands, those who testify but who are unable to meet the test for humanitarian factors are usually forced to return home. Victim witnesses who are still too scared to return home may be forced to consider other illegal means to stay in the country, which again potentially places them in a situation where they are vulnerable to violence and abuse.

b) Protection from reprisals and police protection

The standard witness protection programme is available to trafficking cases dependent upon an assessment of 'urgent need' for protection made by the Prosecutor General's Office.³² This is regulated through the Code for Criminal Procedure and in instructions by the Prosecutor's Office.³³ This is rarely applied, and protection is largely through the residency procedure itself. In several cases in the Netherlands it has been possible for trafficked persons to bring their children to the Netherlands in order to protect them during the trial, and in some cases afterwards. In terms of post-trial protection from reprisals, the police officer and prosecutor interviewed admitted that it is difficult to follow up cases and evaluate the effectiveness of protection measures after the trial. In this respect, there is no institutionalised communication between police, prosecution and STV. If a former witness moves within the Netherlands there is little possibility of making a link between any reported case of retaliation by the trafficker. Police and prosecution also state that there is little co-operation with police in countries of origin due to a lack of trust of authorities, and the unwillingness of women for local police to be informed. There is no police witness protection programme as such. Police in Amsterdam state that due to a lack of resources it is not possible to provide physical police protection to trafficked persons. In some cases, where witnesses are important or there is an obvious risk, police will provide escorts to take trafficked persons to the trial.³⁴

c) In-court evidentiary protection

According to the Dutch legal system, a victim provides a written statement to the police. The witness may then testify at the pre-trial stage in front of an investigating magistrate. Once these two procedures are completed "it is unlikely that he [sic] will have to heard again in court... The victim's pre-trial statement is, as a rule, joined in writing to the file [against the defendant] and used as evidence in court".³⁵ If the witness is summoned to court, then they must appear in court and testify and this is usually in an open court.³⁶ According to STV, the trafficked woman is almost always asked to testify as a witness in court, "The prosecutor tries to use the written testimony, but if the defence wishes to, they can ask that she testify again, and of course he [the defendant] always wants to."³⁷ The witness's testimony in court generally also strengthens the prosecution's case thus securing a longer sentence. One prosecutor stated, "It's usually the best way to get a conviction if the trafficked woman is in court because she then can tell her story directly to the

judge. It is difficult for the victim, and we try to find another way if it's impossible for her, but it is easier if the statement is given in court."³⁸

Witnesses who leave the Netherlands can be asked to return to give testimony at trial, at the expense of the Dutch Government. Otherwise, where victim witnesses have returned home, an 'ad hoc' court may be installed where the judge and prosecutor go to the witness' country of origin to question the witness. STV know of at least one case where an ad hoc court hearing in the country of origin took place. These procedures do not happen often, since former trafficked persons tend to be untraceable once they return home. Testimony in the country of origin is not really recommended in trafficking cases, because of increased risk of retaliation by the trafficker and embarrassment/shame related to the stigma of prostitution if people find out what happened to the witness whilst she was abroad.

There are several possibilities for the trafficked person to give her statement under protective measures to ensure her safety and integrity. The Netherlands, like most countries has provisions enabling a variety of witness protection measures including confidentiality, anonymity, testimony 'in camera' to a closed courtroom, without the presence of the defendant or other persons considered a danger to the witness. These are rarely used in trafficking cases. Such measures may be used if there are other forms of evidence besides the witness testimony.³⁹ STV felt that other less-formal measures of witness protection such as police escorts and separate waiting rooms for defendants and victim-witnesses are also very important to protect

Rosa and others

Seven women from former Soviet States were trafficked into prostitution and found in a police raid. Police informed STV before the raid and STV were present to assist the women, and talked to the women before anyone else did. They informed the women about their choices. Four of the women decided to press charges against their traffickers without wishing to use the reflection delay, while the other two wished to and were able to return home immediately. There was good co-operation between the police and the women, mediated by STV. The women testified at the Prosecutor's Office and they all filed claims for compensation. No traffickers were arrested, though there was international co-operation to investigate and prosecute the traffickers. Eventually, there was a request for all trafficked persons who reported

the traffickers to testify in court in Germany where some traffickers had been arrested and charged.

STV accompanied three victim-witnesses to the court in Germany, and sat with them as they gave evidence. The translator did not speak the women's native language and so used Russian, which they had not spoken for many years. In this case, one representative from STV waited with the women, whilst the other accompanied whoever would be at the witness stand giving testimony. Although STV had been informed by the prosecutor and the judge that the courtroom would be closed and the defendants not present, in actual fact the courtroom was not closed, the defendants were present, members of the public and allegedly members of the traffickers' families.

STV stated, "We appeared in court and the witness just fell on the floor. When she recovered, she wanted to continue with the testimony and the judge asked her: 'Is this the man who raped you? Would you please look him in the eyes?' She said 'no, no' and he said 'Would you please, please?' She had of course an emotional shock, and so I stood up, took her to the hallway and we left. Although this had happened, the woman still wanted to testify. We spoke to the judge and it was agreed the three would give testimony in court at the same time together, the defendant's family would be removed from the courtroom though the defendants would be present, The women were interrogated by the prosecutor, the judge and defence lawyer. The women were not informed about the possibility of giving evidence by video, although it is possible to do this in Germany."⁴¹ One of the women received strange threatening telephone calls after the trial. The effects of testifying had a negative impact on the women, the women were emotionally broken down and their trust in the system in the Netherlands as well as in Germany had diminished. We realised that in between the hearings the women seemed to be disoriented and they couldn't pursue their lives as they had done before testifying. They had seen the defendant and he had seen them, now they were afraid."⁴²

witnesses.⁴⁰

d) Right to information on court proceedings

There are various bureaucratic delays and difficulties under the B9 regulation,

with some trafficked persons not informed about their residency status at all. One regional case manager reported that information stays at the top, and it is difficult to access information about procedures.⁴³ According to STV, this happens particularly with cases that take a long time and where there is poor communication between police, prosecutors and IND. It appears the right of the individual to information is denied, where there is a greater interest of the State in controlling crime.

Rosa and others

After two years had passed from the women filing the criminal report, STV could not find any information on the process of the case though the permit was renewed. One woman returned home. Another year later, suddenly the German court contacted STV. STV then did not receive further information from the case until months later when there was another invitation to testify. Two women testified again in Germany and at the trial of another of the traffickers and were provided a police escort. They were not able to give their evidence from the Netherlands or by video link. Since then, two years have passed and STV have not been informed about the outcome of the case. They have received more invitations to testify against others in the trafficking network but declined on the grounds of the damage it does to the women. The case is still pending due to its complexity with more than 70 suspects. The women remain in the Netherlands.

Masha and Rosa's cases again indicate a violation of the victim's right to information about legal proceedings, as laid down in the Protocol. Both police and prosecutors in the Netherlands have duties to keep the victim informed of the case, if the trafficked persons requests it.⁴⁴ In Rosa's case, we do not know if German authorities informed Dutch authorities about the outcome of the case, but certainly STV was not informed. Prosecutors must give a letter/form to victims to be completed and returned to the prosecutor if they wish to stay informed of the case.⁴⁵ In practice, STV stated that the form is in Dutch and complex, so many trafficked persons do not understand what it is for, unless the support coordinator is present and able to explain it to them.⁴⁶ STV state that witnesses; "In general are not well informed about the progress of the criminal cases." If a victim files a compensation claim, she should automatically be provided with information on the progress of the criminal case. Not informing the victim of the progress of the criminal case

also means effectively depriving her of the right to complain against the prosecutor's decision to dismiss the case under article 12 Code of Criminal Procedure.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

It is possible for the victim to 'join' a civil action for compensation to the criminal case. 'Joining' a compensation claim, means the civil claimant then has various additional rights, as they effectively become a party to the criminal case as an 'injured party'. For example, victims who join civil claims have the right to inspect the legal file (subject to certain restrictions) and to be legally represented, though their lawyer can only interject on issues relating to the compensation.⁴⁷ The civil claimant may also ask the prosecutor to summon witnesses and experts on their behalf, though there is no obligation on the prosecutor to do so.⁴⁸ The victim's claim for compensation has a subsidiary position within criminal proceedings.⁴⁹ It is clearly a means through which the victim's interest may be represented in the criminal case. Unfortunately in trafficking cases the victim's application to join a civil claim is usually denied by the judge on the grounds of complicating the prosecutor's case, thus denying them legal representation in criminal proceedings.

b) Right to recovery (assistance measures)

Appropriate measures for assistance and support are available once the trafficked person is granted a permit to stay under the B9 procedure. The assistance and services available are the same under the reflection delay. The main problems arise if there is a delay in processing the person's immigration status that delays her financial assistance and thus her access to a shelter or other housing, free legal assistance and non-emergency medical care. STV organises appropriate housing facilities for the trafficked person in one of the various shelters throughout the Netherlands or trafficked women may arrange their own accommodation, for example, with a friend or partner. Trafficked persons are placed in various shelters or housing that suit their needs; there is no specific shelter specialised for trafficked women. It is STV's view that such a specific shelter would put trafficked women and staff at too much risk of reprisals from traffickers, and that it would interfere with their ability to recover from their experience and move on with their lives if they are constantly confronted with people who have suffered similar abuse.

Angelina

Angelina decided to stay in the Netherlands under the B9 because it was pointless to try to withdraw her statement or to return home. The support centre helped her find a place to live. There was some delay in getting her financial assistance and certification that would enable her to receive medical care, so she had difficulties in receiving immediate medical care. Angelina was not provided with psychological care due to language difficulties and more basic immediate problems. She is completely dependent upon the financial benefits paid to her and is not allowed to work under the B9 nor receive any professional training or education.

Once the residence permit is issued the person is eligible for benefits in accordance with the law relating to general social support,⁵⁰ and the file is transferred to the Reception of Asylum Seekers Agency (COA) where the trafficked person lives. In practice the first payment is sometimes delayed by up to six weeks. This has implications for access to various services. If the victim decides not to submit a report, the IND notifies the COA and financial assistance will no longer be given. In emergencies, a doctor is obliged to help a patient. However, in some cases, such as Angelina's, STV has had to intervene and ask for urgent medical problems to be attended to when a trafficked person still has not received her social security benefits and guarantee of medical insurance.⁵¹ Both Rosa's and Angelina's cases illustrate the problems with provision of translators. It is sometimes difficult to find translators who can assist in the trafficked person's social assistance. Angelina failed to receive proper medical treatment when she went to a doctor because she was not able to communicate her health problems.

While legal assistance may be provided by the Immigration Office, by lawyers through a victim support organisation or STV, in many cases trafficked persons appear unaware of the possibility of obtaining legal advice. Angelina's case clearly illustrates the lack of information provided to trafficked persons, as she initially did not understand that she was making a formal statement. There is also a lack of information about the right to join a civil claim to the criminal proceedings. Psychological assistance or counselling is provided by STV and by social workers at the women's shelters depending on the needs of the trafficked person. In some cases trafficked

persons do not wish to be counselled, particularly where they are more concerned about solving more immediate (practical) problems.⁵² Under the B9 regulation, trafficked persons are neither allowed to work nor to take up education or training opportunities. Different shelters sometimes organise language courses or volunteer work for the women to do.

Masha

Masha was able to get some informal training. She was able to attend some voluntary computer skills courses. She is not allowed to work, but she uses what she learned in the courses, and does some volunteer work in information technology.

Masha may seem 'lucky', but, as STV state, "These seven years have been hell for her, away from her family and everything she knows and loves. She has no security and safety in this country and her possibility to develop a social network of friends that she can rely on is very difficult as well". STV regards Masha's case as exceptional. She was able to get training because of her own tenacity in finding something to do, and because various individuals and agencies involved in her case engaged actively to ensure her rights. STV comments: "Otherwise what else is there for women to do in the shelter? Sitting, sleeping, thinking about what they've been through? It's not the best way for most women to recover from their ordeal".⁵³ The ability to communicate with family members back home is usually at the trafficked person's own cost, unless there are threats or reprisals against the family. In such cases, the police will assist the person in contacting her family. Since trafficked persons are reliant purely upon social security benefits, this limits their ability to communicate with their families. In Angelina's case she contacts her family in eastern Europe when she has any money left from the financial benefits to post a letter or make a telephone call.

4. Legal redress and compensation

Katya and Anna

The prosecution filed a compensation claim together with the criminal case. Both women were awarded and paid 100,000 Dutch Guilders⁵⁴ as compensation from one of the traffickers.

In the Netherlands there are three ways for trafficked persons to claim compensation. Firstly, as stated earlier, claims for compensation may be joined as a civil action to the criminal proceedings under the Victim Act Terwee 1995. This is called a '*schadevergoedingsmaatregel*', and is on the judge's initiative or on the initiative of the prosecutor. Any compensation paid will come directly from the trafficker's assets. However, there is judicial discretion regarding joining the claim for compensation: the claim must be clear and simple, otherwise the complicated aspect of the claim must go to a civil court.⁵⁵ According to a lawyer in Rotterdam, in trafficking cases compensation claims joined to the criminal procedure are rarely successful because judges regard the calculation of damages in such cases as difficult and a complicating factor.⁵⁶ It is the responsibility of the State to enforce such orders, which is much more favourable for the victim.

The second way is as a separate civil action against the trafficker. The civil procedure is time-consuming, usually taking several years. Even if it is won, given the type of crime, there is a real problem of actually getting the money. If a civil claim is granted, the victim still has to enforce the court order herself. The court would usually order the seizure of the person's salary, but since traffickers do not often have a declared regular income this does not help.⁵⁷ Thirdly, it is possible to claim money from the Government from the State Fund for Victims of Violent Crime. This possibility is independent of assets of the trafficker, or making a civil claim. Any victim of a violent crime can submit a claim to the State Fund. This is the most successful way of getting at least some compensation for trafficked persons.

Police are obliged to inform trafficked persons as victims of crime to their right to compensation, but due to complicated bureaucratic procedures few compensation claims are lodged. The prosecutor told Anti-Slavery International that she knew of only one criminal case where a trafficked woman claimed compensation and actually received it. The immigration lawyer interviewed commented that all compensation claims she was aware of had been unsuccessful.⁵⁸ Even when compensation claims against traffickers are successful, in practice it is difficult to actually obtain the money, since traffickers rarely have recorded regular income and confiscated assets seized in trafficking cases are minimal in the Netherlands. At present, it may be possible for trafficked persons to claim damages for lost wages, since prostitution has been decriminalised in the Netherlands; however, the problem remains of actually obtaining the money. Another problem with

pursuing civil actions is payment of costs if the trafficked person loses the case. She can be required to pay the costs of the procedure, possibly even including the costs of the other party.⁵⁹

III Conclusions and recommendations

The most positive aspect of the Netherlands victim protection measures is the three-month reflection delay under the B9 regulation which enables trafficked persons to recover somewhat from their trauma, whether they press charges or not. However, there are difficulties with this procedure in practice, with tension between applying protection measures for trafficked persons, and the perception of the authorities of what is required for a speedy and effective investigation and prosecution. The further measures that provide a right to remain in the Netherlands continue to limit protection afforded to persons trafficked into the sex industry to those who are willing to testify, and who risk reprisals against themselves and their families in doing so. The extremely narrow grounds for permanent residency mean most victim witnesses are indeed only protected for the purposes of the trial and not in the long-term.

Recommendations to the Dutch Government

- Develop a guideline, which sets out how police and others should inform trafficked persons about their entitlements to the reflection delay.
- Develop mechanisms to ensure that a temporary residence permit is effectively issued within 24 hours of pressing charges.
- Expand B9 so temporary residence is available to those trafficked for other purposes.
- Widen grounds for temporary residency beyond participation in criminal proceedings to take into account the level of abuse suffered in the Netherlands, or potential harm upon returning home.
- Provide the right to seek work, and education and training opportunities under the temporary residence permit.
- Widen the application of permanent residency so existing humanitarian factors are applied more generously and also take into account the degree to which a trafficked person has already integrated in the Netherlands.
- Improve mechanisms for providing trafficked people with information about the status of the criminal case, including an obligation to

- inform the victim of a decision not to prosecute/ or to dismiss the case.
- Increase witness protection mechanisms in court, so trafficked persons have more choice and information about what type of protection is available.
- Improve procedures to ensure swift access to benefits and services.
- Develop procedures to speed up prosecutions and trials of suspected traffickers.
- Ensure there is a standard mechanism for co-ordination between police, immigration, STV and the prosecution.
- Provide more specialised training of police, immigration, lawyers and judges to deal with specific issues pertinent to trafficking cases.
- Ensure there is a coordinator within each of these departments - police, prosecution and immigration - on trafficking so that inquiries can be directed to the right specialist. The specialist would not be involved in investigating or prosecuting the specific cases.
- Improve procedures for seizing assets and ensure that assets are used firstly for compensation for the trafficked person.
- Provide training and guidelines for the judiciary and lawyers on evaluating compensation claims.
- Increase legal representation of trafficked persons in criminal cases, through the mechanism of joining civil claims for damages to the criminal case.

Endnotes

¹ In the Netherlands, Anti-Slavery International relied upon much information provided by Stichting Tegen Vrouwenhandel 'Foundation against Trafficking in Women' (STV). STV is the co-ordinating non-governmental organisation (NGO) on trafficking in the Netherlands and is officially designated to provide support services to trafficked women. STV deals with approximately 300 cases of trafficked women per year (2001). All case studies were provided by STV, and Anti-Slavery International thanks STV for their willing co-operation with this chapter of the report. As the Netherlands was the first country in which Anti-Slavery International conducted field research, interview opportunities were more limited. Anti-Slavery International also spoke with representatives from the National Rapporteur's Office, a police officer, prosecutor, immigration lawyer, compensation lawyer and various other NGOs. Two support coordinators also completed the guide questions related to victim protection and support. Anti-Slavery International would like to recognise the input of Marjan Wijers who provided detailed comments on the draft text.

human traffic, human rights: redefining victim protection

² *Handboek Lokaal Prostitutiebeleid*, Deel IV, Instrumenten, Ed. de Savourin Lohman, P., Remme, H. and Hillenaar, W., VNG Uitgeverij, Den Haag, 1999 (*Local Prostitution Policy Handbook*, Section IV), (Non-official English Translation), p.7.

³ Office of the Dutch Rapporteur on *Trafficking in Human Beings, Policy Approach on Human Trafficking and Prostitution in the Netherlands*, The Hague, 2002, p.1.

⁴ B9 *Slachtoffers en Getuige-Aangevers Van Mensenhandel*, *Sdu Uitgevers* vc 2000 (april 2001, aanvulling 0) at 2, Anti-Slavery International non-official English translation, *Victims and eye witness declarants of trafficking in persons*, Section 1. (Hereafter referred to as B9 Regulation).

⁵ Section 3 B9 Regulation.

⁶ Section 4.1.b.

⁷ Section 4.6.

⁸ Section 3.1.

⁹ Section 3.3 and section 3.4.

Section 4.3.

¹⁰ Section 3.1

¹¹ Section 4.3.

¹² The victim has the right to start a complaint procedure at the Court of Appeal against the decision of the prosecutor not to prosecute (Article 12 Code of Criminal Procedure). During this procedure the victim is entitled to stay in the Netherlands, which means that the temporary permit must be renewed as long as the article 12 procedure is pending or, if she has not yet been issued a temporary permit of stay she must be given a stay of deportation.

¹³ A Dutch NGO focusing on law and women's human rights.

¹⁴ Wijers, M., email communication to Anti-Slavery International, 12 June 2002.

¹⁵ Transnational AIDS/STD Prevention Among Migrant Prostitutes in Europe Project. TAMPEP is an international network operating in 22 European countries aiming to assist migrant sex workers in Europe.

¹⁶ Anti-Slavery International interview, TAMPEP, Amsterdam, 4 October 2001.

¹⁷ Section 2 B9 Regulation.

¹⁸ Section 4.6.

¹⁹ Office of the Dutch Rapporteur on Trafficking in Human Beings, The Hague, email correspondence 16 August 2002.

²⁰ Anti-Slavery International interview, prosecutor, Haarlem, 4 October 2001.

²¹ *Ibid.*

²² *Ibid.*

²³ Mongard, H., *Legislation in the Netherlands Concerning Prostitution and Trafficking in Women. Development of Professional Strategies to Combat the Trafficking in Women*. International Conference Commemorating the International Day of Action against Violence against Women. European Strategies to Prevent and Combat Trafficking in Women, Berlin, 25-26 November 1998, p. 38.

²⁴ Anti-Slavery International interview, police officer and prosecutor, Haarlem, 4 October 2001.

²⁵ *Ibid.*

²⁶ Anti-Slavery International interview, STV, Utrecht, 3 October 2001.

²⁷ Anti-Slavery International interview, police, Haarlem, 4 October 2001.

²⁸ Three grounds: 1) That this rule is only applicable where the original grounds to stay are still valid and in this case they are not (because the criminal case against the trafficker ended four years ago) 2) She knew the initial permit to stay was temporary, the duration of her stay (i.e. four years) is irrelevant to the rule

granting permanent stay upon failure of the Government 3) No real humanitarian factors raised. Anti-Slavery International interview with STV, 5 October 2001.

²⁹ Anti-Slavery International interview, Dutch Rapporteur on Trafficking in Human Beings, The Hague, 5 October 2001.

³⁰ Anti-Slavery International interview, STV, Utrecht, 5 October 2001.

³¹ Section 4.6 B9 Regulation.

³² Office of the Dutch Rapporteur on Trafficking in Human Beings, p.3.

³³ College van Procureurs-Generaal; Instructie getuigenbescherming 2001.

³⁴ STV, response of regional case manager of Amsterdam, Drenthe (north east of Netherlands) and Friesland (north of the Netherlands), 23 January 2002.

³⁵ Brienen, M. and Hoegen, E., Victims of Crime in 22 European Criminal Justice Systems: The Implementation of Recommendation (85) 11 of the Council of Europe on the Position of the Victim in the Framework of Criminal Law and Procedure, Nijmegen, Wolf Legal Productions, 2000, Chapter 17.

³⁶ *Ibid.*

³⁷ Anti-Slavery International interview, STV, Utrecht, 5 October 2001.

³⁸ Anti-Slavery International interview, prosecutor, Haarlem, 4 October 2001.

³⁹ *Ibid.*

⁴⁰ Anti-Slavery International interview, STV, Utrecht, 3 October 2001.

⁴¹ *Ibid.*

⁴² Anti-Slavery International interview, STV, Utrecht, 3 October 2001.

⁴³ STV, Response of regional case manager of Brabant Zuid Oost (in the South of the Netherlands), 23 January 2002.

⁴⁴ Directive Victim Assistance (Aanwijzing) of the Procurators General of 27 July 1999, GAZETTER 1999, no.141 (formerly Guideline Terwee) Police and Prosecutors, see Brienen, M. and Hoegen, E. Chapter 17.

⁴⁵ *Ibid* p. 62.

⁴⁶ Anti-Slavery International interview, STV, Utrecht 3 October 2001.

⁴⁷ Brienen, M. and Hoegen, E. Chapter 17.

⁴⁸ *Ibid.*

⁴⁹ *Ibid* p. 44.

⁵⁰ Section 3.3 B9 regulation,.

⁵¹ STV, questionnaire response of Regional Case Manager of Utrecht, 23 January 2002.

⁵² *Ibid.*

⁵³ Anti-Slavery International interview, STV, Utrecht, 5 October 2001.

⁵⁴ € 45,378.02

⁵⁵ Brienen, M. and Hoegen, E. Chapter 17.

⁵⁶ Anti-Slavery International interview, lawyer, Rotterdam, 9 November 2001.

⁵⁷ *Ibid.*

⁵⁸ *Ibid.*

⁵⁹ Wijers M, email communication to Anti-Slavery International, 12 June 2002.

6. Belgium¹

I Legislation

1. Criminal laws

In Belgium the law against trafficking uses a much broader definition of trafficking in persons than any other countries reviewed in this report. The law on the Suppression of Trafficking of Human Beings and Child Pornography (Law of 13 April 1995, hereafter April 1995 law against trafficking) amended the Criminal Code and the Immigration Law regarding access to the country, stay, residence and removal of foreigners (Law of 15 December 1980, hereafter Immigration Law). Section 1 §1 of the Law of 13 April 1995 defines trafficking in human beings as crimes related to article 77*bis* of the Immigration Law and articles 379² and 380*bis* of the Criminal Code.

Article 77 of the Immigration Law criminalises smuggling in persons, and article 77*bis* penalises involvement in the entry into Belgium of a foreigner if violence, intimidation, coercion or deception were used,³ or abusing the vulnerability of a foreigner in terms of his or her illegal status, precarious situation, pregnancy, disease or disability.⁴ The penalty for such a crime is one to five years' imprisonment and a fine.⁵ A recent amendment has extended these penalties to those who abuse, directly or indirectly, the particular vulnerability of a foreigner and those who sell, rent or enable premises to be used with the aim of making an extortionate profit.⁶ If it constitutes a regular activity, the fine is higher.⁷ If the activity is carried out by an organised association (consisting of two or more persons), increased penalties of 10 to 15 years and a fine apply.⁸

With regard to trafficking for sexual exploitation, the Law of 13 April 1995 replaced the existing article 380*bis* of the Criminal Code with a provision punishing any act of enticement into prostitution (whether or not the prostitute gives his/her consent),⁹ by one to five years' imprisonment and a fine. As in other countries, there are increased penalties for 'aggravated circumstances', i.e. where deception, violence, threats or any constraint is used or there is abuse of a foreigner's vulnerability (as defined under article 77*bis*), with the penalty increased to 10 to 15 years' imprisonment and a fine.¹⁰ The penalty increases to 15 to 20 years' imprisonment and fine if an

organised association was involved.¹¹

Trafficking under Belgian law is consequently understood to involve either commercial sexual exploitation or smuggling with the use of threats, violence, or abuse of the vulnerable or precarious position of a foreigner (which is used to prosecute exploitation in cases not involving prostitution also). In practice, 'abuse of vulnerability or precarious position' is interpreted very widely so that the foreigner's illegal immigration status is proof enough of abuse of vulnerability.¹² So in effect, article *77bis* is also used to prosecute smuggling in persons, cases involving employment of illegal workers, renting rooms to foreigners for an extortionate profit as well as cases involving more severe exploitation that constitutes 'trafficking' under the Trafficking Protocol. The reason for this is that penalties under the generic smuggling provision (article 77) are extremely light.¹³ Both trafficking and smuggling are therefore prosecuted under article *77bis*, the two crimes are conflated under Belgian law. On the issue of trafficking for prostitution, Belgium's laws also include other prostitution and brothel-keeping offences, which are used to prosecute those who traffic into prostitution.¹⁴

A Royal Decree of 16 June 1995 established a mechanism to ensure enforcement of the April 1995 law against trafficking, assigning core responsibility to a government agency, the Centre for Equal Opportunities and Combating Racism. The Centre is also intended to act as a co-ordinating body for the various relevant governmental ministries, prosecutors, police and immigration dealing with trafficking. It sets performance standards for the three NGOs referred to as specialised centres assisting trafficked persons - Payoke, Pag-Asa and Surya based in Antwerp, Brussels and Liege respectively. For more effective co-ordination, a sub-commission of the Belgian Senate on Trafficking in Human Beings and Prostitution recommended the appointment of a special national co-ordinator on trafficking to improve the efficiency of the different federal services concerned, and to serve as an intermediary between the regions, the communities and the Centre for Equal Opportunities and Combating Racism.¹⁵

2. Other laws and policies affecting trafficked persons

a) Circular regarding the issuing of residence documents and work permits to migrant victims of trafficking in human beings (7 July 1994, hereafter July 1994 Circular)

i) Reflection delay and temporary residence

Under the July 1994 Circular,¹⁶ in Belgium, as in the Netherlands, trafficked persons or persons suspected to have been trafficked can stay in the country under certain conditions. It should be underlined that due to the legal definition of trafficking in Belgium, this Circular applies to trafficked persons in the broadest sense, i.e. trafficked and smuggled persons. While the cases referred to in this Chapter all relate to 'trafficking' as defined under the Trafficking Protocol, the lack of distinction is relevant when considering statistics relating to the number of permits issued to 'trafficked persons'.

The Circular enables a reflection delay, an expulsion order suspended for 45 days that gives legal title to be in the country. This is available to persons who have severed all links with the environment into which they were trafficked, and who are being supported by one of the three specialised centres. The specialised centre interviews the trafficked person and then if its staff suspect the individual may have been trafficked (or exploited), the NGO applies to the Immigration Office and provides full details of the person's story and confirms that they are assisting the person. Within 24 hours the Immigration Office is supposed to issue the order to leave the territory (reflection delay). The reflection delay does not confer the right to employment. Within this period, the person has to decide whether he or she will file a complaint against the trafficker. As the document is an order to leave, those who refrain from filing a complaint must leave the country within 45 days. In special circumstances, such as for medical reasons or the need to inform relatives for reasons of safety or with a view to voluntary repatriation, the duration of the permit can be extended.

When a trafficked person files a declaration with the police or Prosecutor's Office, they are issued with a three-month residency document called a 'declaration of arrival' by the Immigration Office. One month before the expiry of the 'declaration of arrival', the Immigration Office contacts the Prosecutor's Office for more information on the complaint. When the Prosecutor's Office informs the Immigration Office that the complaint concerns 'trafficking' or that the person is considered to be a trafficked person, the Immigration Office may approve a second permit of stay, a BIVR¹⁷ temporary permit. In general, the BIVR is valid for six months, and is extended as necessary at six-month intervals until the end of the criminal proceedings against the trafficker. Persons issued with the 'declaration of arrival' permit or the BIVR 'temporary stay' permit can be employed, on the condition that the

employer has obtained an authorisation of employment from the Regional Authorities. It is significant that there is a special investigative department of the Immigration Office, the *Bureau Opsporingen*, which deals with all the issues regarding the granting of permits to trafficked persons.

ii) Permanent residence

Trafficked persons can request permanent residency at the end of the criminal proceedings against a trafficker. In considering such requests, the Immigration Office will look at how significant their information in the complaint was, in terms of the criminal procedure against the trafficker (based on information from the Prosecutor's Office) and also consider the degree to which the trafficked person has adapted into Belgian society.

II General analysis and implementation in cases

1. Investigation and prosecution of traffickers

No accurate information is available on the number of prosecutions under the current anti-trafficking law. A survey of the numbers of court judgments and arrests of traffickers was carried out by the Ministry of Justice based on information from Prosecutor's Offices for the period from 1 January 1998 to 30 June 1999.¹⁸ The study found a total of 116 criminal cases were tried over this 18-month period, using both article *77bis* and article *380bis*. However, the survey noted various methodological problems, indicating this information is far from complete and accurate.¹⁹

Currently those responsible for trafficking people into prostitution can be, and often are, charged under both article *77bis* and article *380bis*. This is confusing when article *380bis* (3) and article *77bis* are worded almost identically, so it is essentially charging the trafficker twice for the same offence. It has also been used as an argument for the defence in order to get one of the charges struck off. Despite the identical wording of these two provisions there is a contradiction in the extremely disparate penalties they prescribe: 10 to 15 years under article *380bis*(3) and one to five years under article *77bis*. This discrepancy again underlines that it would be better to have one all-encompassing article of the Penal Code to cover trafficking for all purposes, and that would equalise the penalties regardless of whether the trafficking is for sexual or other forms of exploitation.

Evidence presented to the courts to prove that offences have been committed under article 77*bis* or article 380*bis* include; statements made by trafficked persons; other witnesses and/or the defendant; confessions; forged or false documents that have been seized or confiscated; information obtained from surveillance such as phone taps and of financial transactions. In general, statements made by trafficked persons are important for a successful prosecution as long as they are confirmed by other evidence. Sentencing by courts in trafficking cases is considered too low to have a deterrent effect on traffickers. Sentences never exceed eight years and vary, on average, between two and three years. Again, this is due to the conflation of trafficking and migrant smuggling.

A Ministerial Directive known as the COL12/99²⁰ was issued in 1999 in order to combat trafficking in human beings more effectively. The Directive focuses on gathering data on the phenomenon of trafficking, exchange of information between federal and local police and Prosecutors' Offices and organisation of investigations and prosecutions. However, the COL12/99 Directive uses a different definition of trafficking from that used in the April 1995 Law.²¹ The COL12/99 definition refers only to trafficking and not to migrant smuggling and is more in line with the Protocol definition, covering forms of forced labour in addition to prostitution. This new definition has led to confusion and discrepancies amongst law enforcement agencies. The directive highlights the importance of a multi-disciplinary approach to counter trafficking and refers to COL6/99, a Ministerial Directive regarding the collaboration, co-ordination and the division of tasks between the local and federal police. Aphrodite's case illustrates the successful implementation of this Directive, ensuring that different law enforcement offices exchange information regularly.

Aphrodite

*Aphrodite was trafficked from Albania via Italy to Belgium and forced into prostitution by her trafficker/ 'boyfriend', 'C'. Aphrodite reported 'C' to federal police in Antwerp and identified a house where several other Albanian traffickers were living, including trafficker 'B'. Independently of this, an investigation in Brussels had already been initiated against trafficker 'B'. Though the prosecution against 'C' was ultimately not successful, Aphrodite's statement was used in the successful prosecution of 'B' who was convicted under article 380*bis*.*

This is despite the fact that the investigation against 'B' was in a different region from where she reported 'C', and illustrates good co-operation between the police in different regions.

The COL12/99 Directive also improves prosecution of trafficking by stipulating the appointment of and tasks for 'reference magistrates' i.e. magistrates specialised in dealing with trafficking. For example, reference magistrates working for the Prosecutor's Office at the Court of First Instance are to serve as a focal point for the law enforcement agencies, authorities, specialised agencies and social service providers involved, and are to follow up trafficking investigations. This seems to have worked well in practice, ensuring relevant expertise is shared in complex or difficult cases. The COL12/99 Directive has been updated and evaluated regularly. However, examining magistrates and prosecutors underline that the release of offenders on bail, some of whom escape the country and avoid trial, needs tackling.²²

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

i) The procedure in practice

The process of granting residency documents in Belgium is swift and efficient, and not impeded by the same problems noted in Italy and the Netherlands. This is due to close collaboration, trust, exchange of information and open communication between the NGO specialised centres (who apply for the permit) and the *Bureau Opsporingen* (that grants the permits). In addition, despite the fact that the Immigration Office is often criticised for its hard-line approach towards migrants, the *Bureau Opsporingen* displays a sympathetic and humane approach when problems occur. Regular meetings are held with the specialised centres to discuss complex or problematic cases. Usually permits are issued within the same day or, at most, 24 hours.

Some procedures regarding the issuing of residency documents differ from the steps outlined in the 7 July 1994 Circular. An additional circular²³ states that law enforcement officials should inform possible victims of trafficking of their right to a reflection delay. In practice, this does not happen, the reflection delay permit is rarely issued and most trafficked persons now file a

complaint immediately after being interviewed by police and thus receive the 'declaration of arrival'. This is reflected in Payoke's case registration figures, which show in 2001 only 3.5 per cent of trafficked persons were issued with the reflection delay permit. In the past, as many as 60 per cent of trafficked persons Payoke dealt with were issued with the reflection delay. This change has occurred because most trafficked persons are referred to Payoke at the moment by law enforcement bodies. Law enforcement officials rarely follow the 1997 guidelines and do not inform trafficked persons of their right to the reflection delay. Instead, they encourage trafficked persons to make a statement immediately. A prosecutor stated that trafficked persons who do not regard themselves to be victims are usually not identified by law enforcement as such.²⁴ Trafficked persons unwilling to press charges face immediate deportation. In the cases where trafficked persons' first point of contact is not law enforcement they are likely to be offered and acquire a reflection delay.

Aphrodite

Before escaping her situation, Aphrodite was admitted to hospital due to a pre-existing medical condition. Her trafficker, 'C', visited her in hospital and threatened that if she did not return to work for him, he would hurt her brother in Albania. Aphrodite informed hospital staff of her predicament and they referred her to Payoke. It took Aphrodite some time to make the decision to file a complaint against 'C', because she feared for her family's safety in Albania. She was issued with the reflection delay permit and this was extended twice before she finally decided to press charges against 'C'.

Another difference in the practical implementation of the residency procedure concerns the transition from the three-month 'declaration of arrival' document to the BIVR temporary permit. Trafficked persons usually only obtain the BIVR document once the criminal case has been filed at court by the Prosecutor's Office. Thus for the entire period of investigation, the three-month 'declaration of arrival' is extended rather than granting a six-month BIVR temporary permit.

Princess

Princess was trafficked from Nigeria to Belgium and forced into prostitution. She escaped with the help of a client who took her to Payoke. After using some of the time of the reflection delay, she filed a complaint against the trafficker and was granted a 'declaration of

arrival'. This was extended until the Court sitting in chambers referred her case to the correctional district court. At this point, she was granted a BIVR permit for six months.

Renewing the 'declaration of arrival' is difficult because it leaves the trafficked person in a state of uncertainty, with no prospect of long-term residency, and this causes them additional stress. It is time-consuming for trafficked persons and the specialised centres that need to support the reapplication procedure every three months. This is especially difficult if the trafficked person has found employment and needs to update the permit every three months.

To overcome this problem, there is a new guideline in place in practice (though it has not yet been formally adopted), entitled Proposed Amendments to the 13 January 1997 Circular.²⁵ The proposed amendments suggest a refined procedure whereby, one month before the expiry of the 'declaration of arrival', the Immigration Office requests the necessary information from the Prosecutor's Office to confirm the status of the complaint. Even if the Prosecutor's Office still has not replied by the end of the second 'declaration of arrival' period, the Immigration Office can proceed to issue the six-month BIVR temporary residence document. This practice is followed when the specialised centre has ascertained in a particular case that it would be difficult for the trafficked person to remain on the 'declaration of arrival' permit. This is most evident in cases, for example, where the trafficked person has found employment, or the specialised centre regards them to be integrating well. This is due to the various practical difficulties regarding lengthy bureaucratic procedures for work permits which are tied to the length of the permit of stay (see below). The Proposed Amendments to the Circular²⁶ procedure overcome many of the difficulties experienced in the Netherlands, regarding poor co-operation between immigration, prosecutors, lawyers and NGOs assisting trafficked persons.

ii) Numbers of permits issued

According to the Immigration Office, 623 foreigners have received residency documents between 1994 and January 2000.²⁷ The statistics do not differentiate between the types of residency document issued. Immigration states that until the end of 2001, over 1101 foreigners have been granted some form of residency document.²⁸ These figures must be regarded as an

absolute minimum, since the Immigration Office have no electronic database or centralised collection of this information. During 1999, the *Bureau Opsporingen* issued 106 people with some form of residency document related to trafficking. Out of these cases, 64 trafficked persons had been exploited in prostitution, 28 in other forms of labour, three were smuggled migrants, three were exploited in sport, three were trafficked as domestic workers for diplomats and five were in unspecified sectors.

According to the Immigration Office, in 2000 they followed up 143 new cases, whereas figures reported by the three specialised centres recorded 230 new cases.²⁹ On the basis of the cases recorded by the specialised centres, 57 per cent concerned exploitation in prostitution, five per cent in sports, seven per cent in the catering industry, 10 per cent in other forms of work and 11 per cent concerned smuggling. According to the Payoke's 2001 figures, out of 199 victims assisted in 2001,³⁰ 115 concerned exploitation in prostitution, 15 in sports, eight in catering, 31 in other forms of work, 26 smuggling, one a fake marriage and three in unspecified sectors. The figures clearly show that trafficking for purposes other than prostitution is a major problem. Belgium is the only country in this report that clearly indicates such a range of cases, mainly because other countries either do not record the information or are not concerned with protecting those who are not trafficked into the sex industry. This is a real problem for countries such as the Netherlands which do not recognise or assist persons trafficked for purposes other than prostitution, especially considering that trafficking for other forms of labour exploitation is increasing.

iii) Limitations

The procedure for acquiring residency status beyond the reflection period is limited to those victims who are willing to co-operate with law enforcement and who file complaints against traffickers. It does not protect those who are too afraid or too traumatised to press charges, or who do not possess sufficient information about their trafficker. If the trafficked person refrains from filing a complaint or withdraws his or her complaint or if the investigation is suspended for technical reasons or other priorities, he or she is issued an order to leave the country. This is unless they fall within the provision allowing them to apply for permanent residency under the STOP procedure (see below, iv) Permanent residency). The Immigration Office routinely takes into account information from the Prosecutor's Office in its decision to issue or renew a residency document. In one way this prevents

abuse of the procedure; however, the fact remains that the period of stay and the assistance related to it are dependent on the result of criminal investigations.

In addition the 'declaration of arrival' does not enable freedom of movement outside Belgium within the European Union. Trafficked persons with a 'declaration of arrival' may leave the country but in practice will not be permitted to re-enter Belgium unless they can prove exceptional circumstances. Under the 'declaration of arrival', immigration deems that the trafficked person should be at all times at the disposition of the law enforcement bodies. In contrast, trafficked persons issued with a BIVR do have freedom of movement within the European Union.

To obtain any residency documents trafficked persons must drop all links with the environment in which they were exploited. In many cases, trafficked persons may return to their trafficker and then leave again. It takes some time to fully break the ties because they are suffering trauma and feel an emotional pull to return to a familiar environment. It is unrealistic to expect all trafficked persons to immediately adjust to a new environment. The requirement to leave the realm of exploitation is extremely restrictive in this regard. It was drafted with prostitution in mind to prevent victims who were exploited in prostitution from returning to the sex industry and from again being vulnerable to exploitation. An exception has been made, in regard to other forms of labour exploitation, for example where trafficked persons exploited in catering can now return to that industry and be legally employed. This concession does not apply to prostitution, and displays the attitude in Belgium that prostitution is inherently exploitative.

Finally, trafficked persons are not only obliged to collaborate with police authorities, they also have to be assisted by one of the three specialised centres. If trafficked persons do not conform to the conditions of the assistance programmes offered by the specialised centres, their residency permit can be revoked.

iv) Permanent residency

Under the 7 July 1994 Circular and further clarified in the Proposed Amendments to the Circular that is being implemented, permanent residency is granted to trafficked persons if it is deemed that the complaint has been significant for the investigation and prosecution of a trafficker. If the

complaint leads to a conviction of the trafficker, then permanent residency is generally always granted. Trafficked persons are not granted permanent residency until the criminal case has been completed. If the criminal case against the trafficker is suspended and the trafficked person has been residing in Belgium (under the framework of the residency procedure for trafficked persons) for two years or more, they can apply for permanent residency under humanitarian grounds. This is the so-called STOP procedure agreed between the specialised centres, the Centre for Equal Opportunities and Combating Racism, and the *Bureau Opsporingen*. It is not in the 1994 Circular and there are no written guidelines for its enforcement.

In all applications for permanent residency, the specialised centre and local authority (of the community where the victim is living) must submit a detailed report regarding the socio-economic situation of the victim to the Immigration Office. The Minister of the Interior makes a decision to grant permanent residency to the victim based on these reports as well as an internal report and advice of the Immigration Office. The judicial outcome of the criminal case against the trafficker is the prime factor in issuing permanent residency, unless it is under the STOP procedure, in which case it is the level of integration that is taken into account. There is no accurate data available on how many trafficked persons have been granted permanent residence status. In 2001, 15 of the 199 people assisted by Payoke were granted permanent residency.³¹

b) Protection from reprisals and police protection

The COL12/99 directive stipulates that all efforts should be taken during criminal investigations to avoid trafficked persons from being vulnerable to threats or reprisals from trafficking gangs. Under the 'declaration of arrival' and the BIVR, trafficked persons who have children under the age of 18 can bring them to Belgium at their own cost. This is difficult in practice, especially for trafficked persons from West Africa due to the costs involved. If severe reprisals occur, trafficked persons can be relocated within Belgium, but dealing with reprisals in countries of origin is more difficult, and is still not sufficiently addressed.

Aphrodite

Aphrodite was threatened soon after filing the complaint against 'C'. While she was safe in the shelter, her family in Albania was threatened and as a result was forced to move city. Aphrodite returned home after

several years for a visit and a safety plan was organised through the IOM to ensure her security during her stay in Albania. Despite this, she was still approached by police officers acting on behalf of 'C's gang, trying to trick money out of her.

c) In-court evidentiary protection

Princess

Princess's declaration was key evidence in the case against her trafficker, but she was not required to testify in court. Although the defence tried to summon her to court as a witness, the judge rejected the request on the grounds that Princess had suffered enough already and should not be forced to face her exploiters again.

Criminal proceedings in Belgium depend mainly on a written procedure, with evidence taken as statements. In this regard victim witnesses are rarely obliged to appear in court to testify against their traffickers. Exceptionally, victims may be summoned to court as witnesses if the judge considers their presence is needed. The criminal case is essentially developed during the preliminary investigations and it is not necessary to rebuild the case again at court.³² In the past five years, Payoke has handled only two cases where victims were required to testify in court in Belgium. This is out of a total of more than 500 cases, in which they have assisted in the same period.

Recently a new law on the anonymity of the witness has been adopted by the National Assembly.³³ The law makes a distinction between partial and full anonymity. In case of partial anonymity, the examining magistrate or judge can decide to leave out certain identifying characteristics of the witness such as age, name, address, and profession; however, the witness must appear before the court to be examined by the defence. In exceptional circumstances, the examining magistrate may grant full anonymity when partial anonymity does not seem to be sufficient. In trafficking cases the examining magistrate can only grant full anonymity in cases of trafficking involving two or more persons (a criminal organisation) or when undertaken on a regular basis. The new law on anonymity will only be of limited use to trafficked persons, since traffickers often know anyway from the nature of the complaint exactly who is testifying against them.

d) Right to information on court proceedings

Trafficked persons who join themselves to criminal proceedings as injured parties are provided with a protected legal status enabling them to access information on the court proceedings.³⁴ The law stipulates quite clearly that injured parties are to be informed of the course of the criminal proceedings. In practice, trafficked persons who do join civil claims are well informed about the status of their cases.

In accordance with the new section 28*quater*, para.1 of the Code of Criminal Procedure, the injured parties should be kept informed of the dismissal of the prosecution (should that be the case) and the reasons why. However, in practice, if a case is dismissed, the reasons given are of a very general nature. It is enough for the prosecutor to state that the crime did not establish a priority for the prosecution, that the offenders were unknown³⁵ or that elements entailed in the complaint do not establish that a crime of trafficking has occurred.

3. Support and assistance to trafficked persons**a) Right to lawyer/legal advocate in criminal proceedings**

As a civil law country trafficked persons who join themselves as injured parties to the criminal proceedings are permitted lawyers. The specialised centres generally arrange for free legal assistance to be provided to trafficked persons. The lawyer has access to the prosecutor's file of the case, but does not have full rights to be present at police interviews of the victim or at the hearing before the examining magistrate without the authorisation of the police or magistrate.

b) Right to recovery 'assistance measures'

Once a trafficked person obtains any of the residency documents (including the reflection delay) they are entitled to all basic services such as housing (shelter or house), education, financial assistance and medical care. However, the right to seek employment is not granted during the reflection delay period. There is a lack of adequate and sufficient housing for trafficked persons, the shelters of the three specialised centres are often full, and suffer from case overload. This is also cited as a reason why law enforcement officials fail to inform many people who may have been trafficked about the reflection delay, since the services of specialised centres are already over stretched.

The right to seek employment is conferred with the 'declaration of arrival' or BIVR permit. However, employers are required to undertake a complicated process of authorisation if they wish to employ a trafficked person. This process takes one month or more and the work permit is only valid for the duration of the residence document.³⁶ When it expires, the whole process of application must be done again, consequently few employers are eager to employ trafficked persons. The work permit is issued for work with a specific employer. In reality, therefore, the state has made it difficult for trafficked persons to get employment and in addition they have little access to the labour market due to lack of fluency in French or Flemish and specialised skills. In 2001, only 31 temporary authorisations to employ trafficked persons were granted to Belgian-based employers in the Flemish region, despite the fact that Payoke (which operates in this region) assisted close to 500 trafficked persons.³⁷ The Government evidently needs to create more special employment projects for trafficked persons, such as those in Italy, to counter this problem. On 19 July 2002, the Federal Council of Ministers approved the proposed reform measures of the Federal Minister of Employment on the employment of foreigners. These reforms aim to simplify the issuing of working permits and to improve the access of foreigners legally residing in Belgium to the labour market. Under this new regulation trafficked persons with a 'declaration of arrival' or a BIVR permit can be employed with a working permit C. This work permit is valid for a one-year term and can be extended. It is not restricted to a specific employer and the victim has to apply for the working permit instead of the employer.

Princess

Princess' lawyer successfully joined a claim for compensation to the criminal action against the trafficker and the trafficker was ordered to pay Princess €12,500. He was sentenced to six years' imprisonment and a fine of €5,000. Criminal assets seized during the investigation were used to pay Princess all of the compensation.

4. Legal redress and compensation

A trafficked person as an injured party can link a claim for damages to the criminal court action or bring a separate civil claim to the civil court. Some trafficked persons link civil claims to the criminal proceedings. In general, criminal courts convicting traffickers award compensation ranging from €650

-€17,500 to victims of trafficking, depending upon the level and type of exploitation.³⁸ Actual enforcement of compensation orders remains the main difficulty as many traffickers claim to be insolvent. Seized assets of convicted traffickers go to the Federal Treasury. There is no specific regulation regarding the use of such assets to pay compensation claims, and, while there are exceptional cases, assets usually go to the State. However, in recent judgments, some criminal courts have granted compensation to trafficked persons from seized criminal assets.

Up until now, trafficked persons do not have access to the *Speciaal Fonds voor Hulp voor Slachtoffers van Opzettelijke Gewelddaden* (Special fund for victims of violence) because of their status as undocumented migrants at the time of the damage/offence.

Under article 11 of the 16 June 1995 Royal Decree regarding the work of the Centre for Equal Opportunities and Combating Racism, and article 11§5 of the Law of 13 April 1995, Payoke, Pag-Asa and the Centre for Equal Opportunities and Combating Racism can take judicial action against traffickers by joining a claim for compensation to the criminal case against the trafficker independently of any claim lodged by the victim. In Princess' case, for example, Payoke was awarded €1,500, which was paid out of the criminal assets seized from the traffickers.

III Conclusions and recommendations

For those identified as trafficked persons who co-operate with the authorities, the Belgian system works effectively, especially the residency procedure and the provision of integrated services. These provide positive opportunities for permanent residence, employment, and help trafficked persons to recover, for example by avoiding the need to testify. However, there remain underlying issues due to the conflation of trafficking and smuggling laws, concerns to prevent illegal migration, and an emphasis on prosecution of traffickers, that have an effect on the protection of trafficked persons' human rights. Considering trafficking as the same as smuggling causes difficulties in ensuring traffickers are appropriately prosecuted and sentenced. Law enforcement bodies experience difficulties in clearly distinguishing trafficking from smuggling. Only a small number of the intercepted people who might have been trafficked are actually referred to the specialised centres, because they are unwilling to file a complaint, or due

to the specialised centres being full. Law enforcement officials prioritise those who are willing to testify, rather than those who may most need assistance. Temporary residency is contingent upon a willingness to testify and there are ineffective protection mechanisms to address increased incidences of reprisals faced by families in countries of origin. Trafficked persons who are willing to testify have access to extensive assistance measures but employment remains difficult in practice.

Recommendations to the Belgian Government

- Amend legislation in line with the Trafficking Protocol to distinguish human trafficking from migrant smuggling, and ensure trafficking for other forms of labour exploitation carries an equal penalty to trafficking for prostitution.
- Law enforcement officials must inform trafficked persons of their right to a reflection delay.
- Create a centralised system to ensure more effective recording of information on prosecutions, convictions and issuance of residency permits, and better information exchange.
- Formally adopt the Proposed Amendments to the Circular (13 January 1997),³⁹ regarding clearer procedures for residency documents.
- Ensure better collaboration between the prosecution services of the judicial districts with immigration and specialised centres.
- Provide trafficked persons with the right to appeal against decisions revoking their immigration status.
- Develop and finance special integration projects to ensure trafficked persons have improved access to employment.
- Ensure work permits are issued quickly and efficiently to trafficked persons.

Endnotes

¹ In Belgium, the non-governmental organisation Payoke in Antwerp conducted the research and prepared a report. This chapter is based on the information included in that report and consequently refers to various titles in Dutch without mentioning their French equivalent.

² Article 379 deals with prostitution of minors.

³ §1(1) Law of 13 April 1995.

⁴ §1(2).

⁵ *Ibid*

⁶ Article 77 *bis*.5

⁷ §2.

⁸ §3.

⁹ Article 380bis § 1(1).

¹⁰ Article 380bis §3.

¹¹ Article 381.

¹² Correctionele Rechtbank, Brussel, 22 Mei 2000, 51ste Kamer.

¹³ The sentence under Article 77 sentence is eight days to three months' imprisonment plus a fine.

¹⁴ Article 380bis §1(2) and (3).

¹⁵ Thijis E. en de t' Serclaes, N., *De mensenhandel en de prostitutie in België*, verslag namens de subcommissie "mensenhandel en prostitutie", Belgische Senaat, zitting 1999-2000, 12 juli 2000.

¹⁶ Circular regarding the issuance of residence documents and work permits to migrant victims of trafficking in human beings (7 July 1994).

¹⁷ Bewijs van Inschrijving in het Vreemdelingenregister (BIVR) (Certificate of Registration in the Immigration Register).

¹⁸ Centrum voor Gelijkheid van Kansen en Racismebeëindiging, "Strijd tegen de mensenhandel," Tussen beleid en middelen: de diepe kloof? Jaarverslag 1999, Brussel, 2000, p. 115.

¹⁹ Not every judicial district replied to the questionnaire, while some offices forwarded information referring to offences such as child pornography, sexual abuse or prostitution rather than trafficking. Other offices

gave information on trafficking cases without specifying which specific type of trafficking offence had been committed. The information was primarily based on computer data from Prosecutor's Offices where trafficking was the first charge or most serious offence, thus leaving out cases in which trafficking was not the predominant offence. It was also unclear whether the numbers reported referred to the number of judgments passed, the number of cases ongoing, or the actual number of arrests of traffickers. The study did not indicate the number of criminals who were implicated in the offences.

²⁰ Adopted by the College of Prosecutors-General, 1999.

²¹ The Directive defines trafficking as the illegal subjection of a person by using violence, threats, tricks or by abuse of authority in order to exploit the prostitution of others, or by employing other forms of abuse or sexual violence, or the abuse of labour or labour conditions, which are a violation of human dignity. 'Abuse of authority' is defined as any form of pressure, exercised in such a way that the victim has no other option than to submit to him or her.

²² Payoke interview, prosecutor, Brussels, 12 May 2002 and prosecutor, Antwerp, February 2002.

²³ Modification des directives du 13 janvier 1997 à l'Office des étrangers, aux parquets, aux services de police, aux services de l'inspection des lois sociales et de l'inspection sociale relatives à l'assistance aux victimes de la traite des êtres humains. (Amendments to the Directive of 13 January 1997 to the Immigration Office, Prosecutors' Offices, police, social law inspectorates concerning assistance to victims of human trafficking.

²⁴ Payoke interview, prosecutor, Brussels, 12 May 2001.

²⁵ Modification des directives du 13 janvier 1997 à l'Office des étrangers, aux parquets, aux services de police, aux services de l'inspection des lois sociales et de l'inspection sociale relatives à l'assistance aux victimes de la traite des êtres humains.

²⁶ *Ibid.*

²⁷ Centrum voor Gelijkheid van Kansen en Racismebestrijding, "Strijd tegen de mensenhandel", *Tussen beleid en middelen: De diepe kloof?*, Jaarverslag 1999, Brussel, 2000, p. 123.

²⁸ Fax communication from Immigration Office, Brussels, 12 August 2002.

²⁹ Centrum voor Gelijkheid van Kansen en Racismebestrijding, *Beeldvorming van de mensenhandel en analyse van de rechtspraak, Jaarverslag 2000*, Brussel, 2001, p. 67. These figures vary, due to the lack of an official registration procedure in Immigration.

³⁰ Ninety-four were new cases submitted to the Immigration Office.

³¹ Payoke, Payoke Annual Report 2001, Antwerp.

³² This is different however, for cases handled before the Court of Assizes (serious offences such as murder or against the State, such as treason) where a jury decides on the guilt or innocence of the defendant and where the whole criminal investigation is presented once again before the court. In these proceedings witnesses are summoned before the court to testify.

³³ Wet van 4 april 2002 betreffende de anonimiteit van de getuigen, B.S. 31 mei 2002.

³⁴ Section 5b Preliminary Title Criminal Court Procedure.

³⁵ If the victim files a complaint against a specified person but this person cannot be caught and confronted with the complaint of the victim, the prosecutor then decides to dismiss the case temporarily. However when the perpetrator is found the case can be reopened.

³⁶ Section 3 Circular regarding the issuing of residence documents and work permits to migrant victims of trafficking (17 July 1994).

³⁷ Ministerie van de Vlaamse Gemeenschap, Administratie Werkgelegenheid, Afdeling Migratie en Arbeidsmarktbeleid, Brussel, 2000, p.91.

³⁸ Centrum voor Gelijkheid van Kansen en Racismebestrijding, De wet van 13 april 1995 houdende bepalingen tot bestrijding van de mensenhandel en van de kinderpornografie. Brussel, 2002, p.53.

³⁹ Modification des directives du 13 janvier 1997 à l'Office des étrangers, aux parquets, aux services de police, aux services de l'inspection des lois sociales et de l'inspection sociale relatives à l'assistance aux victimes de la traite des êtres humains.

7. United Kingdom¹

I Legislation

1. Criminal laws

The current laws in the United Kingdom do not clearly distinguish between trafficking, smuggling migrants and prostitution. The United Kingdom has no specific anti-trafficking law, nor any criminal law against forced labour. Traffickers are generally punished under laws related to pimping and immigration offences. Offences such as rape, assault, unlawful imprisonment and kidnapping, which more closely reflect the human rights abuses faced by trafficked persons, are rarely used to prosecute traffickers as getting the sufficient evidence to ensure conviction is difficult and expensive in terms of police time. Facilitation of illegal immigration, an offence under section 25(1) Immigration Act 1971, has occasionally been used to prosecute traffickers, but in practice is also difficult to prove due to complex evidentiary requirements.² In order to prove 'facilitation of illegal immigration', it is generally necessary for the facilitator to be caught with the illegal entrant at the point of entry into the United Kingdom.³

Traffickers for the sex industry are usually prosecuted under the Sexual Offences Act 1956, especially sections 30 and 31 (living off immoral earnings of prostitution). Detaining a woman against her will for unlawful sexual intercourse⁴ theoretically could be used in a few trafficking cases, but is generally regarded as an archaic provision with a maximum penalty of two years (less than for section 30 and 31) and is rarely used. As stated in a report commissioned by the Home Office (Ministry of the Interior and responsible for immigration), there are no provisions in the Sexual Offences Act 1956 covering psychological coercion and deception, the main means by which traffickers retain control over their victims.⁵

In the current Nationality, Immigration and Asylum Bill (2002), there is a proposed provision entitled 'traffic in prostitution' which prescribes a maximum 14-year penalty to anyone who 'for purposes of gain exercises control, direction or influence over a prostitute's movements in a way that shows he [*sic*] is aiding, abetting or compelling the prostitution'. According to a Home Office policy paper, this provision is only intended as a stopgap

measure 'pending major reform' which will cover trafficking for both sexual and labour exploitation.⁶ Although the proposed provision is welcomed as recognising trafficking for prostitution, it appears to be more concerned with criminalising facilitation of prostitution than the actual conditions of exploitation relevant to trafficking, and fails to cover other forms of trafficking.

2. Other laws and policies affecting trafficked persons

The United Kingdom has no specific residency procedure for trafficked persons as exists in Belgium, Italy, the Netherlands and the United States. Trafficked persons who agree to testify against traffickers may be able to stay in the United Kingdom if they are granted exceptional leave to remain (ELR). Exceptional leave to remain is outside the immigration rules and is granted on 'exceptional and compassionate grounds'. Acting as a witness in a criminal case may be considered 'exceptional'. The Home Office considers both the usefulness of the information provided and the risk or danger to the person if they were to return home.⁷ There are no known successful applications of ELR by trafficked persons who have not testified. Those who obtain exceptional leave to remain are granted a stay of four years, at which time they can make an application for indefinite leave to remain (permanent residence), if the same factors are still prevalent (e.g. fears still exist).⁸ There is no right to family reunification under ELR.⁹

There has been only one successful asylum application regarding trafficking. In this case, a trafficked woman who did not report her trafficker was granted asylum on the grounds of fear of being persecuted by the organised criminal gang in her home country, Ukraine.¹⁰ A successful asylum application permits a permanent stay (indefinite leave to remain).

II General analysis and comparison of cases

1. Investigation and prosecution of traffickers

In the United Kingdom, the absence of an anti-trafficking law made it difficult to identify prosecutions of cases that could be trafficking. According to London's Metropolitan Police, Central Clubs and Vice Unit (Charing Cross) during the three years 1999 to 2001 there have been nine prosecutions for living off immoral earnings that constituted trafficking cases in London. This

is from a total of 29 prosecutions under sections 30 and 31 during the three years 1999 to 2001.¹¹ Of the nine, three occurred in 1999, two in 2000 and four in 2001. It is important to mention here that some members of the Metropolitan Police regard all cases of migrant prostitution to constitute trafficking, regardless of the level of exploitation to which the person is subjected.

Anti-Slavery International looked at the only two cases reported in London, in which adult women had been trafficked into prostitution and subsequently testified against their traffickers.¹² In the other prosecutions, women were either unwilling or unable to stay and give evidence against traffickers, but there was still sufficient other evidence to prosecute the traffickers on charges of pimping. In both cases where trafficked women gave evidence, traffickers were only convicted on pimping charges, despite allegations of rape. Both cases illustrated a high degree of violence, coercion and intimidation against the women; however, as the convictions were only for pimping, sentences for traffickers have been light.

Eva

Eva was trafficked from Eastern Europe, repeatedly raped and forced into prostitution. She escaped, and charges were brought against three traffickers for rape, unlawful imprisonment and pimping in regard to four women. Eva was the only one who testified. The charge of unlawful imprisonment was dropped due to evidence that she had once left and returned to the premises (i.e. had an opportunity to escape). The defendant accused of rape was acquitted on that charge, and all three were convicted of pimping and received sentences ranging from 30 months to three years.

Donna

Donna was trafficked from Albania, raped and forced into prostitution. Her trafficker was charged with pimping and forgery. Her trafficker was convicted of both and sentenced to two years' imprisonment.

Police state the two major obstacles to prosecuting traffickers are the lack of a specific law against trafficking and the lack of trafficked women willing to stay and testify.¹³

To address the perceived unwillingness of women to testify in the United Kingdom, the Metropolitan Police Clubs and Vice Unit developed what they term 'proactive policing' methods - intelligence led investigations based on surveillance and monitoring activities. The Vice Unit states, "In this way we can get the conviction of the traffickers without putting the life of the woman at risk. This way we feel we can get a conviction. Then it is a bonus for us if the woman is willing to testify".¹⁴

Regarding trafficking for purposes other than prostitution, according to an NGO assisting migrant domestic workers, Kalayaan, there have been no cases in the past four years where domestic workers have testified against employers in criminal proceedings.¹⁵ In fact there have been no successful criminal prosecutions of employers exploiting domestic workers in this time. Kalayaan reports that they deal with very few cases that constitute 'trafficking', mostly in relation to children. In their experience, domestic workers rarely want to press charges against their employers, and since the criminal prosecution of employers is slow and difficult it is only something that is pursued with the full agreement of the particular domestic worker.¹⁶

As far as trafficking for other forms of labour is concerned, there is much confusion between trafficking and migrant smuggling by police forces and immigration. There have been a few criminal prosecutions of gang masters (labour contractors exploiting undocumented workers), for offences related to facilitating illegal migration and forgery. For these reasons it is difficult to ascertain if the workers concerned were trafficked, because the charges do not relate to offences against the person. An immigration official stated that the Immigration Service does not view such people as trafficked persons but primarily as "violators of the immigration rules, who may have been exploited but have come here purely to work... they have the freedom to leave their gangmaster if they want to".¹⁷ However, the same immigration officer admitted that many such migrants were in situations of debt bondage, and subjected to intimidation if not by the gangmaster, by the Eastern European organised criminal networks here in the United Kingdom to whom they owe money.¹⁸

A report by Don Pollard of the Transport and General Workers Union regarding gangmasters in Sussex, refers to the system of debt bondage under which many agricultural labourers from Eastern Europe find themselves working long hours for minimal pay in agricultural work: "The illegal workers have no

recourse to their rightful wages, as they fear if they complain, they will be sent back home. Threats, intimidation and even physical beatings are not unknown".¹⁹ There have been no reports of gang masters being prosecuted for the exploitation of their workers. Again, this may partly be blamed on the lack of adequate legislation covering trafficking and forced labour.

Seng

Seng was smuggled from China into the United Kingdom by an organised criminal group, the Snakeheads. He paid £20,000,²⁰ which was borrowed from other Snakeheads. However, upon arrival in London, he was taken to a house and imprisoned with others. The Snakeheads beat him until his family in China agreed to pay more money. Seng escaped by jumping through a window from the second floor of the building where he was held. Four traffickers were convicted of unlawful imprisonment and conspiracy to blackmail, and were sentenced to between seven and 14 years' imprisonment.

Over the past four years there have been four successful prosecutions of unlawful imprisonment, blackmail and kidnapping regarding trafficking of Chinese. These have all involved similar situations to Seng's, of people being held for extortion against their will. In a similar case, *R v Zhang*, a successful prosecution of unlawful imprisonment was upheld despite the fact that at one point the trafficked person had managed to escape from his captors and had subsequently returned to them, apparently because he was terrified of reprisals against himself and his family.²¹

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

The two women trafficked into prostitution who testified against their traffickers were granted exceptional leave to remain.²² At least six trafficked Chinese held by organised criminal groups who testified against their traffickers have been granted either asylum or exceptional leave to remain.²³

In regard to trafficking for prostitution, police and immigration officials state they usually send trafficked women who are unwilling to co-operate with the British authorities back to their home country within 48 hours of their arrest.²⁴ Police state that in most cases, trafficked women who are released during a

police raid and interviewed by both police and immigration are too terrified of their traffickers to consider remaining in the United Kingdom to testify against their traffickers. The police themselves lament that no adequate protection is available to protect the victims, however, more importantly they note the lack of protection for their families back home, and feel that without such protection, it is not in the best interests of the women to submit themselves and their families to the increased risk to their safety and to the considerable trauma that the process of testifying would entail.²⁵ Likewise, the Immigration Service dealing with exploited migrants in the agriculture sector reported the same wishes of undocumented agricultural workers: "They generally always say they want to go home... They are worried about reprisals against their families if they do not pay back the debt; we have never had a case where someone has been willing to testify".²⁶

The absence of a referral option and reflection delay, and instead the process of quick and quiet removal, leaves trafficked persons vulnerable to be re-trafficked. For example, in one case where a trafficked woman was returned to Thailand, within months she left the country again, because she was being pressured to repay her debt and was given no protection by Thai police.²⁷ Another woman trafficked from Albania, who was returned home as the result of a brothel raid, was brought back to the United Kingdom within a month by the same trafficker:

Lisa

*"I contacted him myself, because I was afraid for my family. We were receiving phone calls every night and threats, and I was scared back in Albania. I didn't trust the police, so I thought it would be easier and safer for them if I just went back to England."*²⁸

The process of returning the trafficked person to their country of origin, whether by deportation or removal, does not protect the trafficked person's basic human rights in terms of ensuring that they are protected from reprisals by traffickers²⁹ or their right not to be held in slavery.³⁰ In addition, this approach does not respect a trafficked person's right to access to justice.³¹ A residency permit for trafficked persons who have suffered harm, or appear likely to suffer harm upon return to their home country, would address these violations.

b) Protection from reprisals and police protection

The United Kingdom has a fully comprehensive witness protection scheme involving change of identity and relocation. It is not deemed appropriate in trafficking cases, because it is too controlling, expensive and extremely rigid. In the only known case of a trafficked person in the witness protection scheme, they were removed and it was considered not suitable since they made efforts to socialise with people from their cultural group and were easily identifiable in those circles.³² This highlights the issue that trafficked persons themselves ought to have input into the level and type of protection they receive.

Witness and victim safety are major considerations on decisions as to whether a defendant is held in custody pending their trial. If there is any suggestion that a defendant, either directly or indirectly, will intimidate a witness, he or she is likely to be kept in custody. In addition the police have the power to prosecute offences of attempting to pervert the course of justice, and other similar offences, which in other cases have been used where witness intimidation has occurred. Other measures for witness protection include provision of panic alarms or mobile phones to trafficked persons and thus the ability to contact police officers at all hours. A police case chaperone is assigned to serious crimes, and in cases of sexual offences is a female officer. The role of the chaperone is to provide support to witnesses of serious crimes through regular contact (at least once a week), to inform them of developments on the investigation and prosecution and to ensure that the witness has a police escort, to and within, the courthouse.³³

Eva

At trial, Eva testified to an open courtroom without any in-court protection measures. On the first day she took the stand, she was so traumatised at seeing the defendants again and having to tell her story, she collapsed. The police report that the defence were aggressive in their questioning. In the end, Eva was unable to testify to having been raped. She was invited to write down her answers, but this was still too traumatic for her.

Donna

On the first day of her testimony at trial, Donna broke down hysterically and the judge called for a two-hour adjournment so she could recover and continue to give evidence. She spent two days on the witness stand.

c) In-court evidentiary protection

Under the Youth Justice and Criminal Evidence Act 1999, special witness protection measures are available to witnesses if the quality of their evidence is likely to be diminished by reason of fear or distress in connection with testifying.³⁴ Some of the measures (mentioned here) apply to adults, as well as children. Factors most relevant in trafficking cases to determine if these measures should be applied are: the nature of the offence, the social, cultural background and ethnic origin of the witness, any behaviour towards the witness by the defendant, their family or associates, and views expressed by the witness.³⁵ Victim witnesses of sexual offences are automatically eligible for special protection measures.³⁶ Special measures include the use of screens (to prevent the witness seeing the defendant, but leaving the witness visible to the court,³⁷ evidence by live video link,³⁸ closed courtroom (only the defendant, judge and jury, legal representatives and interpreters are present) where the proceedings relate to a sexual offence or if there are reasonable grounds to believe that any person has sought or will seek to intimidate the witness.³⁹ Confidentiality prevents public disclosure of the names of victims of sexual offences (automatically) and vulnerable witnesses (upon request).⁴⁰ A new Criminal Justice White Paper, *Justice for All* released in August 2002 reiterates a commitment to special measures for vulnerable or intimidated witnesses.⁴¹ The paper states the introduction of special measures from July 2002 such as screens around the witness box, clearing of the public gallery in sexual offences cases, providing evidence by pre-recorded video or live TV links.

Although such measures are available upon application to the court, up till now, they have been rarely used in practice in trafficking cases. In a case of a trafficked teenager under 18, she was able to testify behind a screen shielding her from the public. The prosecutor explained that in this case it would also be possible to apply if she was an adult, on the grounds that she could easily be identified by others from her own country.⁴² Similarly in one of the cases of trafficked Chinese, they testified behind screens shielding them from the public, because of fear of reprisals from organised criminal groups. However, some prosecutors clearly regard the interests of the prosecution best served by a witness testifying in open court. Defence lawyers have concerns that in-court evidentiary protection measures may prejudice the defendant. There is clear tension between the additional trauma to victim witnesses who testify without any in-court protection, and the interests of both prosecution and defence.

Informal mechanisms are recognised to play an important factor also in safe testimony. Defence and prosecution witnesses should have separate waiting rooms.⁴³ This is available in some, but not all, courts. Where separate rooms are not available, alternative arrangements have been recommended such as the use of court office rooms and of pagers to summon witnesses.⁴⁴

The adversarial nature of the system, the process of examination and cross-examination, especially as to the 'credit' of the testimony (e.g. the defence seeking to undermine the credibility of testimony by calling the witness' character into question) is extremely unpleasant for trafficked persons giving testimony. Organisations such as Victim Support⁴⁵ play a role in advising victims about the courtroom and trial procedures. Unlike other jurisdictions, the prosecutor rarely has any contact at all with the witness before the trial begins, because the police perform all investigative roles.⁴⁶ Thus trafficked persons have often been unprepared for the nature and line of questioning in trials.

d) Right to information on court proceedings

Generally, it is the responsibility of the police to inform victim witnesses on developments of the criminal case throughout the investigation and prosecution. A standard regarding the role of the police in providing such information is recommended in the Victim's Charter (1996).⁴⁷ Case chaperones in rape cases have a specific duty to keep victims informed on the outcome of the police investigation and information about court hearings and the outcome of the case. Anti-Slavery International was unable to interview the two women who testified to inquire if they were well-informed regarding the court proceedings.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

In the United Kingdom, there is no right for a victim or witness in criminal proceedings to be advised by a lawyer. Neither Eva nor Donna had legal representation for the purposes of the criminal proceedings, including in their interviews with police.

b) Right to recovery (assistance measures)

This is the major obstacle in the current system of protection for trafficked persons. Firstly, there is no NGO providing specialised services to trafficked

persons. So, in cases such as Donna's, the police often find themselves in the position of being ad hoc social service providers, in terms of at least organising housing and legal assistance. Unless the trafficked person has applied for asylum, there is no recourse to public funds until they have exceptional leave to remain in the country. The accommodation and services offered under the asylum system cannot provide the kind of specific housing and specialised assistance needed for trafficked persons, and highlights the absence of a State funded NGO to provide support to trafficked persons. Until and unless an application for exceptional leave to remain is granted, they have no access to refuges or other housing that is state-funded. Neither do they have access to non-emergency medical care, training or counselling. In Eva's case, she made an application for asylum with the assistance of an immigration lawyer. This entitled her to access to services such as housing, medical care and basic financial assistance.⁴⁸

Donna

In Donna's case, no asylum claim was made, thus she had no recourse to public funds. This had a negative impact on her rights to even basic support, such as housing. Submitting an application for exceptional leave to remain does not entitle a person to social services. Finally, police were able to access some emergency funding from Social Security to pay for Donna's housing and food.

Trafficked persons who act as witnesses are put in contact with Victim Support. In Donna's case, this was especially useful because Victim Support provided a volunteer translator who was able to translate and provide basic support. One organisation, Eaves Housing, currently provides housing and services such as medical, legal and counselling to trafficked women, but has no State funding, and thus is limited in its capacity to assist trafficked women.

Trafficked persons who are granted exceptional leave to remain obtain the right to work, but only once the leave has been granted. Usually the process takes many months, and in the mean time trafficked persons have no access to State programmes of education/training or the right to work.

4. Legal redress and compensation

Openings to seek legal redress and compensation in the United Kingdom need to be developed and applied in trafficking cases, as in no case so far has compensation been awarded to trafficked persons. It is unfeasible for a migrant trafficked person to navigate this labyrinth of compensation options without legal advice. Police have the responsibility to inform victims about the right to compensation within the criminal justice process.⁴⁹ In the two cases that reached trial, no compensation was sought by the prosecution nor awarded by the judge. Criminal courts can award compensation to victims for loss or damage suffered as a result of a crime, though a study by Brienen and Hoegen reported that compensation is awarded in only a minority of cases.⁵⁰ Under section 130 of the Powers of Criminal Courts (Sentencing) Act 2000, courts may order that the person convicted of an offence pay compensation for any personal injury, loss or damage resulting from that offence, subject to certain conditions. Such compensation shall not exceed £5,000.⁵¹

In regard to seizure of traffickers' assets, the Proceeds of Crime Act 1995 confers a duty upon the court to order an offender to pay an amount when it determines the offender has benefited from criminal conduct.⁵² Under section 143 of the Powers of Criminal Courts (Sentencing) Act 2000, a court has the power to deprive a convicted defendant of the criminal property/assets related to that offence. Currently, the Metropolitan Police Central Clubs and Vice Unit has the highest seizure rate in the country; in regard to assets seized from traffickers in the first half of 2002 it had already seized over £275,000.⁵³ Under article 145 of the Powers of Criminal Courts (Sentencing) Act 2000, the court may make an order that any proceeds arising from the deprivation of the offenders' property (under sections 143 and 145) may be paid to a person who has suffered personal injury, loss or damage as a result of that offender's crime. There are concerns that currently seized assets are remaining in the Government's Treasury, rather than being applied to compensation for trafficked persons.

A trafficked person could bring a civil action against their trafficker though the amount may be limited if he or she has already received compensation under the Powers of Criminal Courts (Sentencing) Act 2000 (section 143). A civil claim can take two to three years to process; and there is no specific statutory right for an undocumented migrant to stay for the duration of the proceedings.

Trafficked persons can also seek compensation through the Criminal Injuries Compensation Scheme for various criminal injuries, paid for by the Government. The Criminal Injuries Compensation Act 1995 provides for a compensation scheme for victims of violent crime. The Scheme includes a tariff of injuries, including physical damage as well as shock (post-traumatic stress disorder, depression and other psychological symptoms). The fund has not been used to compensate trafficked persons so far, and amounts awarded for psychological injuries are generally low. For non-consensual sex the standard amount awarded is £7,500.⁵⁴

III Conclusions and recommendations

Trafficked persons are rarely recognised as victims of crime in the United Kingdom. Currently, laws are being used to remove trafficked persons rather than to protect their basic rights. There is no specific mechanism to ensure their rights are protected and to enable them to stay in the United Kingdom, unless they apply for asylum. Due to the lack of clarity in the law, the conflation of migrant prostitution and illegal migration with trafficking is manifested deeply in government policy and attitudes of the authorities.

Recommendations to the United Kingdom Government:

- Adopt comprehensive trafficking legislation, in accordance with the Trafficking Protocol, which covers all forms of exploitation and includes comprehensive human rights protection.
- Create a specialist prosecution unit for trafficking cases.
- Train law enforcement officials, in particular judges, lawyers and immigration officials, to help them to understand the predicament of trafficked persons.
- Provide a reflection delay of three months to those who need it
- Provide, under the immigration rules, specific rights of temporary and permanent residence for trafficked persons, independent of claims for asylum.
- Ensure the right for families of trafficked persons to join them in the United Kingdom, where there is fear of reprisals in their home country.
- Grant access to assistance and services, including the right to employment, to all trafficked persons.
- Fund specialised NGOs to provide services to trafficked persons.
- The authorities should inform trafficked persons of the court procedures available to make giving testimony less traumatic,

- and inform them that as victims, they have a right to ask for such measures to be used before the court hearing.
- Amend the Proceeds of Crime Act to ensure compensation for trafficked persons takes precedence over other claims on seized assets.

Endnotes

¹ In United Kingdom, Anti-Slavery International conducted the research in London only and thus the research focuses only on England and not Scotland or Wales. Anti-Slavery International spoke with various police officers dealing with prostitution and smuggling, immigration, a prosecutor, immigration lawyer, and NGOs.

² As stated in Kelly, L. and Regan, L. *Stopping Traffic: Exploring the extent of, and responses to, trafficking in women for sexual exploitation in the United Kingdom*, Police Research Series Paper 125, Home Office, 2000, p.10 and reiterated in Anti-Slavery International interview, Metropolitan Police, Human Smuggling Unit, Heathrow, 19 June 2002 and Anti-Slavery International interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, 15 June 2002.

³ Anti-Slavery International telephone interview, immigration officer, 26 June 2002.

⁴ Section 24 Sexual Offences Act 1956.

⁵ Kelly, L. and Regan, L., p.10.

⁶ Home Office White Paper, *Secure Borders, Safe Haven: Integration with Diversity in Modern Britain*, 2002.

⁷ Anti-Slavery International telephone interview, Home Office, 28 June 2002.

⁸ Anti-Slavery International interview, Immigration Advisory Service barrister, 22 May 2002.

⁹ *Ibid.*

¹⁰ Secretary of State for the Home Department vs., L.D., Immigration Appeal Tribunal, 13 April 2000.

¹¹ Information supplied by Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, to Anti-Slavery International, 8 March 2002.

¹² Anti-Slavery International telephone interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, 17 November 2001.

¹³ *Ibid.*

¹⁴ Anti-Slavery International interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, April 2001.

¹⁵ Anti-Slavery International interview, Kalayaan, London, 10 May 2002.

¹⁶ *Ibid.*

¹⁷ Anti-Slavery International telephone interview, immigration officer, 26 June 2002.

¹⁸ *Ibid.*

¹⁹ Pollard, D., Rural Agricultural Workers' Trade Group T&GWU, *Gangmaster System in Sussex*, 2000, p.4.

²⁰ £31,763.29.

²¹ Anti-Slavery International interview, Metropolitan Police, Human Smuggling Unit, Heathrow, 19 June 2002.

²² Anti-Slavery International telephone interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, 17 November 2001.

- ²³ Anti-Slavery International telephone interview, police, Scotland Yard, London, 2 August 2002.
- ²⁴ Anti-Slavery International interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross, April 2001.
- ²⁵ *Ibid.*
- ²⁶ Anti-Slavery International telephone interview, Immigration Officer, 26 June 2002.
- ²⁷ Anti-Slavery International interview, Global Alliance Against Traffic in Women, Bangkok, June 2001.
- ²⁸ Anti-Slavery International interview, trafficked woman, London, July 2002.
- ²⁹ Article 3 Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984 states no expulsion or return of a person to another state if substantial grounds for believing she would be in danger of torture. Also Article 7 Trafficking Protocol, Articles 24 and 25 Crime Convention.
- ³⁰ Article 8 International Covenant on Civil and Political Rights (1966) Prohibition on slavery and servitude.
- ³¹ Article 26 International Covenant on Civil and Political Rights (1966) and Article 15 Convention on Elimination of all forms of Discrimination Against Women (1979).
- ³² Anti-Slavery International interview, Metropolitan Police, Human Smuggling Unit, Heathrow, 19 June 2002.
- ³³ Anti-Slavery International interview, Metropolitan Police, Central Clubs and Vice Unit, Charing Cross 15 June 2002.
- ³⁴ Section 17(1) Youth Justice and Criminal Evidence Act 1999.
- ³⁵ Section 17(2).
- ³⁶ Section 17(3).
- ³⁷ Section 23.
- ³⁸ Section 24.
- ³⁹ Section 25.
- ⁴⁰ Section 46.
- ⁴¹ Home Office, *Criminal Justice White Paper: Justice for All*, CJS, 2002 at http://www.cjsonline.org/library/pdf/CJS_whitepaper.pdf.
- ⁴² Anti-Slavery International interview, prosecutor, London, 19 July 2002.
- ⁴³ Paragraph 16.1, Statement of National Standards of Witness Care, as stated in Home Office, *Speaking up for Justice: Report of the Interdepartmental Working Group on the treatment of Vulnerable or Intimidated Witnesses in the Criminal Justice System*, 1998, p 60.
- ⁴⁴ *Ibid.*
- ⁴⁵ An NGO providing support to victims of crime.
- ⁴⁶ Anti-Slavery International telephone interview, Crown Prosecution Service, London, 1 July 2002.
- ⁴⁷ Home Office, *The Victim's Charter* (1996) at <http://www.homeoffice.gov.uk/cpd/pvu/vicfore.htm>.
- ⁴⁸ In accordance with the Immigration and Asylum Act 1999.
- ⁴⁹ Brienen, M. and Hoegen, E., Chapter 7
- ⁵⁰ Brienen, M. and Hoegen, E., Chapter 7
- ⁵¹ € 7,990.
- ⁵² Section 1.
- ⁵³ € 439,483. Written Communication to Anti-Slavery International, Metropolitan Police, New Scotland Yard, 21 June 2002.
- ⁵⁴ €11,736.09. "Descriptions of injury", *the Criminal Injuries Criminal Compensation Scheme* at <http://www.cicap.gov.uk/site/hearings/tariffscheme/information/scheme/tariff3.htm>

8. United States of America¹

Introductory Note

The Trafficking Victim Protection Act of 2000 (TVPA)² addresses various forms of protection available to trafficked persons, including residence permits. It introduces new criminal provisions related to trafficking into the United States Code and various other strategies to combat trafficking. Since the law was still new, it was not possible to assess the implementation of the law using concrete cases as elsewhere, because the cases available for referral during the research period (December 2001) fell in the time period prior to implementation of the new legislation. The case studies and practices nonetheless still illustrate what obstacles still exist, and what obstacles may have been overcome through the new legislation.

I Legislation

1. Criminal Laws

a) Peonage and Slavery in the US Code

Under section 112 of the TVPA new criminal offences were introduced to amend the United States Code chapter on Peonage and Slavery.³ These are trafficking, forced labour and unlawful possession of documents.

Section 1590 of the US Code makes trafficking with respect to peonage, slavery, involuntary servitude, or forced labour a crime. It defines trafficking as "whoever knowingly recruits, harbours, transports, provides, or obtains, by any means, any person for labour or services" for peonage (holding another against their will to pay off a debt), slavery, involuntary servitude (holding another in service through force or threats of force) or forced labour (defined below). Trafficking is punishable by fine or imprisonment of up to 20 years, or both. It also contains a provision for up to a life sentence in cases involving kidnapping, aggravated sexual abuse (or attempts of either) or attempt to kill.

This definition of trafficking is in line with the Trafficking Protocol, and seems more practical in application because it requires fewer elements to prove and so covers more cases. For example, instead of having to prove deception, coercion or abuse of a position of vulnerability, all that is required is to prove peonage, slavery, involuntary servitude or forced labour. Within these crimes, those various elements of force, fraud, coercion etc. are implicit.

The new law against forced labour (section 1589) covers:

"A person who knowingly provides or obtains the labour or services of a person: -

- (1) By threats of serious harm to, or physical restraint against, that person or another person;
- (2) By means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labour or services, that person or another person would suffer serious harm or physical restraint; or
- (3) By means of the abuse or threatened abuse of law or the legal process".⁴

This is an important new provision in United States law because it fills a gap in criminal law, as previously under the crime of involuntary servitude, psychological coercion was insufficient to prove the crime. With the new crime of forced labour, which includes the use of psychological coercion, cases in which trafficked persons are told that they would eventually earn their own money once they pay back a debt, or that they would be arrested and put in prison if they left, or that their families would reject them if they were to return, are also covered under forced labour.

Section 1591 criminalises trafficking into the sex industry by force, fraud or coercion (including psychological coercion) and, where minors are involved, no force, fraud or coercion is required. The punishment for forced labour and sex trafficking through force, fraud or coercion is the same as for trafficking. Section 1592 deals with other unlawful conduct with respect to documents in furtherance of trafficking, peonage, slavery, involuntary servitude or forced labour. Under this section, "whoever knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document, or any other actual or purported government identification document, of another person in furtherance of any of the crimes related to peonage and slavery or in order to prevent or restrict (or attempt to) liberty to move or travel of a victim of severe form of trafficking, in order to maintain their labour or services is subject to a fine or imprisonment of up to five years, or both". Trafficked persons are explicitly excluded from prosecution for this offence.

The provision on confiscation of documents addresses one of the main

methods of coercion used by modern-day traffickers. Holding the trafficked person's papers is a severe impediment to most people being able to leave their situation, since it strips them of their identity and makes them even more afraid of being deported or detained as an undocumented migrant.

Prosecutors charge traffickers with either trafficking, slavery, involuntary servitude or forced labour, depending on which is easier to prove. The punishment is the same for all of these offences and the benefits and protections are the same for trafficked persons.

b) Other laws used to prosecute traffickers

Other relevant crimes that the Department of Justice may use to prosecute traffickers include "human smuggling, kidnapping, transportation for prostitution or any criminal sexual activity (Mann Act) and importation of aliens for unlawful activities including prostitution, organised crime and racketeering, fraud and false statements, money laundering and visa fraud".⁵ Additionally traffickers can be prosecuted under the Fair Labour Standards Act, the Migrant and Seasonal Agricultural Workers Protection Act, and for various immigration offences.

2. Other laws and policies affecting trafficked persons

a) Temporary residence: Continued presence, T visa and U visa

Prior to the Victims of Trafficking and Violence Protection Act (VTVPA), various temporary residency measures, such as 'parole in' or 'deferred action', were available to allow trafficked persons to remain to assist in prosecution of traffickers. These measures did not ensure trafficked persons could work or acquire services and support as they can under the VTVPA.

Continued presence (stay of deportation)

Under section 107(c)(3) TVPA, the Attorney General may grant 'continued presence' to a trafficked person if law enforcement officials determine the person to be a victim of 'severe forms of trafficking' and a potential witness to such trafficking. This is effectively a stay of deportation, the sole purpose of which is to assist in prosecution. It does not allow any time for a reflection delay (as in Belgium and the Netherlands) because the trafficked person must agree to co-operate in order to be given 'continued presence'. This section also provides that in such circumstances, officials involved must ensure the victim and victim's family safety including protection from

intimidation, threats and reprisals by traffickers and associates.⁶ 'Continued presence' entitles trafficked persons to support and assistance on the same basis as refugees, as well as the ability to work.

'Continued presence' applies to what is referred to in the TVPA as 'severe forms of trafficking'. This is essentially the same as the criminal definition of 'trafficking', but emphasises the need for elements of force, fraud or coercion. Section 103 of the TVPA also contains a provision on 'sex trafficking'. Sex trafficking is simply the recruitment, harbouring, transportation or obtaining of a person for the purpose of a commercial sex act. This distinction is confusing, especially since it collapses voluntary movement into sex work by adults with trafficking for the sex industry. In any event, severe forms of trafficking more closely relates to the Protocol definition of trafficking.

'T' and 'U' visas

Prior to the TVPA, trafficked persons who co-operated with authorities could reside in the United States in order to testify against traffickers, through various measures, including the 'S' visa post-trial. The quota on S visas is restricted to only 250 per year, and it is geared more towards informants on terrorism and organised crime rather than victims of crime. S visas cannot be guaranteed to victims who testify (due to risk of discrediting or impeaching their testimony) and thus witnesses had to trust that the prosecutor would recommend an S visa post-trial.

The T visa under the TVPA is essentially a streamlined S visa, which attempts to address the specific issues related to trafficked persons and can be issued prior to the trial. The T visa is specifically for trafficked persons, whereas the new U visa under the VTPA is for migrant victims of specific serious crimes including trafficking. The Attorney General grants the visas and is obliged to refer victims to an NGO that can advise them of their options in the United States and the resources that are available to them. T and U visas entitle visa-holders to the right to work (employment authorisation).⁷

The T visa is available to trafficked persons currently present in the United States if they have complied with a reasonable request to assist in the investigation or prosecution of trafficking and who would suffer extreme hardship upon removal from the United States.⁸ Thus, it is contingent upon a willingness to provide information or testify. The T visa is also available to

spouses and children or parents (all subjected to certain age restrictions) if necessary to avoid extreme hardship.⁹ There is a limit of 5000 visas for trafficked persons per year (this limit is not applicable to relatives).¹⁰ Trafficked persons who hold T visas can apply for permanent residence if they have been continually present for three years, not committed any violations and complied with reasonable requests to aid investigation and prosecution or would suffer extreme hardship involving unusual and severe harm upon removal.¹¹

According to the T visa regulations issued by Department of Justice, trafficked persons apply to the Immigration and Naturalization Service (INS) for visas themselves. The ostensible purpose of the self-petitioning provision is to prevent possible allegations of entrapment or impeaching evidence of victim witnesses, by separating the process of obtaining residency status from law enforcement and prosecution. The purpose is undermined by the regulation that trafficked persons must have had contact with a law enforcement agency (LEA) and submit a 'LEA endorsement' (describing how they are assisting the investigation or prosecution).¹² In addition they must prove hardship upon removal. Sample factors of hardship include physical and psychological consequences of being trafficked, access to criminal and civil redress and likelihood of being re-trafficked or harmed upon return. T visas are valid for three years but can be revoked at any time if, for example, the LEA withdraws its endorsement of the application or notifies INS that the person has 'unreasonably refused to co-operate'.¹³ It is also unclear if in such cases, trafficked persons may be deported even if it is determined they would suffer extreme hardship if removed. The power of revocation at any time effectively reduces the independence of the T visa from the prosecution process. INS could use the visa as leverage to encourage the witness to co-operate. This indicates potential problems in terms of impeachment material in prosecution of traffickers, but also in terms of violating trafficked persons' human rights by making them vulnerable to additional harm and danger as a result of effectively being forced to co-operate with law enforcement. What will be considered a 'reasonable request' by investigators may still be unreasonable for traumatised or fearful victims, especially those who have families at risk.

The tests of 'willingness to co-operate' and 'severe harm upon return' are unnecessarily restrictive. Those who co-operate in criminal proceedings against traffickers should be assured residency status even if they cannot

prove severe and unusual harm upon removal. Whilst the quota for T visas is 5,000 per year, considering the fact that an estimated 50,000 women and children alone are trafficked into the USA each year¹⁴ this means less than 10 per cent are eligible to obtain relief through the T visa.

The U visa has different criteria; the victim must prove he or she has suffered substantial physical and mental abuse as a result of being a victim of a certain crime and has information regarding criminal activity and must be (or have been or likely to be) helpful to law enforcement.¹⁵ 'Likelihood of being helpful' is determined by law enforcement.¹⁶ Spouses and children may also be granted the U visa to avoid extreme hardship and if the Government determines the investigation or prosecution would be harmed without the presence of the spouse or child.¹⁷ A maximum of 10,000 visas per year may be issued to victims.¹⁸ Permanent residence may be granted to U visa holders after three years of continuous residence if the person has not refused reasonable requests to provide assistance in an investigation or prosecution and if their presence is justified on humanitarian grounds, to ensure family interest or in the public interest.¹⁹ At the time of writing, no regulations had been issued concerning implementation of U visas.

II General Analysis and Comparison of Cases

1. Investigation and prosecution of traffickers

Since the introduction of the new criminal provisions of trafficking in 2000 there has been a substantial increase in prosecutions of traffickers. In 2001, the Department of Justice reported that the Civil Rights Division convicted 34 defendants for trafficking and slavery-related crimes and 91 federal trafficking cases were investigated.²⁰ This reflects a 19 per cent increase in twelve months. As mentioned above, a variety of crimes are used to prosecute traffickers. The following cases were prosecuted before new law, but display the different types of charges used to prosecute traffickers.

Florence

Florence spent five years in domestic slavery in California, forced to cook, clean and take care of two children for a couple from her own country. She was beaten and sexually assaulted by the husband. They threatened that the authorities would imprison her if she ever tried to escape because she was an illegal migrant. Finally she escaped with

the help of a neighbour. Florence gave evidence at trial against the male employer, and corroborating witnesses backed up her claims. The male employer was found guilty of conspiracy, involuntary servitude and harbouring an illegal immigrant. He was sentenced to 11 years in prison and ordered to pay \$125,819²¹ in restitution to Florence.

Luis

Luis was trafficked to pick tomatoes on a farm in a situation of debt bondage in Immokalee, Florida. He worked six days a week for 14 hours per day and lived in a mobile home with 23 other workers. He was promised he would earn \$100²² per day, but in reality he received \$40²³ a week to buy food once deductions for transport and rent were made. The trafficker told Luis that one trafficked person who tried to escape was caught. The traffickers beat that person and threatened to kill him if he escaped. Luis escaped with two other workers on a once-weekly escorted trip to an Immokalee grocery store. A week later the trafficker found Luis and the two other workers and threatened that they had to return to the camp and pay back \$5,000.²⁴ The trafficker was charged with extortion, harbouring illegal migrants and involuntary servitude. In a plea bargain, the charges were reduced into a multi-layered felony charge with a 33-month prison term and an order to pay \$29,000²⁵ restitution to victims. The case was completed within six months of Luis' escape.

These cases were prior to the TVPA, but each of them could now additionally be prosecuted as §1590 (trafficking) or §1589 (forced labour) under the TVPA. In Luis' case this might have resulted in a longer sentence for the trafficker. The TVPA enables more prosecutions of traffickers because of the inclusion of psychological coercion as proof of trafficking or forced labour. In Luis' case, prosecutors feared that because the coercion was mainly intimidation and threats it would be difficult to prove involuntary servitude. An Assistant United States Attorney (AUSA) stated that on the facts of Luis' case, it would be easier now to prove §1590 (trafficking) or §1589 (forced labour).²⁶

According to all the service providers interviewed, despite the existence of the TVPA, obstacles remain in the process of investigation. CAST states that the INS is the key to ensuring the success (or failure) of the TVPA.²⁷ The expertise investigators gain through working on these cases is often lost

because law enforcement agents are assigned according to geographic location rather than subject. Service providers assisting trafficked persons find themselves repeatedly in the position of 'training' agents' in regard to trafficking and victim-sensitive issues.²⁸

Successful investigations and prosecutions occur where law enforcement officials are experienced and sensitive to the specific issues regarding trafficked persons such as language, culture, safety and immigration status. In Luis' case, the Coalition of Immokalee Workers (CIW) states the reason that the case was a success in terms of a swift conviction was primarily because the INS, Department of Justice (DOJ) and Department of Labour (DOL) agents were experienced in dealing with the issues since they had recently dealt with a similar case.²⁹ Further, Luis and the other trafficked persons were very committed to justice being served and together with CIW they pressured law enforcement agents to respond quickly.³⁰ In a subsequent case in a different geographical region, effective prosecution of traffickers was hindered because investigative agents did not move quickly enough, did not speak Spanish and were not familiar with the intricacies involved in such cases.³¹ Similarly, CAST states the success of Florence's case was largely due to the tenacity of Florence's lawyer in liaising with investigators and prosecutors and pushing the process along.³²

INS agents interviewed in regard to Florence and Luis' cases admitted the key to the success of their investigation was the relationship established with witnesses and understanding the position and needs of the victims.³³ Difficulties remain regarding the clear separation between the law enforcement arm and the administrative arm of INS in granting immigration and work permits. While the two need to be clearly separate, lengthy bureaucracy delays in administration can occur.

Ruth

Ruth was trafficked into domestic work in Washington D.C. She entered the country legally on a B-2 visa arranged by her female employer who worked for the World Bank. She was physically and verbally abused by both of her employers. When the police came after one beating, Ruth was unable to explain her situation because she did not speak English, so the male employer 'translated' for her saying she was crazy and they were taking care of her. The employer took Ruth to a mental hospital and she was forcibly sedated and tied to a hospital bed. When she

returned home with the employers they threatened to call the police or take her back to the hospital if she did not 'behave'. Neighbours came to her aid and eventually she escaped from her situation. Although the Department of Justice and the FBI launched an investigation, things moved too slowly for Ruth. The male employer found out where she was staying and started to harass the family she was living with. The Government took no action to stop this, despite repeated requests from the Campaign for Migrant Domestic Workers assisting Ruth. After two months, Ruth decided to return to her country of origin. No charges were ever laid against the employers.

Ruth's case illustrates how slow and ineffective investigation techniques prevented a successful prosecution of a trafficker and jeopardised the safety of the witness to the point that her safest option was to return home. Mechanisms are needed to institutionalise how to address issues such as Ruth's safety, her access to information about the case and to ensure swift investigations by the various law enforcement departments. Regional inter-agency task forces involving Department of Justice officials from the INS, DOL, FBI, prosecutors, as well as NGOs have been developed in some regions, such as Los Angeles, Chicago, New York, San Diego, Houston and Atlanta, to improve investigation and prosecution of cases.³⁴ These work with varying degrees of effectiveness from region to region. More task forces are needed, as is the will of the agencies involved to ensure collaboration is effective.

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

Little can be said regarding actual implementation of the T and U visas since, at the time of the research, none had been issued. An analysis of the law and regulations of the T visa is included above. As of August 2002, only 2 have been issued although dozens of applications have been filed.

b) Protection from reprisals and police protection

Florence

Up to and during the trial, Florence's family back home faced repeated reprisals by relatives and associates of the traffickers. Her family home

was set on fire and her family intimidated by officials. Some trumped-up charges were filed against her brother by relatives of the traffickers, and he was beaten. The reprisals intensified to the point that two weeks before the trial, Florence was so concerned for her family's safety that she was unwilling to testify. INS was willing to bring family members to the United States to ensure their safety and protection, but the family did not want to come. The FBI used its contacts and arranged for a legal attaché to go to the village and inform local police. Local police spoke with both families and the reprisals stopped temporarily and Florence testified. Reprisals started again around the time of the sentencing of the traffickers. A neighbour was also intimidated and beaten by an associate of the traffickers soon after Florence escaped. Florence was kept in a secret shelter and did not face any direct reprisals herself.

By law, fully comprehensive witness protection measures are available to witnesses testifying in relation to trafficking, forced labour, slavery, involuntary servitude and unlawful confiscation of documents.³⁵ Witness protection measures specified under US law include change of identity, housing, transport costs, financial assistance, assistance to find employment and "other services necessary to assist the person in becoming self-sustaining."³⁶ One needs to establish a 'real' threat to trafficked persons, with evidence, which is difficult to prove. As one service provider to trafficked women noted, "The witness protection programme is premised on the notion of blending in which simply is not possible in most trafficking cases, because these people are migrants, they do not speak English and they are not immediately able to function independently as the programme requires".³⁷ Thus the Federal Witness Security Programme (complete witness protection with new identity and relocation) is not always suitable to trafficked persons.

Witness protection provided in trafficking cases tends to be more ad hoc, with varying degrees of success. Federal law states that the immediate family of witnesses may be protected and relocated if "endangered on account of the participation of the witness in judicial proceedings".³⁸ In several trafficking cases, family members of trafficked persons (spouse, children and siblings) have been provided residency in the United States as a measure to guarantee their safety. This was so in a case of a prominent San Francisco landlord, Lakireddy Bali Reddy (Reddy case) who trafficked men, women and

children into sexual and other forms of labour exploitation over a decade. In Florence's case, action was taken to protect the family's safety in the home country but the FBI was reluctant to speak about what specific measures were actually taken.³⁹ Florence herself was provided with police escorts for all meetings with law enforcement, and to and from the trial. Luis and Ruth were not provided any police protection.

Luis

After authorities apprehended two of the traffickers, one was still at large. Luis was in a flea market when he ran into the trafficker who had transported him to Florida. The trafficker threatened him, brandishing a gun. Since it was a Sunday, Luis was unable to call the federal agents, as they were not at work. He felt scared and vulnerable.

The Coalition of Immokalee Workers recommended that at least the Government should have given Luis a panic alarm or a mobile phone to ensure he had a direct line of communication to police in his own language at any time of day.⁴⁰ Similarly in Ruth's case, when the trafficker appeared at her new place of residence several times, the police did not take any effective action to keep her abuser away from her. The Campaign for Migrant Domestic Workers states that "The fact that at all times her location was common knowledge to her abuser made Ruth less willing to go forward and testify".⁴¹ Clearly there needs to be a way to institutionalise ad hoc protection measures to ensure that a minimum standard of protection is made available to all trafficked persons at risk of reprisals. There is also a need to ensure that certification of trafficked persons (and therefore their access to basic protection measures such as shelter) is immediate, as currently the process takes many months (see more below under 3.b. right to recovery i.e. assistance measures). Witness protection needs to consider simple measures that make trafficked persons feel safer rather than complex programmes which are in themselves systems of control. More recently, the Department of Justice stated that intermediary measures such as provision of secure housing/shelter, panic alarms, mobile phones, change of telephone number and address, daily contact by law enforcement if desired, can be provided in trafficking cases.⁴²

c) In-court evidentiary protection

In the United States, formal in-court evidentiary protection measures are

used very rarely. Civil rights enshrined in the Constitution ensure the rights of defendants to a fair trial, and prioritise an open system of justice. Adult victim witnesses have fewer possibilities for in-court protection than witnesses have in civil law countries. The only real measure of in-court evidentiary protection is that witnesses may request that their names be kept confidential in proceedings and thus not released to the public.⁴³ Criminal trials are always open to the public and there is no obligation concerning confidentiality although ethical reporting guidelines usually prevent witnesses' identities from being reported in the press.⁴⁴ Informal protection mechanisms such as separate waiting areas for victims at court are used.⁴⁵ The Attorney General Guidelines for Victim and Witness Assistance (2000) comprehensively cover standards for treatment of victims and witnesses by law enforcement officials during investigation and prosecution.⁴⁶

There are victim witness coordinators, attached to all AUSA Offices, who provide a range of information and support measures to victims of crime acting as witnesses in federal criminal cases. These coordinators are part of the prosecution team, and essentially play a liaison role with victim witnesses to ensure their rights are recognised and needs are addressed. Their ability to perform their multi-faceted roles in supporting and assisting victim witnesses is hampered by a shortage of resources. For example, in California there are only three victim witness coordinators for all victim witnesses of federal crimes, of which trafficking is only one. In regard to evidentiary measures, they can sit with witnesses during the case, and help prepare a witness impact statement before sentencing. Such statements are submitted orally or in writing to the judge before sentencing a defendant, to ensure the views of the victims are taken into consideration in sentencing.

Some consider the US system of plea bargains (though politically questionable) as a measure of protection, because it ensures a conviction without victim witnesses undergoing the trauma of testifying in court. Plea bargains occur only in cases where victims have input into the decision to accept plea bargain arrangements with the prosecution. In the plea bargain arrangement of the Reddy case a trafficker was sentenced to eight years in prison and ordered to pay US\$2 million in restitution to four of the victims.⁴⁷

d) Right to information on court proceedings

Under the United States Code, a federal crime victim has the right to be notified of court proceedings and the right to information about the

conviction, sentencing, imprisonment and release of the offender.⁴⁸ In all the cases studied, the victims were kept well informed about the court proceedings through a lawyer or service provider liaising with law enforcement and the prosecution on their behalf. No major difficulties were reported. Ensuring trafficked persons are kept informed about court proceedings is also a role for victim/witness coordinators.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

Lawyers represent the immigration and civil claims of trafficked persons, however they can also influence the criminal proceedings in a positive way. Although witnesses' lawyers do not participate directly in the trial proceedings, they can ensure the trafficked persons' rights are protected at all stages, and be present in all interviews with investigators and prosecutors.⁴⁹ In Florence's case, CAST states that the best service Florence received was legal assistance.⁵⁰ Florence's lawyer was present in all meetings and could facilitate her participation in interviews, not to stop her from divulging information, but to assist her to tell her story straight. This is especially important in trafficking cases where trafficked persons are so traumatised it affects their ability to remember and record things in a coherent way, especially timing of events. Florence's lawyer prevented Florence from having to repeatedly recount particularly traumatic parts of her story unnecessarily.⁵¹ Lawyers must be culturally sensitive and it helps if they speak a common language with the trafficked person.

In the Reddy case, lawyers played a crucial role in representing the victims' interests by ensuring that "law enforcement treated the victims as victims, and with sensitivity."⁵² This representation initially involved enabling the release of trafficked persons from immigration detention facilities where they had been held for two weeks 'for their own safety' and into secure shelters. A Department of Justice prosecutor interviewed also agreed that criminal cases generally are more successful when trafficked persons have lawyers who can mediate and represent their interests regarding requests from the prosecution and defence.⁵³

b) Right to recovery (assistance measures)

Under the TVPA, trafficked persons are eligible for benefits and services in the same way as refugees.⁵⁴ To receive services, trafficked person must either

have a bona fide T visa application, be willing to co-operate with reasonable requests from authorities, or have been granted continual presence in the United States.⁵⁵ In practice this process of 'certifying' trafficked persons takes a long time; in the Reddy case, the process of certification took approximately eight months.⁵⁶ In Florence's case, certification took 12 months. CAST paid for her place in a shelter, her food, medication, and transportation for this period. For certification to be meaningful to trafficked persons, it needs to be immediate. In the meantime, trafficked persons are dependent upon the resources of NGOs, INS and various victim-witness protection funds that exist. Medical care is also extremely limited with very few emergency medical facilities available to undocumented persons.

Adequate and appropriate housing is clearly the biggest service problem in the United States because the Government has not funded any shelters specifically for trafficked persons. CAST and the Campaign for Migrant Domestic Workers both stated a main obstacle is finding suitable shelter for trafficked persons, which provides long-term accommodation, adequate security and cultural sensitivity.⁵⁷ Ruth and Luis were dependent on individuals to house them, which is not ideal, especially considering in both cases traffickers discovered where they were living and harassed the trafficked person and the household. In the Reddy case, the Asia Pacific Institute on Domestic Violence stated services for victims worked best when women fit neatly within the service program. Specific needs such as the security issues regarding trafficked persons were more difficult to administer in a way that could afford both physical protection and protection of their rights.⁵⁸ This case also illustrated the potential for conflict between legal and social service provision catering to different needs of victims.

The right to work is addressed through the T visa and highlights the importance of visas being issued faster so people can be economically independent. As Luis stated, "I came to this country to work, and just because I'd been screwed over, I still needed that. I don't need benefits, I just want to work".⁵⁹ Both Luis and Florence had to wait six months to one year for work permits. Victim witness coordinators, who also act as referrals for victim witnesses, need to be aware of appropriate services to direct trafficked persons to. In addition, they should play an important role by following up and speeding up the process of certification so trafficked persons can access support and assistance measures faster.⁶⁰

4. Legal Redress and Compensation

Under federal law on mandatory restitution, criminal courts are obliged to order the defendant to pay the victim the full amount of the victim's losses, including fair wages for labour or services.⁶¹ Section 1594 sets out forfeiture of all traffickers' assets to the Government. As yet, it is unclear whether such forfeiture will occur before or after the payment of mandatory restitution to the victim. As the International Human Rights Law Group notes, there must be a clear process to ensure forfeited assets pay compensation and restitution claims to trafficked persons first, in order to ensure the rights under §1593 are protected.⁶² Florence was awarded \$125,819⁶³ in restitution, but it is unlikely ever to be paid, as the trafficker had no assets. Luis was paid some restitution under the plea arrangement.

The victim may also bring a civil claim against the trafficker but this would be more complicated as trafficked persons would have to try to receive the money from the forfeited assets held by the Government.⁶⁴ A trafficked person would only seek to pursue a civil suit generally after the criminal case, if the claim for restitution was not satisfactory. In the Reddy case, victims have filed a civil suit against the trafficker. The US has state compensation funds, though they are of little use because they only cover lost wages due to injury.

III Overall conclusions and recommendations

The new criminal provisions related to trafficking display a clear application of the Protocol that is more user-friendly for law enforcement and prosecution. The inclusion of psychological coercion under forced labour is especially important in enabling more traffickers to be prosecuted for crimes where force or threats are less apparent. However, only trafficked persons who co-operate with authorities can stay in the United States and thus only victim witnesses access wide-ranging protection and support measures under the TVPA. The success in the illustrated cases was due to the commitment of trafficked persons, service providers, lawyers and individual law enforcement agents. This is still needed despite the TVPA. The Government still needs to institutionalise effective investigation and victim-sensitive mechanisms for trafficking cases within investigative and prosecution departments.

The Government needs to do more to make the process an empowering one for victims, where they can make informed choices and regain control over their lives that through the process of being trafficked has been denied to them. As Florence's lawyer stated, "There is a tendency to 'over-victimise' the victim in the courtroom in trafficking cases, but there is a need to recast the narrative. You can choose between seeing this story as a poor dumb girl from the village who was completely duped into a very horrific situation, or you can see it as a woman who was denied everything at various points in her life, but despite it all was smart and savvy and really is going to try and make something out of this."

Recommendations to the United States Government:

- Police protection should include direct access to law enforcement officers in case of emergency, e.g. panic alarms.
- Provide State-funded safe housing for male and female trafficked persons, from the moment of discovery. This must not be detention, and should be appropriate to the trafficked person's needs.
- Immigration (INS) should streamline process of certification and granting of T and U visas to ensure trafficked persons access to essential services is immediate (i.e. within 24 hours) and that they are guaranteed the right to work.
- Department of Justice should evaluate existing multi-agency task forces, in order to ensure good practices are replicated and avoid bad practices.
- Department of Justice should expand multi-agency task forces to other regions.
- Continue training of all those involved in use of the trafficking provisions.
- Department of Justice should provide more resources for victim witness coordinators to deal with trafficking cases.
- Develop mechanisms and anti-trafficking units to provide effective national coordination between different law enforcement bodies and different states, and consistent practice.
- Ensure all trafficked persons are equally provided access to services and support.

Endnotes

¹ In the United States, Anti-Slavery International conducted the research in California, Washington D.C. and Florida. Anti-Slavery International would especially like to thank Coalition to Abolish Slavery and Trafficking (CAST) in Los Angeles, International Human Rights Law Group and Campaign for Migrant Domestic Workers in Washington D.C. and Coalition of Immokalee Workers in Immokalee (Florida) for their assistance in providing cases for the research and sharing their expertise. Anti-Slavery International also spoke with people who had been trafficked, police, immigration officers, prosecutors, lawyers, and representatives from the Departments of Justice, Labour and State (Centre to Monitor and Combat Trafficking in Persons) and from various other NGOs. Anti-Slavery International would like to recognise the input of Ann Jordan who provided detailed comments on the draft text.

² Which is the first part of a larger Victims of Trafficking and Violence Protection Act 2000 (TVPA).

³ Title 18 Crimes and Criminal Procedure, Part I Crimes, Chapter 77 Peonage and Slavery, US Code.

⁴ Section 1589 (forced labour) US Code.

⁵ Sections 1956 - 1957 U.S. Code. Women's Bureau of the U.S., Department of Labour in collaboration with the U.S. Departments of Justice, Health and Human Services, and State, *Trafficking in Persons, A Guide for Non-Governmental Organisations*, 2001 at <http://www.usdoj.gov/crt/crim/wetf/trafficbrochure.html>

⁶ Section 107(3) TVPA.

⁷ Section 107(e)(4).

⁸ Section 107(e)(1).

⁹ Section 107(e)(1).

¹⁰ Section 107(e)(2).

¹¹ Section 107(f).

¹² National Immigration Law Centre, 'Immigration Law and Policy: Obtaining Lawful Permanent Residence Status,' *DOI Issues Regulations for T Visas, Available to Victims of Trafficking, Immigrants' Rights Update*, Volume 16, No. 1, February 28, 2002 at <http://www.nilc.org/immlawpolicy/>

¹³ *Ibid.*

¹⁴ Richards, A., *International Trafficking in Women to the United States: a contemporary manifestation of slavery and organized crime* (DCI Exceptional Intelligence Analyst Program: An Intelligence Monograph), 2000.

¹⁵ Section 1513 (b)(3) TVPA.

¹⁶ Section 1513(c)(1).

¹⁷ Section 1513(b)(3).

¹⁸ Section 1512(c)(2).

¹⁹ Section 1512(f).

²⁰ Nelson, D., Department of Justice, as quoted in the *Chicago Sun Times*, 25 February 2002.

²¹ € 129,285.43.

²² € 102.76.

²³ € 41.10.

²⁴ € 5,137.74.

²⁵ € 29,798.90.

²⁶ Anti-Slavery International interview, AUSA, Fort Myers, 12 December 2001.

²⁷ Anti-Slavery International interview, CAST, Los Angeles, 28 November 2001.

²⁸ Anti-Slavery International interview, CAST, Los Angeles, 28 November 2001, and Anti-Slavery International interview, Coalition of Immokalee Workers (CIW), Immokalee, 11 December 2001.

²⁹ Anti-Slavery International interview, Coalition of Immokalee Workers, Immokalee, 11 December 2001.

³⁰ *Ibid.*

³¹ *Ibid.*

³² Anti-Slavery International interview, CAST, Los Angeles, 28 November 2001.

³³ Anti-Slavery International interview, INS, Los Angeles, 27 November 2001, and INS, Miami, 13 December 2001.

³⁴ Anti-Slavery International telephone interview, former DOJ (Civil Rights Division) employee, Washington D.C., 1 August 2002.

³⁵ Section 107 TVPA

³⁶ Title 18, Part II, Chapter 224, Section 3521 (a) (1). US Code

³⁷ Anti-Slavery International interview, Asian Pacific Institute on Domestic Violence, San Francisco, 30 November 2001.

³⁸ Title 18, Part II, Chapter 224, Section 3521 (a) (1). US Code

³⁹ Anti-Slavery International interview, FBI, Los Angeles, 27 November 2001.

⁴⁰ Anti-Slavery International interview, Coalition of Immokalee Workers, Immokalee, 11 December 2001.

⁴¹ Anti-Slavery International interview, Campaign for Migrant Domestic Workers, Washington D.C., 4 December 2001.

⁴² Anti-Slavery International telephone interview, DOJ Office for Victims of Crime, 2 August 2002.

⁴³ Anti-Slavery International telephone interview, prosecutor, 6 December 2001.

⁴⁴ *Ibid.*

⁴⁵ Title 42 US Code §10607(C)(4).

⁴⁶ US Department of Justice, *Attorney General Guidelines of Victim and Witness Assistance*, 2000 p. 25-37.

⁴⁷ Anti-Slavery International, interview, ACLU lawyer, San Francisco, 30 November 2001.

⁴⁸ Title 42 10606 (b) U.S. Code.

⁴⁹ Anti-Slavery International interview, ACLU lawyer, San Francisco, 30 November 2001.

⁵⁰ Anti-Slavery International interview, CAST, Los Angeles, 24 November 2001.

⁵¹ Anti-Slavery International interview, American University legal academic and lawyer, Washington DC, 6 December 2001.

⁵² Anti-Slavery International interview, ACLU lawyer, San Francisco, 30 November 2001.

⁵³ Anti-Slavery International interview, DOJ, Washington DC, 6 December 2001.

⁵⁴ Section 107(b)(1) TVPA.

⁵⁵ *Ibid.*

⁵⁶ Anti-Slavery International interview, ACLU lawyer, San Francisco, 30 November 2001.

⁵⁷ Anti-Slavery International interview, CAST, Los Angeles, 24 November 2001 and Campaign for Migrant Domestic Workers, Washington D.C., 4 December 2001.

⁵⁸ Anti-Slavery International interview, Asia Pacific Institute on Domestic Violence, San Francisco, 30 November 2001.

⁵⁹ Anti-Slavery International interview, *Luis*, Immokalee, 11 December 2001.

⁶⁰ Anti-Slavery International telephone interview, former DOJ (Civil Rights Division) employee, Washington D.C., 1 August 2002.

⁶¹ §1593 US Code.

⁶² International Human Rights Law Group, (IHRIG) Draft Commentary on the Trafficking Victims Protection Act 2000.

⁶³ ¶126, 152.35.

⁶⁴ § 1594 US Code.

9. Italy¹

I Legislation

1. Criminal laws

Italy has no specific criminal provision against trafficking in human beings, but it is punishable under several other articles of the Penal Code. Italian prosecutors are rare in that they have understood a wide range of specific offences may be committed in the course of trafficking, each of which is punishable.

a) Article 600 and 601 Penal Code

Article 600 provides that "any person who reduces another to slavery, or to a condition similar to slavery, is punishable by imprisonment between five and 15 years." The Penal Code does not define 'reduces another to slavery', though this can be derived from definitions in the United Nations Slavery Convention (1926) and the United Nations Supplementary Convention on the Abolition of the Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956), both of which Italy has acceded to. Cases falling under article 600 have the common element of control by one person over another person. Article 600 has been used in recent years particularly to punish offences involving minors and cases of forced begging of Roma children.² Jurisprudence suggests, in the absence of any specific law on trafficking, article 600 can be used to prosecute trafficking in persons. In 1996 the Cassation Court (*Corte di Cassazione*) passed a judgment stating that in cases where there is complete control of one person by another, what constitutes slavery is dependent upon the specific situation and may be decided on a case-by-case basis.³

Irena

Irena was trafficked from Albania to Italy with a group of women. One of her traffickers was actually a relative from the same village. In Italy she was forced into prostitution. She and the other women were constantly intimidated and beaten, and forced to have illegal abortions involving serious health risks. They were rescued during a police raid. Irena and two other women made statements to the police. Thirty-eight

Italian and Albanian traffickers were arrested following the police investigation. Blackmail and threats continued after Irena's initial statement. The 38 traffickers were convicted of various crimes, including; facilitation and exploitation of prostitution, bringing women illegally into Italy with the aim of exploiting them in prostitution, reduction to slavery and slavery-like conditions, encouraging the involvement of Italians and others in organised crime, giving false statements, obtaining illegal abortions for those women who became pregnant while working as prostitutes, illegal possession of firearms, deprivation of liberty and harbouring heroin with intent to supply. Six of the traffickers were convicted of reduction to slavery. The investigation showed that there were clear links between Albanian criminal groups and local Italian criminals, who helped directly or facilitated criminal activities.

Article 601 provides "whoever traffics or otherwise trades in slaves or persons in a condition similar to slavery shall be punishable by imprisonment from five to twenty years". This is used less frequently than article 600.

b) Law 75 of 1958 (The Merlin Law): closure of brothels and exploitation of prostitution

This is not an anti-trafficking law, in the spirit of the Trafficking Protocol, but rather one reflecting the United Nations 1949 Convention, criminalising third party involvement in prostitution.⁴ Enticement or recruitment into prostitution is sometimes applied to prosecute those who traffic people into prostitution. Article 4(1) stipulates that such offences are aggravated if the exploiter uses threats, deception or violence. The Merlin law tends to consider exploitation of prostitution as a crime against public order or morality rather than as a crime against the individual,⁵ thus not really reflecting the nature of the abuses that occur in trafficking.

Mary

Mary was trafficked from Nigeria to Italy and forced into prostitution under debt bondage. After one year she escaped. She did not immediately report her traffickers because she feared for her family in

Nigeria. However, threats against her and her family occurred because of her outstanding debt. Mary finally reported her traffickers and one of them, her 'Madam' was convicted on the charge of exploitation of prostitution. She was sentenced to 22 months in prison and fined 600,000 lire.⁶

Jana and Maria

Jana was trafficked through the Balkans to Italy. The man who exploited her in Italy bought her in Albania. A relationship developed between them and in which he became her 'boyfriend'. He forced her into prostitution in Italy, and raped her repeatedly. He kept control of her and another woman from Eastern Europe, Maria. They were forced to work every day. Out of the 20 million lire⁷ each of them earned every month, they were sometimes allowed to keep two million lire⁸ for themselves. Then in the last few months, Jana was not given any money. Their trafficker controlled them by watching them as they worked, recording the length of time they spent with clients and constantly calling them on their mobile phones. Maria and Jana were both scared to report their trafficker to the police. Their trafficker threatened to kill Maria's mother and sister since he knew where they lived. A local NGO contacted Maria and Jana, and advised them of their legal rights to a permit to stay, and of the support available to them. They escaped and reported the trafficker to the police. On the basis of their testimony, police arrested and prosecuted the trafficker. He was charged with facilitation, enticement and exploitation of prostitution under aggravated circumstances,⁹ aiding and abetting illegal migration and residency,¹⁰ forcing another to undergo sexual acts/sexual abuse¹¹ and the possession of false documents¹² and weapons.¹³ The trafficker pleaded guilty and was sentenced to four years in prison.

c) Other laws used to prosecute traffickers and future law

Other relevant laws that are used to prosecute traffickers are article 12 of the Immigration Law 286 of 1998 (facilitation of illegal migration), article 605 (kidnapping), article 416 (criminal association) and article 416*bis* (involvement with *mafioso* type¹⁴ organised criminal association) Penal Code. The Senate is presently discussing a Bill (S.885) regarding trafficking in persons which proposes amendments to article 600 Penal Code and to

create a specific offence of trafficking, article 602*bis*. Under the amended article 600, a definition of 'servitude' is proposed as 'a continuous state of being deprived of freedom of choice and, depending on the facts of the case and the victim's experiences and personal circumstances, force them to render either labour or sexual services'.¹⁵ It proposes that "anyone who through violence, threats or deception forces or induces one or more people to enter, remain or leave the territory of a State, or to move around within it, with the aim of coercing that person into forced labour, begging, sexual exploitation or in any case to a condition of servitude, is punishable with imprisonment from eight to 20 years".

2. Other laws and policies affecting trafficked persons

a) Temporary residence: Article 18 of the Immigration Law

Trafficked persons who are not Italian nationals have a right to temporary residency under article 18 of the Immigration Law, Law 286 of 1998. Article 18 provides a renewable six-month permit to stay to victims of severe exploitation who are seen to be in danger as a result of escaping from the situation.

The Article 18 permit applies to migrants in situations of abuse or severe exploitation where their safety is seen to be endangered as a result of trying to escape from the situation or as a consequence of pursuing criminal action against the traffickers. People granted the Article 18 permit are obliged to take part in a social assistance and reintegration programme offered by various local NGOs and community projects in Italy. They are also afforded access to social services and educational institutions, enrolment with the State's employment bureau and are provided access to employment. Granting of the Article 18 permit is not tied to the person's willingness to take part in any legal proceedings against the trafficker, and can be obtained through two different channels: through the social services of local councils and registered NGOs or through the Prosecutor's Office, though in practice it is issued in both cases by the *Questore* (Chief of Police for each district). The permit is renewable after the initial six months for another year, either if the permit holder is assisting the prosecution, or enrolled in an education programme or employed at the date of expiry of the initial permit. Thus the Article 18 permit is not dependent upon the quality of the trafficked person's co-operation during investigation or prosecution, but dependent upon participation in a social assistance programme.

The Article 18 permit may be obtained by making a simple statement to the police which reports that the crime has occurred (*esposto*), not only by making a full, sworn statement (*denuncia*). The idea of such a procedure is that it allows for a period of consideration (equivalent to the reflection delay in the Belgian and Dutch systems) before a victim decides whether he or she wishes to testify. However, the danger of retaliation against a victim may be the same, as the prosecutor can start an investigation once an *esposto* has been made.

b) Permanent residency opportunities

The Article 18 permit is renewable, and it does not state that the person must return home. If the trafficked person has found employment at the end of the initial 18 months stay, they can remain indefinitely depending on their work contract, and eventually apply for permanent residency. Renewal of residency documents is determined by the degree of the person's integration into Italian society and employment. Trafficked persons can submit applications for asylum on the grounds of fear of persecution and of no provision of State protection against such persecution.¹⁶

II General Analysis and Implementation in Cases

1. Investigation and prosecution of traffickers

Although articles 600 and 601 are now being used to prosecute trafficking cases, successful convictions regarding cases of trafficking in adults are limited. According to the anti-*mafia* programme of the national Prosecutor's Office, article 600 was applied in only seven cases between 1997 and 1999. This is because 'reduction to slavery' was interpreted as complete physical deprivation of liberty. Recently, however, there has been a shift to broadening the scope of article 600. For instance the Court of Assizes¹⁷ in Rome recently held that slavery is an extremely serious crime. The court also held that people might be held in slavery, if they have some limited freedom of movement. For example, trafficked persons may have physical 'freedom', and be controlled through other methods such as mobile phones, these methods are sometimes the tools used by traffickers just to achieve the subjection of the victims.¹⁸ In Milan, article 600 was applied in nine trials concluded in 2000, and five trials concluded in 2001.¹⁹ In Busto Arsizio, article 600 was used to convict a total of 40 traffickers in seven trials

concluded in 2000.²⁰

While statistics are available on the number of prosecutions for exploitation of prostitution and illegal migration, it is not clear how many of these are actually trafficking cases under the terms of the Trafficking Protocol. Without a specific provision against trafficking, it is difficult to collect reliable statistics on prosecutions of traffickers. However, according to one court judge, since the Article 18 residency permit has been available, the number of prosecutions of traffickers has increased and the majority of cases have resulted in convictions.²¹

In Italy, investigation and prosecution of trafficking mostly has been directed only at the last link in the chain of a much larger criminal network (as in Mary and Jana's cases). Trafficking is still confused with exploitation of prostitution in this way (prosecution of pimps) and rarely seen as an activity by organised crime with many different actors. Irena's case was unusual in that it also involved the prosecution of many other criminals involved. Other obstacles to prosecution, identified by two prosecutors included the transnational nature of trafficking (and thus difficulties in apprehending defendants), lack of co-operation with authorities in other countries, and corruption of the authorities in countries of origin.²²

Dimitru

Florin and Dimitru, two men from Romania, were trafficked to Italy. On arrival they were put to work in construction. Their documents were taken away and they were held in debt bondage. They were deceived as to the amount of money they would earn, and most of their earnings were retained by their trafficker for rent and for travel expenses. They worked 12 hours or more per day, and slept 10 to a room in premises supplied by the employer. They were afraid to go to the police because they were working illegally and because they did not have their passports. Florin discovered he could legalise his status under an amnesty for illegal migrant workers in Italy. He told Dimitru and the others and encouraged them to leave their employer. The employer discovered this and burned Florin alive in front of the other workers. At first, they were too scared to report the employer, but a trade union

assisted them and they decided to report the trafficker. Dimitru and some others reported the trafficker and were granted the Article 18 permit to stay. Their employer was arrested and tried for murder. He was convicted and sentenced to 30 years in prison

There are few prosecutions of traffickers who exploit people in areas other than the sex industry. Dimitru's case was prosecuted successfully but it was an extreme case. The only charge was for Florin's murder, not for the exploitation of Dimitru and other workers. Prosecutions of trafficking other than for prostitution tend to be based on charges of facilitating illegal migration.²³ In very few cases, where trade unions or NGOs are able to assist those trafficked into domestic work, construction, garment or other industries, civil claims may be lodged under the labour law for low payment or non-payment of wages or health and safety labour violations, but up until now these have generally been unsuccessful.²⁴

The unwillingness of trafficked persons to testify against their traffickers remains a significant barrier, despite Article 18. This is especially true in cases such as Jana's where there is a 'romantic' relationship between the trafficker and trafficked person. In such cases, not only is the coercion less visible, but the confused emotions the trafficked person has for his/her trafficker make him/her less likely to be willing to report the trafficker, and, if they do, to be regarded as a less reliable witness.²⁵ Although under the law it is not necessary for trafficked persons to report their trafficker in order for a prosecutor to start an investigation and prosecution, statements by trafficked persons are of fundamental importance to a successful prosecution.²⁶ Other forms of evidence used in trafficking cases are generally based on surveillance and monitoring by the police.

2. Procedure affecting trafficked persons and measures of protection

a) Residency rights

Article 18 of the Immigration Law in Italy is the only system in Europe that provides a temporary residence permit to trafficked persons who are not willing to testify against their traffickers. Article 18 introduces "two different and alternative circuits; a social and a judicial one".²⁷ There are no accurate statistics on how many trafficked persons with Article 18 permits testify, but a judge estimated approximately 70 to 80 per cent of the Article 18 permits

are issued to people co-operating in prosecutions and about 20 to 30 per cent to individuals who are only involved in social assistance and integration programmes.²⁸ According to the Milan *Questura*, 55 permits were issued in the first six months of 2002, but only four of these were through the social route, the other 51 had pressed charges against their traffickers.²⁹

According to an NGO report, approximately 1500 Article 18 permits were issued between January 1999 and March 2002, of which four to six per cent were for minors.³⁰ Statistics released by the Ministry of the Interior show that 1044 permits were issued in the two-years' 1999 and 2000, of which 74 were for minors.³¹ The Ministry for Equal Opportunities reported that on 31 December 2001, there were 744 Article 18 permits currently valid, of which 651 had been issued to females.³²

No information was available to indicate what proportion of permits had been issued to those trafficked into prostitution as opposed to those trafficked/exploited in other sectors. However, evidence indicates that few Article 18 permits were issued for purposes other than prostitution. In part, this is because the funding for social and integration programmes related to Article 18 is limited to cases of sexual exploitation. Such programmes are clearly not appropriate for most cases where men are trafficked, and for those who are trafficked for other purposes, such as Dimitru. COLCE³³ mentioned that in one case they handled, where a woman was trafficked into domestic work, it was not appropriate to put her in a shelter and a programme with women who had been forced into prostitution: "She clearly did not want it and so we did not put in an Article 18 permit on her behalf".³⁴

Although under the law, the Article 18 permit is not conditioned on the trafficked person's readiness to report their trafficker, in practice there is a clear tendency to grant permits only to those who are willing to testify. In all four cases included in this report, once contact with the authorities was made the trafficked persons made statements implicating their trafficker almost immediately. In all cases, the trafficked persons provided evidence to the police and gave evidence against the traffickers. COLCE³⁵ state that of 40 cases in which they have assisted trafficked women to obtain the Article 18 permit, there was only one case where the person was granted the permit without having to report her trafficker to the police. It is the *Questura* that grants the Article 18 permit in all cases, "The *Questura* will not identify the trafficked person as a 'victim of severe exploitation' unless they submit the

information to the prosecutor and there is enough evidence to start a prosecution. So practically speaking, we will not get a permit for a trafficked woman from the police unless there is a denuncia (full report made against the trafficker/s)".³⁶

Mary

Mary did not want to report her trafficker as she was fearful for her family and she resisted doing so for some time after she escaped. Her reason for eventually reporting the trafficker was both to stop the threats and intimidation and to regularise her immigration status under Article 18. Caritas, the organisation assisting her, encouraged her to testify in order to be able to obtain the Article 18 permit, which in Turin is notoriously difficult if one does not report the trafficker.³⁷ It still took 10 months from the time that Mary reported the trafficker to the police until Mary actually received the Article 18 permit to stay, which gave her the right to work.

There is also some evidence to suggest that the number of those who report traffickers is high as a result of increased feeling of security on the part of the victim. A court judge noted, "In the majority of cases, the trafficked women want to act as witnesses because once they are confident about their own situation, once they know that they are protected, that they can get a job, they want their traffickers to be punished." This was confirmed in interviews with several service providers. They indicated that trafficked persons who have not yet reported their trafficker are often more willing to testify towards the end of the six-month initial stay because they have recovered in part from their trauma, and they then begin to feel angry and seek justice.³⁸ Additionally, they have spoken to other women in a similar position who have testified or are testifying against their trafficker.³⁹

The actual implementation of Article 18, in terms of how and when the permit is granted varies widely according to each region. Often the prompt granting of an Article 18 permit by a *Questura* is a result of police sensitivity to the issues concerned, and due to close co-operation between law enforcement and NGOs in the region. In regions where a relationship of trust develops between the police and NGOs, the *Questura* grants the permit on the basis of material provided by the relevant NGO, instead of waiting for the opinion of the prosecutor or the start of an investigation process. This is how the Article

18 permit was intended to operate.⁴⁰

However, in Varese and Turin for example, the *Questura* will not grant the Article 18 permit without a victim's sworn statement and the prosecutor starting an investigation.⁴¹ In Dimitru's case, he received the Article 18 permit on the intervention of the prosecutor.⁴² In one case a trafficked woman applied for an Article 18 permit at one *Questura* and was denied it. When she applied a second time for the permit at another *Questura*, it was granted immediately.⁴³ There are also regional differences as to the length of time taken to grant the Article 18 permit. As a judge explained, "In some *Questure* this is not such a problem and they do what the law requires and grant the residence permit immediately".⁴⁴ However Caritas in Turin reported that in some cases they wait six months to one year for the Article 18 permit to be granted by the *Questura*: "In some cases, the reality is that she will only get the permit once she has taken part in the *incidente probatorio*⁴⁵ (special evidence hearing). It is a real problem for women because during the time just waiting for the permit they cannot work".⁴⁶

Practical issues also delay the issuing of the Article 18 permits, particularly if trafficked persons do not have any identity documents. In order to obtain the Article 18 permit, the trafficked person needs a 'temporary document' from their embassy to prove their identity. The Prosecutor's Office faces a problem in identifying foreigners without documents or with forged documents, visas and residence permits.⁴⁷ Embassies are often slow and unhelpful in issuing documents, especially passports, to trafficked persons.⁴⁸ Without a passport, a trafficked person cannot obtain the *libretto di lavoro* (permit to work) required to be legally employed.⁴⁹

There are contradictions between immigration laws affecting undocumented migrants generally and those affecting trafficked persons. This conflict prevents many trafficked persons from being able to access the Article 18 permit. In Italy, when found most undocumented migrants are generally given an order to leave the country within 15 days.⁵⁰ After such time they are liable to be deported. In some cases, such as if the identity of the migrant is questionable, they are sent to reception centres to await confirmation of their country of origin.⁵¹ There is no obligation on the police to inform such migrants (who could have been trafficked) about the existence of Article 18, nor to inform them about access to NGOs, or undertake any interview in which they could ascertain if someone might have been trafficked. In some

cases, the process of granting Article 18 status to trafficked women has been delayed or refused on the grounds that they have been served a deportation order.⁵² This is partially caused by the lack of communication between the *Prefettura* (local Government officials), who serve the deportation order, and the *Questura*, who grants Article 18 status. In addition, Italy has readmission agreements with several countries, such as Nigeria, that do not take into consideration the experiences of trafficked persons. Under article IV of the readmission agreement with Nigeria,⁵³ the Italian authorities can return women to Nigeria within 48 hours on the mere presumption that they are Nigerian nationals.

Mary

After Mary escaped, the trafficker continued to threaten her through her family in Nigeria. He found out where Mary was living in Italy and came to the house and beat her for not paying back the debt. Mary moved into a religious community for the duration of the investigation and trial and was safe; however, the threats against her family continued. Caritas contacted the Nigerian Embassy in Rome, and local police were sent to the family's home in Nigeria to obtain statements from them. However, the Nigerian police allegedly asked for money from the family to continue the investigation. Interpol was contacted, and took action that stopped the threats, though it is unclear exactly what action was taken. After the trial, since Mary moved out of the religious community, she continues to receive threats from the trafficker who was only imprisoned for a short time.

Irena

When Irena was rescued, there were 11 other women who had also been trafficked with her. Only three of these women wanted to stay in Italy. One of them considered it, however, while she was deciding what to do, her brother was kidnapped, so she left Italy without reporting the traffickers. Irena and the other women were all threatened in the shelter where they were staying during the trial. Irena went home for a holiday some months after the trial (against police advice) and she was shot and wounded by one of the traffickers.

b) Protection from reprisals and police protection

Article 18 provides protection to the individual concerned, in terms of securing their temporary residency status in Italy, but it does not provide any protection for relatives back home. There is no provision for trafficked persons, especially those who act as witnesses, to bring family members to Italy to ensure their safety during a trafficking trial.

Police witness protection is generally only available for *mafia* cases, involving protection of *pentiti* - members of the organised criminal group who give the police information on other gang-members. However, in 2001, the witness protection law was expanded to include witnesses in general.⁵⁴ In certain conditions, witnesses can apply for the police witness protection programme, which includes measures such as financial maintenance, relocation, and change of identity. In Irena's case, the prosecutor tried to get this witness protection for Irena, but the application was refused. As yet, it has not been applied in any trafficking cases. One court judge commented that police witness protection in Italy in trafficking cases would be very difficult to provide because of its expense, and also because of the prevailing public attitudes towards trafficked persons: "They are stigmatised and regarded as undeserving of protection because the public see them not as victims but as illegal migrants and prostitutes".⁵⁵ Instead, physical protection of trafficked persons who testify is provided by NGOs, basically through shelters or 'communities'. However NGOs are limited in their capacities.

Police escorts can be provided to trafficked persons when the authorities consider it a priority such as accompanying trafficked persons to court to testify. In all four cases, the trafficked persons were provided with police escorts between the shelters and the courtroom.

c) In-court evidentiary protection

Under Italian law, the main way of protecting the trafficked person's safety when she or he gives testimony is through using the *incidente probatorio* (special evidence pre-trial hearing).⁵⁶ The *incidente probatorio* can be requested by the victim or the prosecutor under article 392 and 394 of the Code for Criminal Procedure. It is a closed hearing and generally used in cases where there is a danger that evidence may be interfered with. For example, in Dimitru's case, he was offered money not to testify. It may also be provided in cases where witnesses may be pressured not to testify, or if

there is a risk of them leaving the country before the actual trial starts. The witnesses testify in front of the investigative magistrate, prosecutor, defence counsel and usually the defendant. If the defence counsel is present at the *incidente probatorio*, then evidence presented there, including witness testimony, can be transferred to the trial, and statements made do not need to be repeated in open court.⁵⁷ An *incidente probatorio* is now standard in most trafficking cases.⁵⁸ In the four cases of this research, all of the trafficked persons testified in the *incidente probatorio*; some also testified at trial. None of the trafficked persons were provided with additional in-court witness protection measures. It does not protect the witness's identity from the trafficker, merely from the wider public.

In terms of protecting a trafficked person's identity from the trafficker, the decision to apply such measures is dependent on the views of the prosecutor and the judge.⁵⁹ This makes it important for the victim to have a lawyer in the criminal proceedings to request such protection measures. One prosecutor explained that it is possible for witnesses to testify behind screens,⁶⁰ but according to TAMPEP this protection is very difficult to obtain in trafficking cases. Police and a prosecutor in Busto Arsizio reported that witnesses could give their statement confidentially, although they did not know of any cases where such a protection measure had been followed.⁶¹ Often in-court witness protection mechanisms in trafficking cases are more informal. For example, a lawyer in Rome reported that the witness may be separated from the defendant by a line of police officers in front of her, which is more psychological protection, to make her feel more secure, or with her back to the defendant.⁶²

d) Right to information on court proceedings

The police have no obligation to inform the victim about the outcome of the police investigation.⁶³ Neither is the prosecutor obliged to inform the trafficked person about the outcome of the case.⁶⁴ The witness will only be updated with relevant information in so far as his/her participation in the trafficking case is concerned i.e. when if they are giving evidence, when and where they should go. Prosecutors or police may inform victim's lawyers regarding the status of the criminal proceedings, but will not inform the victim directly - the lawyer's mediation is required. In the cases reviewed for this report, witnesses were informed through the informal channel of NGOs who liaised with police and prosecution to find out the progress and outcome of cases.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

Trafficked persons as victims who have suffered damages can have a lawyer represent them in the criminal proceedings if they join themselves formally to the criminal action as a civil claimant (injured party) (see right to recovery). The victim's lawyer can call, examine and cross-examine witnesses and experts at the trial.⁶⁵ All of the NGOs and service providers interviewed agreed prosecutions and victim protection (in terms of the criminal procedure) seem to be more successful if the trafficked person has his/her own lawyer. The lawyer can also inform the prosecutor about aspects of the case where the prosecution is not being carried out effectively, or if the prosecutor misses some important facts,⁶⁶ or if the centre requested an *incidente probatorio*. Caritas stated that the reason why the prosecution of Mary's trafficker was largely unsuccessful (in terms of sentencing) was because Mary did not have a lawyer representing her interests at the trial.⁶⁷

Dimitru

Dimitru was not given shelter, but was able to remain in the housing where he had been staying. A trade union provided support and assistance to Dimitru and other trafficked persons, especially in finding work.

Mary

It took 10 months before Mary received the Article 18 permit to stay. Until then she was dependent upon the care and assistance of Caritas. Caritas arranged a social integration programme for her during this time, so that as soon as she received the permit she had a job waiting and could start work immediately.

b) Right to recovery (assistance measures)

As mentioned earlier, once a trafficked person is granted an Article 18 permit they have the obligation (rather than right) to engage in a social integration programme, which is organised by local NGOs and community groups. This entitles them to extensive services and support. In 2001, the Department for Equal Opportunity certified and funded 57 NGOs to assist victims under the Article 18 procedure. However, this funding is only for projects relating to the

integration of those who are trafficked for prostitution. This has the effect of excluding those trafficked for other purposes from financial or material assistance. The programmes were designed using the existing framework of rehabilitation projects for drug abusers. There is a particular moral approach in the Italian system in reforming prostitutes and drug users. There is a contradiction and an inconsistency whereby the article 18 law requires permit holders to engage in a social integration programme, but does not fund programmes for economic or other exploitation. Services for those trafficked for purposes other than sexual exploitation, such as in Dimitru's case, are more limited.

Material assistance is not given by the Italian Government directly to support victims. The Government funds under Article 18 are allocated to the NGO to provide social support and assistance. This places a lot of pressure on NGOs to provide services that could be provided by the Government, such as housing. Since there are so many different projects, and they are administered through each region's local government, there is little uniformity, and evaluation and monitoring is difficult.⁶⁸ The organisation supporting a trafficked person provides them with accommodation, usually as part of the social integration and assistance programme. The type of shelter available is dependent upon the NGO. Often it is a women's shelter or within a religious community. Some NGOs have a range of shelters available to suit the needs of different trafficked persons. For example Associazione On the Road has different types of housing available for trafficked women, dependent upon their needs and their wishes: a 'flight' (escape) house (for a very short period immediately upon leaving their situation), a second shelter (for a longer period of time, also with a high level of physical protection for those who are at risk), family placement (for those who obtain work as domestic workers, can also offer a high degree of protection if suitable), an autonomy shelter (for those not considered at risk), and independent housing (for those living with friends/partner).⁶⁹

There is a real problem regarding access to information in foreign languages. Due to a lack of resources there are not enough interpreters available during the investigation process and legal procedures, which means the testimony of trafficked persons may not be understood or used properly when interpreters are required. Many interpreters have called for action to be taken to protect *them*, to maintain their anonymity and so on. There are no regulations that allow such measures to protect interpreters.

Trafficked persons have access to free legal services, paid by the State, but prosecution and the police have no obligation to inform victims of their right to a lawyer⁷⁰ and rarely do so. In many cases, trafficked persons are unaware of their right to legal assistance. Usually it is only if the NGO or a friend informs the victim of their right to a lawyer and assists them in finding one that they receive legal assistance. In Italy the right to medical assistance is protected for all persons, regardless of immigration status.⁷¹ Once a person receives the Article 18 permit, they have the right to use the national health service in the same way as Italian citizens.⁷² Counselling is often provided by State social workers to trafficked women in shelters.⁷³ Other psychological assistance is dependent upon the resources of the NGO concerned and the needs of the trafficked person. For example, Differenza Donna has a therapist who provides free services to traumatised women once a week (for the worst cases). Sometimes it is also possible for public psychologists to provide counselling to trafficked women, co-ordinated through the NGOs.

Under the Article 18 permit, there is a right to education, training and employment. The NGO usually takes responsibility for education/training as part of the integration programme tailored to the trafficked person's requirements. For example, Jana and Maria enrolled in a hospitality course. It is also possible for trafficked persons to go to school or study Italian or other skills training. Finding work for the victim can be difficult. All the trafficked persons in these cases were successful in finding employment. NGOs often try to set up an apprenticeship system whereby the employer provides training for the initial six months during which the employee remains unpaid on the basis that subsequently employment will be offered.

4. Legal redress and compensation

Jana and Maria

Both Jana and Maria were awarded 10 million lire⁷⁴ for compensation by the court when the trafficker was sentenced. However, the trafficker claimed he had no money to pay the compensation and it is unlikely this money will ever be paid. To enforce payment, Jana and Maria would have to go to a civil court, which would take many years and cost them money.

Mary and Irena did not have legal representation, and did not file for compensation.

It is possible for trafficked persons to join a civil action for damages to the case against the trafficker in the criminal court, as Jana and Maria did. In such cases, the victim becomes a civil party to the case. The criminal court judge must take into consideration the 'civil consequences' of the losses/injuries sustained by the victim⁷⁵ and decide on the civil claim for compensation if it finds the defendant guilty.⁷⁶ When the trafficker is charged under the Merlin Law, judges are reluctant to award damages because of the prevailing attitude to prostitution as a crime against public morality, rather than against the person, even in cases of aggravated exploitation of prostitution.⁷⁷ Where damages are awarded, in most cases, this amounts only to a symbolic gesture. Damages are rarely paid because traffickers tend to hide their assets abroad. Confiscation of profits of crime is possible,⁷⁸ but proof is difficult. There does not appear to be an effective system in Italy for confiscation of assets.⁷⁹

All the lawyers interviewed agreed that claims for damages in the civil court, although possible to bring, are not really an option with such a slow and bureaucratic system. Massive delays occur, with normal cases taking eight to ten years and complicated cases up to 20 years for the civil court to come to a decision!⁸⁰ In all the interviews conducted, no one knew of a successful case for compensation where the money had actually been paid to the victim. The most likely way of enforcing payments is to use payment of compensation as a mitigating factor in sentencing. Under Italian law, actual payment of compensation to the victim may reduce the sentence against the defendant by one third.⁸¹ In Italy, there are no government funds from which trafficked persons could receive compensation.

III Conclusions and Recommendations

The temporary residence permit under Article 18 appears to have had a positive effect on the victims of trafficking. The separation of the residency procedure from participation in criminal proceedings has focused support on the victim's needs, rather than the State's need to obtain evidence against criminals. This has had the beneficial consequence of more victims volunteering to testify towards the end of their residency period, as well as meeting the needs of trafficked persons. The numbers of residence permits granted appears to refute concerns that such a system may open the floodgates of applications. However, there remains a gap between the law on paper and its implementation, in particular in relation to those trafficked into

sectors other than prostitution.

Recommendations to the Italian Government

- Adopt a new trafficking law incorporating the Trafficking Protocol definition.⁸²
- Change the interpretation of what constitutes mafia crime in Italy, and extend the existing anti-mafia law to trafficking in order to facilitate prosecutions of those higher up in the trafficking network.
- In the interim, encourage broad interpretation of existing laws to cover situations of slavery where psychological coercion occurs.
- Suspend immigration infractions if there is the suspicion that a migrant is a trafficking victim.
- Develop guidelines for interviewing undocumented migrants to establish if they may have been trafficked.
- Centralise the system of granting the Article 18 permit, or provide clearer guidance regarding the circumstances in which the Article 18 permit can be granted, which is disseminated in each *Questura*, and introduce a system of review to standards practice in different local government areas.
- Ensure that information about the Article 18 procedure is properly disseminated, so that all *Questure* in all regions of Italy are aware of the procedure and know how to apply it.
- Improve co-ordination between different law enforcement agencies (especially police and immigration) to ensure Article 18 permits are granted quickly and efficiently.
- Provide clear guidelines for granting the Article 18 permit on social grounds.
- Improve the efficiency of the process of granting Article 18 permits to ensure permits are granted more quickly.
- Provide trafficked persons with the opportunity to bring their family to Italy if they act as witnesses during legal proceedings (which puts them and their families at risk).
- Provide funds for services and social integration programmes for Article 18 for all trafficking cases and not only programmes for victims of sexual exploitation.
- Centralise programmes for social assistance carried out by non-governmental organisations to provide at least a minimum standard.
- Provide a variety of options of programmes available to trafficked

- persons and in particular different types of shelters.
- Introduce public monitoring and evaluation of such programmes on an annual basis in order to identify the most successful ways of assisting trafficked persons.
- Adapt witness protection law so that it is more suitable to victims of trafficking and ensure it can be used for victims who testify in appropriate cases.
- Police and prosecutors should be obliged to inform the trafficked person about their rights e.g. right to lawyer, right to compensation and right to information about criminal and administrative proceedings.
- Train judiciary so that trafficking and forced prostitution are recognised as crimes against the person.
- Improve confiscation of assets procedures.
- Set up a government fund using seized assets of traffickers to enable trafficked persons who cannot obtain redress from the trafficker to claim compensation.
- Improve civil court mechanisms for compensation.
- Review the Agreement with the Republic of Nigeria on Identification and Readmission (2000).
- Suspend summary deportations to Nigeria until and unless independent human rights monitors confirm that no abuses of the human rights of victims of trafficking or other deportees are continuing to occur on their arrival back in Nigeria.

Endnotes

¹In Italy, Anti-Slavery International conducted the research in Turin, Milan and Rome. Anti-Slavery International would especially like to thank Marcello D'Amico in Milan, *TAMPEP Italia* and *Caritas* in Turin, and *Differenza Donna* in Rome for their assistance in providing cases for the research and sharing their expertise. Anti-Slavery International also spoke with women who had been trafficked, police, prosecutors, a judge, immigration lawyer, criminal lawyer and representatives from the Department for Equal Opportunity and from various other NGOs, shelters and a trade union. Translations of various laws and cases were completed by Anti-Slavery International unless otherwise stated.

²For example, Corte di Cassazione, Sezione V pen., sentenza 9 febbraio 1990.

³Corte di Cassazione, Sezione Unite, sentenza 20 novembre 1996.

⁴Article 3 (6) and (7) Law 75 of 1958.

⁵Leone, F. *Delitti di prossenetismo e addescamento*, Milano, 1964, p.155.

⁶€ 309.87.

⁷€ 10,329.14.

⁸€ 1,032.91.

⁹Article 4 Law 75 of 1958.

¹⁰Article 12(3) and (5) Law 286 of 1998.

¹¹Article 609 Penal Code.

¹²Article 477 and 495 Penal Code.

¹³Article 4 Law 110 of 1975.

¹⁴Art. 416*bis* paragraph 3 of the Penal Code states "The association is considered of *mafioso* type when members' criminal activities make use of links and obligations of the group, including the conspiracy of silence (*omertà*) regarding their crimes or when they try to control economic activities, concessions of authorisations, contracts and public services for personal profit, or to prevent the free enjoyment of the right to vote during public elections". [unofficial translation]

¹⁵Unofficial translation.

¹⁶Article 19 Law 286 of 1998.

¹⁷The Court of Assizes is the only court in Italy with a jury, and deals with extremely serious crimes such as murder (and now slavery).

¹⁸Corte di Assise di Appello di Roma, sentenza 25 ottobre 2001.

- ¹⁹ Anti-Slavery International telephone interview, prosecutor, Milan, 5 June 2002.
- ²⁰ Anti-Slavery International interview, prosecutor, Busto Arsizio, 29 January 2002.
- ²¹ Anti-Slavery International interview, Criminal Court Judge, Rome, 5 February 2002. This judge was previously in the Ministry for Equal Opportunities, which is responsible for the administration of Article 18 permits and the social and integration programmes.
- ²² Anti-Slavery International interview, prosecutor, Turin, 1 February 2002, and prosecutor, Busto Arsizio, 29 January 2002.
- ²³ Anti-Slavery International interview, *Camera Del Lavoro* (Trade Union), Varese, 7 February 2002.
- ²⁴ *Ibid.*
- ²⁵ Anti-Slavery International interview, La Grande Casa, Milan, 29 January 2002 and Anti-Slavery International interview, Differenza Donna, Rome, 4 February 2002.
- ²⁶ Anti-Slavery International interview, prosecutor, Rome, 5 February 2002.
- ²⁷ Giammarinaro, M., *La Rappresentazione simbolica della tratta come riduzione in schiavitù?*, Carchedi, F., Piccioli, A., Mottura, G. and Campani, G., a cura di, *I colori della notte. Migrazioni, sfruttamento sessuale, esperienze di intervento sociale*, Milano, p. 92.
- ²⁸ Anti-Slavery International interview, criminal court judge, Rome, 5 February 2002.
- ²⁹ Anti-Slavery International interview, Questura di Milano, 10 June 2002.
- ³⁰ Fondazione Internazionale Lelio Basso Per Il Diritto e la Liberazione dei Popoli in collaborazione con Terre des Hommes, Save the Children Italia, Associazione Parsec, *Il traffico internazionale di minori. Piccoli schiavi senza frontiere. Il caso dell'Albania e della Romania. Prime considerazioni* (Draft), Roma, 2002, p.17.
- ³¹ *Ibid.*
- ³² *Polizia e Traffico Degli Esseri Umani. Sistema dei Controlli e Protezione delle Vittime*, Conferenza Internazionale, Servizio Centrale Operativo della Polizia di Stato, Primo Dirigente della Polizia di Stato, Milano, 10 giugno 2002.
- ³³ Cooperativa Lotta Contro L'Emarginazione. An NGO in Varese providing services to trafficked women and sex workers.
- ³⁴ Anti-Slavery International interview, COLCE, Varese, 30 January 2002.
- ³⁵ *Ibid.*
- ³⁶ *Ibid.*
- ³⁷ According to service providers Caritas Torino and TAMPEP Italia.
- ³⁸ Anti-Slavery International interviews with COLCE, Varese, 30 January 2002, Differenza Donna, Rome, 4 February 2002, and La Grande Casa, Milan, 29 January 2002.
- ³⁹ Anti-Slavery International interview, Differenza Donna, Rome, 4 February 2002.
- ⁴⁰ Anti-Slavery International interview, lawyer, Rome, 5 February 2002.
- ⁴¹ According to Caritas, COLCE and TAMPEP Italia.
- ⁴² Anti-Slavery International interview, prosecutor, Busto Arsizio, 29 January 2002.
- ⁴³ Anti-Slavery International interview, TAMPEP, Turin, 31 January 2002.
- ⁴⁴ Anti-Slavery International interview, criminal court judge, Rome, 5 February 2002.
- ⁴⁵ Article 2(d) Right to safety in providing testimony.
- ⁴⁶ Anti-Slavery International interview, Caritas Servizio Migranti, Turin, 1 February 2002.
- ⁴⁷ La Torre, A., Procuratore Generale presso la Suprema Corte di Cassazione, *Relazione sull'amministrazione della giustizia nell'anno 1999*, Roma, 12 gennaio 2000; Relazione del Procuratore Generale presso la Corte di Appello di Torino per l'inaugurazione dell'anno giudiziario 2000, Torino, gennaio 2000.

- ⁴⁸ As told to Anti-Slavery International by TAMPEP Italia and La Grande Casa.
- ⁴⁹ Anti-Slavery International interview, Associazione On the Road, Rome, 6 February 2002.
- ⁵⁰ Article 13 Law 286 of 1998.
- ⁵¹ Anti-Slavery International interview, La Grande Casa, Milan, 29 January 2002.
- ⁵² *Ibid.*
- ⁵³ Agreement between the Italian Republic and the Republic of Nigeria on Identification and Readmission (2000).
- ⁵⁴ Anti-Slavery International interview, criminal court judge, Rome, 5 February 2002. Article 472 (3) Code of Criminal Procedure.
- ⁵⁵ Anti-Slavery International interview, criminal court judge, Rome, 5 February 2002.
- ⁵⁶ Article 392 Code of Criminal Procedure.
- ⁵⁷ Brienen, M. and Hoegen, E., Chapter 13
- ⁵⁸ Anti-Slavery International Interview, criminal court judge, Rome, 5 February 2002
- ⁵⁹ Anti-Slavery International interview, prosecutor, Turin, 1 February 2002; interview, lawyer, Differenza Donna, Rome, 4 February 2002.
- ⁶⁰ Anti-Slavery International interview, prosecutor, Turin, 1 February 2002
- ⁶¹ Anti-Slavery International interview, prosecutor and police, Busto Arsizio, 29 January 2002.
- ⁶² Anti-Slavery International interview, prosecutor, Turin, 29 January 2002..
- ⁶³ Brienen, M. and Hoegen, E., Chapter 13; Anti-Slavery International interview, prosecutor, Busto Arsizio, 29 January 2002.
- ⁶⁴ Anti-Slavery International interview, prosecutor, Turin, 1 February 2002.
- ⁶⁵ Brienen, M. and Hoegen, E., p.524.
- ⁶⁶ Anti-Slavery International interview, Differenza Donna, Rome, 4 February 2002.
- ⁶⁷ Anti-Slavery International interview, Caritas, Turin, 1 February 2002.
- ⁶⁸ Anti-Slavery International interview, Associazione On the Road, Rome, 6 February 2002.
- ⁶⁹ Anti-Slavery International interview, Associazione On the Road, Rome, 6 February 2002.
- ⁷⁰ Brienen, M. and Hoegen, E., Chapter 13 and confirmed in interviews with prosecutors.
- ⁷¹ Comitato per i diritti civili delle prostitute, *Agenda Legal: Guida Facile Alla Legge Italiana* (Easy Guide to the Italian Law), 2000, Pordenone p. 19-20.
- ⁷² *Ibid.*
- ⁷³ Anti-Slavery International interview, La Grande Casa, Milan, 29 January 2002.
- ⁷⁴ €5,164.57.
- ⁷⁵ Brienen, M. and Hoegen, E., p 527.
- ⁷⁶ *Ibid.*
- ⁷⁷ Anti-Slavery International interview, prosecutor, Turin, 1 February 2002
- ⁷⁸ Article 12 Law 286 of 1998.
- ⁷⁹ Anti-Slavery International interview, prosecutor, Milan, 29 January 2002.
- ⁸⁰ Brienen, M. and Hoegen, E., Chapter 13
- ⁸¹ *Ibid.*
- ⁸² Italy hosted the signing ceremony for the Trafficking Protocol in Palermo in December 2000.

10. Nigeria¹

I Legislation

1. Criminal laws

Nigeria has two codes of criminal law, the Criminal Code covering the Southern States of Nigeria, and the Penal Code applying to the North. The vast majority of Nigerian women trafficked to Europe for prostitution come from the South, specifically Edo State. Under the Criminal Code, there are various offences against liberty or slave dealing which could be used to prosecute trafficking in persons.² Section 369 regards slave dealing as *inter alia* purchasing, selling, dealing with or transferring persons so they may be treated or held as slaves or placed in servitude as a pledge or security for debt or entering into a contract or agreement in furtherance of these purposes. This is punishable by imprisonment of up to 14 years. Section 365 deals with unlawful confinement or detention against a person's will. Section 366 covers compelling someone to do something by threats, surveillance or other intimidation and is punishable by one year's imprisonment. If this involves assault, the penalty increases to five years.³ These provisions cover some of the main methods of intimidation used by traffickers in Nigeria, particularly in regard to the situation of debt bondage in which most women who are trafficked from Nigeria for purposes of prostitution find themselves.

The Nigerian authorities continue to regard trafficking as being exclusively for prostitution and the articles of the law most often invoked in relation to trafficking regard the procurement of women for sex or exploitation of prostitution.⁴ Individual Nigerian States can amend the Criminal Code, and in 2000 Edo State added new provisions making prostitution itself a crime, and purporting to criminalise trafficking.⁵ These changes have not moved the definition of the offence into line with the Trafficked Protocol. They relate more to the criminalisation of third parties (sponsors and traditional priests) who facilitate migration out of Nigeria for prostitution or 'immoral purposes'. In fact, the Edo State law criminalising prostitution has had significant negative effects for trafficked women who are now regarded as criminals on their return to Nigeria if they have been involved in prostitution. Under section 223b, any person who knowingly offers herself for prostitution may be punished by up to two years' imprisonment.

The Penal Code, which applies to northern states of Nigeria, states that "whoever imports, exports, removes, buys, sells, disposes, traffics, or deals in any person as a slave or accepts, receives or detains any person against his will any person as a slave shall be punished with imprisonment for a term which may extend to fourteen years and shall also be liable to a fine".⁶ This does not define the term 'traffic'. The term 'as a slave' has meant this provision is extremely restrictive, thus not useful to prosecute traffickers. The same problem is shown in the various other provisions relating to trafficking including abduction (inducing someone to move somewhere by force or deceit)⁷ and kidnapping.

The lack of adequate provisions regarding trafficking in Nigeria's criminal laws has led the Federal Government to draft a new law on trafficking entitled the Prohibition of Trafficking and Allied Matters Bill.⁸ The Bill has been passed by the House of Representatives and is currently in the Senate. It is expected to be passed in 2002. The Bill adopts the definition of trafficking laid out in the Trafficking Protocol.⁹ It covers both trafficking within and across borders¹⁰ and a range of offences including attempted trafficking,¹¹ forced labour¹² and traffic in slaves.¹³ It restates the slave dealing provision of section 369 of the Criminal Code, increasing the sentence to life imprisonment.¹⁴ However, the Bill still shows a strong focus on prostitution rather than trafficking for all forms of exploitation.

2. Other laws and policies affecting trafficked persons

a) Deportation

Since many Nigerians who have been trafficked are deported back to their country, Anti-Slavery International spoke to various officials about the treatment of deported nationals. When women return, Nigerian Immigration Service (NIS) officials do not know if they have actually been trafficked or not, only that they have been found abroad with an illegal status. Depending upon the circumstances of deportation, deportees may be detained and interviewed on their return by immigration, police or both.¹⁵ Police and/or immigration officials record details of the women including their statements concerning how they were trafficked abroad. Deported women are generally hostile to the law enforcement personnel. During Anti-Slavery International's visit to Nigeria, a group of approximately 160 women were deported from Italy *en masse* and taken directly from the airport to the police station at Alagbon, Lagos to be interviewed by police.¹⁶ Police held the women for three to four

days, without charge, to interview them. The women were hostile and clearly distressed about their situation of having been deported from Italy and now again detained. According to police, some had escaped from the station by breaking down a gate during the night and were rounded up and forcibly returned by police. Anti-Slavery International witnessed a reunion between one girl and her relative. The girl was crying and her first words were, "I have nothing. They [Italian authorities] let me take nothing. I'm sorry, I wasn't able to bring anything back... not even any clothes, nothing".¹⁷

As part of the screening process, all deported women arriving back in Nigeria through Lagos are forced to undergo medical tests including tests for HIV/AIDS.¹⁸ No such tests appear to be obligatory for Nigerian men. Police report that details of those who are HIV positive are given to the State Liaison Office (state office for social welfare), however, it is unclear that anything is done with the results of the tests. Officials stated women are informed of the results of tests by post, but many of the women do not give their true address due to an unwillingness to be later identified by officials, so actually never know the result of the HIV test. No medical assistance is provided to those women who are HIV positive. Many local NGOs have condemned the practice of screening women for HIV/AIDS as violating their basic rights, and encouraging the perception of trafficked women as "potential HIV/AIDS victims or carriers".¹⁹ The Edo State Criminal Code Amendment Act 2000 includes a provision that deported Nigerian nationals should be made to undergo compulsory medical examination for the purpose of determining if they have a sexually transmitted disease.²⁰ This violates the United Nations HIV/AIDS standards, which clearly states that HIV testing should be done only with the specific informed consent of the individual.²¹ This stigmatises and discriminates against deported women, making the process of reintegration much more difficult for returning women.²²

Although police and immigration both claim to detain returnees for as short a time as possible, usually one to five days,²³ in one case where 33 women were deported from Conakry, Guinea, they were detained for at least one month at Alagbon, which is poorly equipped and not a long-term detention facility. Once the screening is complete, immigration and police release women to the State Liaison Office, which is charged with organising the women's return travel home and reunion with families.²⁴ Two sources, who did not wish to be identified, claimed that the Edo State Liaison Office does not always accept responsibility for deported women. In such cases, it is

alleged women are released in Lagos, either to families who come to collect them (who could potentially be traffickers) or are simply left to their own devices. The State Liaison Office is also given details of deported women, to record these women and prevent them from being issued passports to travel outside Nigeria.²⁵ This practice violates the freedom of movement of women, and in effect means the women concerned are even more vulnerable to agents, who could be traffickers, to arrange illegal migration.

b) Voluntary return and reintegration

IOM states that the two key factors affecting repatriation of Nigerian trafficked persons are reprisals against women and their families, and stigmatisation of returned women, where women who return empty handed are seen as failures regardless of the human rights abuses they have suffered through being trafficked abroad.²⁶ IOM has a programme run in conjunction with the Committee for the Support and Dignity of Women (COSUDOW) in Benin City, an order of nuns who provide support and assistance to those who return voluntarily. COSUDOW contacts the woman's family and prepare the family for her return: "We need to know if the family will reject the woman, and if so, to counsel the family before she returns back to Nigeria. We do not have a shelter so we need to ensure the family will accept the woman back before she returns."²⁷ Trafficked women are met and escorted back to Benin City by representatives from COSUDOW. They are provided on-going counselling, medical and legal assistance, opportunities for vocational training and small micro-credit loans for income generation activities. The process can take up to a year, but most practical aspects of reintegration are covered within the first three months. Only a minute number of women actually return to Nigeria voluntarily. In the one year period since its inception, this programme has assisted nine women to return.²⁸ COSUDOW, through direct links with NGOs in Europe, has provided assistance in reintegration to approximately 11 other women since 1999.²⁹

II General analysis and comparison of cases

1. Investigation and prosecution of traffickers

There is no clear indication of exactly how many cases related to trafficking have been prosecuted in Nigeria, but very rarely indeed do cases ever reach a courtroom. Many cases are filed but never tried, and cases are often suspended.³⁰ The court process is very slow. The Police Task Force Against

Trafficking in Human Beings (hereafter Police Task Force) in Lagos reported that there were four cases undergoing police investigation as of March 2002.³¹ Of these, two cases had been filed in court. Since then, one other prosecution of 17 Nigerian traffickers who were deported from Guinea has come to trial.

Gina

Gina from Benin City travelled from Nigeria to Guinea and was awaiting false travel documents to enable her to travel on to Europe. A man, 'Sunday', who was staying in the same premises as Gina, reported to the Nigerian Embassy and local Guinean police that Gina and other women were to be trafficked to Europe to work in prostitution. Gina was arrested, along with 32 other women from Nigeria and 17 traffickers. All were deported to Nigeria. According to the Special Advisor to the President on trafficking issues, charges against these traffickers relate to procuring women for prostitution and forgery offences under the Criminal Code.³² Although the trial commenced, it has proceeded slowly, and no witnesses have given evidence to date in court.

As stated earlier, trafficking tends to be seen as one and the same as prostitution in Nigeria. In Cross River State, one trafficker has been convicted under section 223 of the Criminal Code (for procurement for prostitution) and sentenced to three months in prison.³³ In Edo State, the Solicitor General reported that in the past five years, two cases of trafficking had reached court; but neither has been concluded.³⁴ Only one of the cases involved adults, and it was not clear whether the women were actually going to be exploited since they never reached their destination:

Ladi

Ladi was promised work in Europe and paid a fee to an agent who agreed to facilitate her travel and arrange false travel documents. She was intercepted with four other women and two alleged traffickers at Lagos Airport. The traffickers were charged under section 369 (slave-dealing), section 223 (procurement for prostitution) and section 516 (conspiracy to commit a felony) of the Criminal Code.³⁵ Ladi was also charged with conspiracy, but granted bail. She was released on the grounds of being a State witness against the traffickers.

The lack of prosecutions and convicted traffickers in Nigeria is widely blamed on the lack of adequate anti-trafficking legislation, poor investigations by police officials and the unwillingness of those who have been trafficked to testify against their traffickers. Law enforcement officials lack expertise in detecting, investigating and gathering evidence against traffickers.³⁶ Additionally, the current provisions of the Criminal Code are difficult to prove when the exploitation generally occurs outside Nigeria, and there is poor information sharing between the authorities in destination countries and those in Nigeria; police in Europe blame this on corruption in Nigeria.³⁷ Police corruption in Nigeria is high, because of non-payment and delayed payment of police wages. In an interview with officials from the Solicitor General's Office, an official said, "It is very difficult for us as prosecutors, because on the one hand, our police have not been paid for months, they are not properly paid and the sponsors (traffickers) in Benin City are very powerful. Even if we [prosecutors] did have the power to direct police to investigate a case, they probably would not do it... traffickers offer money to police officers".³⁸ In one case in Edo State involving trafficking of minors police actually gave evidence against the prosecution. "We called two police to give evidence. The police claimed the case was hurriedly charged to court and that they did not find anything against the defendant.... So two of the charges were dismissed".³⁹ Police are rarely victim sensitive and as a result trafficked persons rarely co-operate with police as witnesses. Indeed, in Ladi's case, the women themselves were charged with conspiracy. This might be resolved by a provision in the new Trafficking Bill that trafficked persons cannot be detained, imprisoned or prosecuted for offences related to being a trafficked person.⁴⁰

Various attempts are underway to improve the performance of law enforcement agencies in Nigeria. For example, the Italian Government recently committed major funding to the Police Task Force for police vehicles and technical equipment to aid investigations. At community level, the Italian based NGO, Turnaround Project, has also tried to address the lack of investigations by making Italian law enforcement and judiciary officials aware of reality of trafficking in Nigeria. Turnaround Project organised a delegation of police, immigration, prosecutors and magistrates to visit Nigeria and to establish direct connections between the authorities concerned in Benin City and Turin.⁴¹ This has proved successful, with one arrest in Benin City so far and positive responses from the Italian authorities.⁴² Likewise, an awareness-raising visit for local Benin City

authorities is planned in Turin.

The other major obstacle is the unwillingness of trafficked persons to give evidence against traffickers. This is in part due to fear instilled by ritual oaths of secrecy that women undergo when they are lent money to travel abroad.⁴³ These oaths are frequently administered by traditional priests in the community as part of a ceremony at a shrine. As one traditional priest interviewed stated, "Traffickers use both authentic and fake priests to administer these rituals... The whole process of undergoing this kind of ritual, under such circumstances of fear, means that a psychological reaction may in itself trigger the effect of the oath, and that is where it has power over the woman".⁴⁴ For example, in one case a Nigerian woman who was trafficked to the United Kingdom refused to give evidence to police because of the fear of the oath. She was eventually persuaded to speak to police. Soon after speaking about her experiences to a social worker, she injured herself and blamed the injury on the oaths she had sworn.⁴⁵ Unwillingness is also due to fear of retaliation by traffickers, with reprisals against family members not uncommon (see Italy Chapter).

The Police Task Force states that the most common way of obtaining information for investigations is through interviewing deported women who return.⁴⁶ However, due to the treatment at the hands of authorities abroad and upon return, such women are often hostile and reluctant to provide information, as Anti-Slavery International witnessed at first hand in the March 2002 deportation from Italy. This is probably due to the circumstances of the deportation: being detained in substandard facilities against their will and often lacking clothing, food and water.⁴⁷ For deported women, the authorities are seen not as 'saviours' or protectors of their human rights but rather as captors and oppressors.

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

Although Nigeria was considered in the study as predominantly a country of origin, it is also a country of destination for people from neighbouring African countries. There is no current legislation providing a right to stay to migrant trafficked persons, but the Trafficking Bill stipulates that a trafficked person should not be denied temporary residence visas during criminal, civil or other legal actions and adequate health and social services should be provided to

the person during this period.⁴⁸ This inclusion of civil action is broader than that available in other countries.

b) Protection from reprisals and police protection

If trafficked women leave their trafficker before paying back their debt (either because of being apprehended by authorities or of their own will), often agents and traffickers in Nigeria will harass and intimidate families in Nigeria to pay the outstanding debt. In some cases they threaten the family verbally, physically or destroy the family's property.⁴⁹ Positive examples of police protection from reprisals by traffickers are rare, whilst allegations of corruption and police complicity in trafficking remain rife. Lack of faith in the police means reprisals against families and trafficked persons go largely unreported. In one case reported in the chapter on Italy, police in Nigeria investigating reprisals allegedly requested money from the victim's family to continue the investigation.⁵⁰ Another Italian NGO, COLCE, mentioned a case where a woman trafficked to Italy escaped her situation and was about to testify against the trafficker: however, her family was being threatened and her mother in Edo State was shot dead: "It seems clear to us, that the mother being shot is not merely a coincidence, but was related to the fact that her daughter was going to testify, but there is a huge problem of proving the nexus and of course with the mother dead, who else is going to be willing to talk?"⁵¹ Reprisals are not limited to trafficked persons and their families, but include other witnesses.

Gina

Sunday, who is a key witness against the traffickers in Gina's case, was threatened despite the fact that 17 traffickers were imprisoned. According to Sunday, his life is in danger as associates of the traffickers tried to kidnap his daughter and burn down his parents' house in Benin City.⁵² His family had to go into hiding. Sunday himself cannot return to Benin City. Sunday was given some protection; he was relocated from his hometown Benin City to another place in Nigeria. He was provided housing and some financial assistance. Sunday has also been given a card that states he is a Government witness and authorities should provide him appropriate assistance when in need. Sunday wants to be relocated in another country after the trial to protect him from the traffickers.

Sunday's case illustrates some key issues faced by law enforcement in providing police protection to trafficked persons and their families. Whilst Sunday himself has been provided protection, his family are left unprotected. Although a higher level of protection was provided initially, this was down graded because he did not observe basic principles regarding the protection scheme and is consequently described as a difficult witness to 'protect'.⁵³ There is clearly a gap between the ideal type of protection from the point of view of a witness, and the authorities' capacity to provide such protection. In relation to trafficked persons and their families, service providing agencies such as COSUDOW and also lawyers can play an important role in facilitating dialogue between trafficked persons and law enforcement officials to ensure that concerns for the safety of the victim and family are addressed adequately.

The current Bill provides for protection from intimidation, threats of reprisals and reprisals from traffickers, their associates and persons in positions of authority. It states that safety and integrity of trafficked persons and witnesses must not be subordinated in the interests of prosecution before, during or after, any legal proceedings.⁵⁴

c) In-court evidentiary protection

No information was obtained concerning in-court witness protection measures, because in the case studies the victim witnesses, even when called, did not appear in court and give evidence against traffickers. There are positive provisions in the current Bill regarding measures for evidentiary protection. It states that proceedings must be consistent with the psychological and physical safety of trafficked persons or witnesses,⁵⁵ and evidence may be given *in camera* in cases of sexual violence.⁵⁶ The defence cannot introduce evidence of the personal history, a current or previous occupation of the trafficked person.⁵⁷ The Bill provides that the name of the trafficked person should not be released 'recklessly',⁵⁸ but it is unclear what may be considered 'reckless' and this may provide little protection in reality.

d) Right to information regarding court proceedings

No information was obtained on this point once again because of the lack of cases of trafficked persons testifying.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

As in other common law countries, in Nigeria victims and witnesses do not have any right to be legally represented in criminal proceedings.

b) Right to recovery (assistance measures)

There is a stark lack of Government assistance to trafficked persons who return home. The lack of any shelters for trafficked persons in Nigeria is the most pressing problem, though there is no legal assistance, medical care, financial assistance or counselling available by the authorities. The COSUDOW and IOM reintegration programme does provide assistance, but it assists only a tiny number of victims. There is also one 'rehabilitation centre'⁵⁹ in Abuja, which has capacity to house a small number of victims, but no capacity to assist large numbers of deported women. In March, three women were living there who had been deported back to Nigeria from neighbouring African countries and in one case from Italy.⁶⁰ There is no such centre in Lagos or Benin City. In Benin City, there is a skills acquisition centre⁶¹ that provides free vocational training programmes (such as sewing, catering and computer skills) to women and girls. This is primarily a prevention rather than reintegration activity because it is aimed at women and girls at risk of being trafficked. The centre states there are women in the programmes who have been deported from neighbouring African countries in their attempts to travel abroad.⁶² Returned women are not identified so as to avoid stigmatisation. There is a need for support and assistance measures to be integrated into the process of deportation in order to protect the basic rights of deported women who have been trafficked.

4. Legal redress and compensation

No trafficked persons have received legal redress or compensation in Nigeria. Such issues are unlikely to be resolved until better mechanisms for completing criminal cases against traffickers are developed. The Trafficking Bill addresses this area and enables a trafficked person, regardless of immigration status, to bring a civil action against a trafficker (including public officials).⁶³ Whilst pursuing such claims, trafficked persons are entitled to temporary residency in Nigeria.⁶⁴ The Bill also entitles the trafficked person to compensation, restitution and recovery for economic, physical and

psychological damage from the traffickers' assets or the appropriate Government agency.⁶⁵ The Bill will establish a Victims of Trafficking Trust Fund into which proceeds from confiscated assets are to be paid, and this will be used to compensate trafficked persons.⁶⁶

III Conclusions and recommendations

The research indicates that destination countries need to be aware of the distinct lack of protection available or afforded by the Nigerian authorities when they decide to repatriate trafficked persons to Nigeria. In particular, the procedures facing deported nationals in Nigeria violate basic human rights by discriminating against and stigmatising women as sex workers, forcing them to undergo STD tests and preventing them from leaving the country legally again. There is a lack of basic support and assistance available to trafficked persons, and organisations that do offer services should be involved in restructuring treatment for deported persons. The lack of prosecutions of traffickers and lack of access to justice means trafficked persons are vulnerable to reprisals and to being re-trafficked. Police rarely protect the rights of victims or their families, and the lack of faith in the police means that many cases are left unreported and potential witnesses are unwilling to testify.

Recommendations to the Nigerian Government

- Amend the new proposed Bill, in line with the Trafficking Protocol, to provide a more comprehensive definition of all forms of trafficking, rather than concentrating on trafficking of women and children into prostitution, and add provisions to protect trafficked persons' rights.
- Ensure all aspects of the new law are implemented once it is adopted, and provide training to police, immigration, judiciary and NGOs accordingly.
- Provide awareness-raising training on human rights abuses of trafficked persons for law enforcement officials in conjunction with law enforcement officials from countries to which Nigerians are routinely trafficked.
- Improve co-operation with countries of destination in sharing information, in particular to address reprisals and protect returned trafficked persons or their families from intimidation and violence.
- End the practice of routine screening of deported persons without

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- their consent for AIDS and sexually transmitted diseases.
 - End the practice of removing entitlement to passports from deported persons.
 - Deported persons who might have been trafficked should be notified about access to free legal services or social services and organisations that provide these in Lagos, Benin City or elsewhere.
 - Provide adequate housing on a voluntary basis in appropriate shelters to deported trafficked persons.
 - Give access to voluntary medical care and tests for deported trafficked persons.
 - Provide trafficked persons with contact details of an NGO and the relevant law enforcement agency that can be relied upon to investigate trafficking cases impartially, in case they decide later that they want to report trafficker or if they have a problem with reprisals.
 - Improve communication between Benin City and Lagos, so that women who return to Benin City can be made aware of resources available there to assist them.

Endnotes

¹ In Nigeria, Anti-Slavery International conducted the research with the Belgian partner NGO, Payoke. Anti-Slavery International visited Lagos, Abuja and Benin City. Anti-Slavery International appreciates the assistance of the Women's Consortium of Nigeria (WOCON) in arranging appointments in Lagos. Anti-Slavery International spoke with people who had used illegal agents to travel overseas and been deported back to Nigeria, sex workers, police, immigration officers, prosecutors, lawyers, various government officials and NGOs. Unlike other countries, Anti-Slavery International was only able to obtain in depth information about one case that matched the selection criteria (see introduction). However in regard to treatment and repatriation,

human traffic, human rights: redefining victim protection

references are made to other cases.

² Chapter 31 Criminal Code Act (Cap 77) Laws of the Federation of Nigeria 1990.

³ Section 367 Criminal Code (compelling action by assault).

⁴ Sections 223 - 226 Criminal Code. See Olateru-Olagbegi, B., *The Social and Legal Implications of Trafficking in Women and Children in Nigeria*, 2000, WOCON, p. 15-18.

⁵ Criminal Code Amendment Law (2000) Amendments to sections 222, 223, 225, 226 and 233 of the Criminal Code.

⁶ Section 279 Penal Code.

⁷ Section 272.

⁸ Full title is: A Bill for an act to establish the national agency for trafficking in persons law enforcement and administration to enforce laws against traffic in persons, to investigate and prosecute persons suspected to be engaged in trafficking in persons, and to take charge and co-ordinate the rehabilitation and counselling of trafficked persons and for other matters connected therewith. Federal Republic of Nigeria Official Gazette, 21 February 2001, Lagos, Volume 88 No. 10. Hereafter 'the Bill'.

⁹ Section 2.

¹⁰ Section 4.

¹¹ Section 3.

¹² Section 9.

¹³ Sections 10 and 11.

¹⁴ Section 25.

¹⁵ Anti-Slavery International interview, NIS, Lagos, 27 February 2002 and confirmed in interview, Police Task Force Against Trafficking in Human Beings (Police Task Force), Lagos, 28 February 2002.

¹⁶ 2 March 2002.

¹⁷ Anti-Slavery International was unable to interview the women since the commanding officer was not present when we visited Alagbon police station.

¹⁸ Anti-Slavery International Interview, Police Task Force, Lagos, 28 February 2002.

¹⁹ Olateru-Olagbegi, B., *Promoting Human Security to Prevent Exploitive Migration in Africa with Special Emphasis on Trafficking in Women and Children*, Nakano, K. (ed.), Peoples for Human Rights; Durban and Beyond, International Movement Against Discrimination and Racism (IMADR), Japan, Volume 8, 2001 p.69.

²⁰ Section 233A(2).

²¹ Office of the United Nations High Commissioner for Human Rights and the Joint United Nations Programme on HIV/AIDS, *HIV/AIDS and Human Rights: International Guidelines*, Second International Consultation on HIV/AIDS and Human Rights, Geneva, 1996, HR/PUB/98/1, Guideline 3: Public Health Legislation. 128(b)

²² Advocacy Net, "Deportation Backfires", *Nigeria: Trafficking in Women*, On The Record Series, www.advocacynet.org/cpage_view/nigtraffick_deportation_6_36.html

²³ Anti-Slavery International interview, Police Task Force, Lagos, 28 February 2002.

²⁴ *Ibid.*

²⁵ Anti-Slavery International interview, NIS, Lagos, 27 February 2002.

²⁶ Anti-Slavery International interview IOM, Lagos, 1 March 2002.

²⁷ Anti-Slavery International interview, COSUDOW, Benin City, 6 March 2002.

²⁸ *Ibid.*

²⁹ Anti-Slavery International interview, COSUDOW, Benin City, 6 March 2002.

³⁰ Anti Slavery International interview, Women's Right's Watch Legal Aid Clinic, Benin City, 8 March 2002.

- ³¹ Anti-Slavery International interview, Police Task Force, Lagos, 28 February 2002.
- ³² Anti-Slavery International interview, Special Assistant to the President, Human Trafficking and Child Labour, Abuja, 4 March 2002.
- ³³ *Ibid.*
- ³⁴ Anti-Slavery International interview, Director of Public Prosecutions, Ministry of Justice, Edo State, 7 March 2002.
- ³⁵ Both cases come under the 'old' Edo State law because they refer to acts prior to the 2000 law being passed.
- ³⁶ Olateru-Olagbegi, B., *Promoting Human Security to Prevent Exploitive Migration in Africa with Special Emphasis on Trafficking in Women and Children*, p.69.
- ³⁷ Anti-Slavery International interview, Carabinieri police, Turin, Italy, 24 September 2001.
- ³⁸ Anti-Slavery International interview, Solicitor General's Office and Director of Public Prosecution, Benin City, 7 March 2002.
- ³⁹ *Ibid.*
- ⁴⁰ Section 52.
- ⁴¹ Anti-Slavery International telephone interview, Turnaround Project, 10 June 2002.
- ⁴² *Ibid.*
- ⁴³ Women's Consortium of Nigeria (WOCON), *Research on Trafficking in Women in Nigeria*, supported by The Netherlands Embassy, Lagos, 2000 p. 51.
- ⁴⁴ Anti-Slavery International interview, traditional priest, Ebohon Cultural Centre, Benin City, 8 March 2002.
- ⁴⁵ Anti-Slavery International interview, solicitor, London, 16 April 2001.
- ⁴⁶ Anti-Slavery International interview, Police Task Force, Lagos, 28 February 2002.
- ⁴⁷ The Advocacy Net, "Deportation Backfires".
- ⁴⁸ Section 48(e) and (b).
- ⁴⁹ Anti-Slavery International interview, COSUDOW, Benin City, 6 March 2002.
- ⁵⁰ Anti-Slavery International interview, Caritas, Turin, Italy, 1 February 2002.
- ⁵¹ Anti-Slavery International interview, COLCE, Varese, Italy, 30 January 2002.
- ⁵² Anti-Slavery International interview, "Sunday", Abuja, 4 March 2002.
- ⁵³ Anti-Slavery International interview, Special Assistant to the President, Human Trafficking and Child Labour, Abuja, 4 March 2002.
- ⁵⁴ Section 48(j).
- ⁵⁵ Section 49.
- ⁵⁶ Section 50.
- ⁵⁷ Section 51.
- ⁵⁸ Section 48(g).
- ⁵⁹ Women Trafficking and Child Labour Eradication Foundation (WOTCLEF).
- ⁶⁰ Anti-Slavery International interview, WOTCLEF, Abuja, 4 March 2002.
- ⁶¹ Idia Renaissance Skills and Acquisition Centre.
- ⁶² Anti-Slavery International interview, Idia Renaissance Skills and Acquisition Centre, Benin City, 7 March 2002.
- ⁶³ Section 53(a).
- ⁶⁴ Section 48(e).
- ⁶⁵ Section 53(b) and (c).
- ⁶⁶ Section 27(3).

11. Thailand¹

I Legislation

1. Criminal Laws

Trafficking occurs both to and from Thailand for a variety of purposes, of both men and women.² The law contains an arsenal of measures to suppress trafficking, as well as prostitution in general. The Traffic in Women and Children Act B.E.2540 (1997) (Trafficking Act) amended the Traffic of Women and Girls Act (1928) to be more effective in combating the forms of trafficking occurring nowadays. It makes it an offence to transfer any woman or child for sexual gratification, an indecent sexual purpose, or to gain any illegal benefit for themselves or another person, whether or not the woman or child concerned has consented to the transfer or any of the acts committed.³ The Act covers acts of trafficking for purposes other than prostitution, but does not cover trafficking in adult men. The Trafficking Act prescribes that traffickers will be charged under the Penal Code, Prostitution Prevention and Suppression Act, Safety and Welfare of Children and Youths Act and punished accordingly,⁴ with a maximum five-year penalty for conspiracy to commit these offences.⁵ Treatment of trafficked women and children is also considered under the Trafficking Act. For example, victims of trafficking may only be detained by the Thai authorities for a short period of time, and must not be held in a detention centre or prison.⁶ Women and children trafficked into Thailand are to be given food, shelter and repatriation to their home country.⁷

The Prostitution Prevention and Suppression Act B.E. 2539 (1996) (Prostitution Act) can be used to prosecute those who traffic women or children into prostitution. Under section 9, "anyone who procures, seduces, or takes away another person with or without their consent to commit prostitution within or outside Thailand, shall be punished with imprisonment of up to ten years and a fine of 20,000 to 200,000 baht".⁸ Section 9 further states that the penalty should be increased by one third if deception, threats, violence, immoral influence, or any other means of mental coercion are used. Section 12 considers forced prostitution where someone has been unlawfully detained (deprivation of liberty), and punishes this along with the use of violence or threats with up to 20 years' imprisonment or life imprisonment,

or death penalty (in aggravated circumstances) and a fine. If this is by a public or police official or a shelter or social welfare official, the penalty is 15 to 20 years and a fine. Section 11 deals with brothel-keeping (three to 15 years' imprisonment and fine).

2. Other laws and policies affecting trafficked persons

a) Memorandum of understanding B.E. 1999 (MOU)

The Memorandum of Understanding on Common Guidelines of Practices among Concerned Agencies for Operation in Case Women and Children are Victims of Human Trafficking, B.E. 2542 is a non-binding legal agreement signed in 1999 between the Prime Ministers Office, police, Ministry of Public Welfare and NGOs. It recommends measures for co-operation between police and public welfare officials regarding the treatment of trafficked persons (Thai and non-Thai), and to improve chances of successfully prosecuting traffickers. The MOU uses a similar definition to the Trafficking Act but also adds elements of slavery-like labour practices, forced begging and 'other inhumane acts'.⁹ The MOU stipulates that foreign women and children who have been trafficked into Thailand should not be treated as illegal migrants. The MOU specifies that after a statement from a victim is taken, the official is to submit information to the Immigration Service to grant leniency under Section 54 of the Immigration Act B.E. 2522 (1979) and give assistance as provided for in Section 11 of the Trafficking Act (housing in an approved shelter). Women and children trafficked to Thailand who agree to testify against traffickers can stay in Thailand for the duration of the trial and are supposed to be housed in a shelter.¹⁰ Under the MOU, trafficked persons are entitled to food, clothing, medical care and counselling.¹¹ Public welfare officials are supposed to collect information from the trafficked person and pass it to the police in case it can be used as evidence in the criminal case against the trafficker.¹² The MOU contains various other provisions relating to the type of care and assistance to be given to trafficked women and children.

II General analysis and implementation in cases

1. Investigation and prosecution of traffickers

In cases of trafficking for prostitution, police still tend to use the Prostitution Act rather than the Trafficking Act. However the Prostitution Act has not been used successfully in many cases to prosecute traffickers, and in general is

used to prosecute people working in prostitution.¹³ According to the statistics from the Ministry of Justice, over a two-year period (from January 1996 to December 1997), a total of 325 women and 64 men were convicted as prostitutes under sections 5 to 8 of the Prostitution Act. In this same period, 52 persons were convicted under sections 9 and 12 of the Prostitution Act as traffickers, and there were 19 convictions under section 11 of people who had supported prostitution (brothel-keeping).¹⁴ A two-year study from December 1999 by the NGO, Fight Against Child Exploitation (FACE),¹⁵ looked at 87 reported cases of criminal proceedings under sections 9 (procurement), 11 (brothel-keeping) and 12 (forced prostitution) of the Prostitution Act. Out of the 88 cases reported, 72 were brought before a prosecutor, 54 cases were issued with a prosecution order and 21 cases were dismissed.¹⁶ Twenty-one traffickers were convicted under section 9 of the Prostitution Act. These statistics relate to both trafficked women and children. In cases of trafficked women only, 24 cases were prosecuted and seven cases were dismissed. The reason for dismissing most of the cases was lack of evidence.

The sentences imposed were usually three years' imprisonment; the longest was 15 years.¹⁷ In this case, a 19-year old woman escaped from a house where she had been imprisoned, and the trafficker was prosecuted under both article 9 and article 12.¹⁸ There were five cases in which women in prostitution were charged by the police under article 6 alleging they were present in a brothel for the purpose of prostitution. In these cases the business owners, the traffickers and the customers were not arrested, although in four out of five cases the children of the sex workers were also arrested.¹⁹ This may be because the police have no instructions to inquire or interview the women to find out if they were trafficked or not, or if they wanted to press charges against the trafficker. The police did not enforce the trafficking law to protect and assist the women in these cases, but treated them instead as criminals.

In a case where the Foundation for Women (FFW) worked with police to raid a brothel and rescue a trafficked woman, the woman was questioned by the police and then charged 500 baht.²⁰ The police argued that the woman had not been trafficked on the grounds that she had worked in the brothel for a period of time and they did not believe that she was being forced to work against her will. The police did not charge the brothel-owner or recruiter under the Prostitution Act, because the trafficked woman was too scared to make a complaint against them. Since mid 1999, the Director of the National Police Bureau has ordered the police concerned to follow the MOU and

threatened to punish police who do not follow the guidelines. However, in practice few police follow the guidelines of the MOU. Many police are unaware of its existence, and instead simply enforce the Prostitution Act and Immigration Act thereby committing further violations of the rights of the trafficked persons. Where police are aware of the MOU, they generally only use it in relation to acts covered under the Traffic Act and Prostitution Act, although the MOU provides an expanded definition of trafficking including forced labour.

Pen

Pen is a Thai woman who was trafficked into prostitution in Germany. She reported her traffickers to the police and acted as a witness against her traffickers at a trial in Germany, but due to a lack of corroborative witnesses Pen's traffickers were not convicted. After the legal proceedings in Germany were completed, Pen returned to Thailand. FFW assisted Pen upon her return and she received legal advice. She decided to file charges against her trafficker in Thailand, who was a government official. Pen had a lawyer who acted as a joint prosecutor in her case, that is to say, the lawyer joined her to the proceedings as an injured party. After five years the trial finished and the trafficker was convicted under sections 282, 83 and 91 of the Penal Code (forced sexual intercourse with others) and section 4 of the Trafficking Act and was sentenced to eight years in prison. Pen's case was slow, but an eventual success. FFW believes the success was due to the position of Pen's lawyer in acting as a joint-prosecutor on the case, having access to the prosecution's file and preparing additional evidence (such as that from the trial in Germany) to that provided by the Thai police. The lawyer explained, "We prepared more than the police and prosecutor. We took additional interviews from Pen. In court, we examined the handling of the case and as a joint-prosecutor to the case, we could also ask questions after the prosecutor, if we deemed it necessary".²¹

One of the major obstacles to successful prosecution is the release of offenders on bail who then abscond.

Jaem

Jaem is a Thai woman who was trafficked to England into prostitution. She escaped and went to the British police. Jaem was returned to Thailand almost immediately but police in London contacted immigration police in Thailand and a local NGO, the Global Alliance Against Traffic in Women (GAATW), to provide assistance to Jaem on her arrival in Bangkok. The Thai police asked Jaem and another woman to press charges against her trafficker. The police arranged lodging for both of the women in a hotel next to the police station. Both women were afraid that the trafficker would be released on bail. GAATW and FFW who assisted the two women during the legal proceedings submitted a request not to release the suspect on bail. Jaem's trafficker was nevertheless released on bail and absconded. The police issued an arrest warrant but did not apprehend the trafficker. The person who paid bail was a high-ranking military officer. The case is still pending three years later.

Lah

Lah, an ethnic minority woman from Burma was trafficked into Thailand to work in prostitution. She was discovered during a police raid on the premises where she was staying. There was no arrest or prosecution against the owner of the massage parlours who, according to Lah and other women, was directly engaged in trafficking and benefiting from it. Police were insensitive to the needs of the women because they regarded them as willing prostitutes.²² Lah's lawyer was denied access to participate in the process of taking the deposition from Lah and the other women.²³ Critical information regarding the massage parlours and the participation of the owner was missing from the police file of the case.²⁴

In two cases of women trafficked from Burma and Laos to work in a garment factory and a fish factory in Thailand, their traffickers were not prosecuted for trafficking and the related human rights abuses inflicted on the workers in those cases, but rather under the Immigration Act (harbouring illegal migrants), Labour Act (hiring illegal labour-child labour) and the Social Security Act. This had a significant effect on the treatment of the trafficked women in these cases by the authorities. In regard to Win Win and other Burmese women trafficked to a garment factory, FFW staff reported, "The

problem was the definition of 'trafficking'. The police and the prosecutor did not think that these women and girls had the right to be 'complainants' against the employer. They were not seen as trafficked persons. These women and girls rescued from the factory were seen as illegal workers because they illegally entered Thailand to work in the garment factory and they were not forced or lured to come with the agent. But they were forced to work every day for many hours, they were beaten if their work was not satisfactory and they were locked in the building and unable to go out."

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

As far as non-Thai victim witnesses are concerned, the application for a stay of deportation under Part 5(8) depends on the authorities' understanding of the case. Law enforcement officials are still less inclined to recognise non-prostitution cases as trafficking than those including prostitution. Once court proceedings are over, there is no possibility for trafficked persons to remain in Thailand. In Win Win's case, the women were deported to Burma once their traffickers had been convicted.

Pen

The trafficker threatened Pen and one of her relatives and tried to bribe her, but Pen did not withdraw her accusations and the legal proceedings went ahead.

Jaem

When Jaem identified the trafficker, the police provided her with no protection. She was afraid and disguised herself by wearing a wig. Even when her trafficker was granted bail, she still did not receive any protection from the police. During the investigation, Jaem returned to her home village. At the bus terminal two men followed her and her friend who was a witness. When they arrived in her home town, a car tried to run them over. They were afraid and hid in a hotel, and contacted GAATW. GAATW staff contacted the police in that town to ask for assistance. After that, Jaem did not want to continue the legal proceedings, as she felt unsafe.

b) Protection from reprisals and police protection

Currently there is no law to provide protection to witnesses in Thailand. The cases clearly indicate the lack of police protection for witnesses who are subject to intimidation, bribes and threats. GAATW reported, "In the town,²⁵ we couldn't verify if it was the traffickers or not, but when the two women are so frightened, there is nothing you can do to make them feel better. Law enforcement needed them to be witnesses and tried to persuade them, but at the same time there were no measures proposed which could make them feel safer".²⁶

The police have established guidelines for protecting witnesses. It is the duty of the police to provide protection to the witnesses. For example, after a trial, police must see the village head or district head to inquire about the behaviour of the witnesses and find out if the life of the witnesses has changed since their report/testimony.²⁷ Guideline Number 6 emphasises the importance of the process of going to court to give testimony and protecting those involved. Although Thailand currently does not have a witness protection law, there is a Draft Witness Protection Bill approved by the Council of State.²⁸ Under the current draft it recognises witnesses who have been trafficked for prostitution as witnesses in need of protection.²⁹ Those trafficked for other purposes are not explicitly recognised, though an application could be made.³⁰ The Bill sets out various provisions regarding housing, financial assistance for up to one year, change of identity, vocational training or education, confidentiality and access to compensation and expenses for testimony.

c) In-court evidentiary protection

Section 12 of the Trafficking Act enables a preliminary deposition to be taken by a prosecutor from a victim, even if no trafficker has yet been arrested. This testimony may be used as evidence in a later trial of the trafficker if the witness cannot be located. This may reduce the incentive for traffickers to seek reprisals against a witness, because they cannot prevent the testimony being used once it has been given.³¹ In Jaem's case, although she gave a preliminary deposition she was still intimidated by traffickers. It simply meant there was no possibility of her changing her testimony or dropping the charge.

There are no guidelines or policies to prevent the media from publicising the

identity of trafficked persons. In Pen's case, her name and details of her case were reported on the front page of a national newspaper. Police did not respect her right to privacy, although FFW staff had asked them to treat the case confidentially. Similarly in Lah's case, media were present when she was rescued. One of the women rescued was chained up and journalists photographed her in this demeaning position. Lah said, "I did not like it this way. The police just told us to put our head down if we did not want to show our faces."

d) Right to information regarding court proceedings

Generally the NGO or lawyer supporting the trafficked person liaises with police to find out the progress of the criminal proceedings. The police have no obligation to inform victim witnesses about court proceedings except if/when a witness is testifying.

3. Support and assistance to trafficked persons

a) Right to lawyer/ legal advocate in criminal proceedings

In their capacity as victims of crime, trafficked persons have a right to a lawyer if they join themselves to the criminal proceedings as an injured party. This includes the right to access the prosecutor's file, call and examine witnesses, as in Pen's case above (1. Investigation and prosecution). This is important to the success of criminal prosecutions in trafficking cases. However, the prosecutor can prohibit the procedure of an 'injured party' if they feel it is going to cause damage to the prosecution's case.³²

b) Right to recovery (assistance measures)

Information from interviews has shown that NGOs play a significant role in providing support to trafficked persons, and empowering them (see also Key Findings and Recommendations chapter). For the victim's rights to be respected an NGO advocate needs to accompany the trafficked person during police interviews, and provide information about their legal rights and organise activities to help their recovery. In Pen's case, FFW brought her to a shelter and provided her with legal assistance, counselling and, later, some financial support to set up a small business. GAATW observed: "The woman needs someone whom she can trust and explain to her the conditions of the shelter and what will happen to her if she stays there. After that, she needs shelter where she can make a decision on what she wants to do next."³³ They stressed that NGOs had an important role in meeting the woman returnee at

the airport upon her arrival, because trafficked women would prefer to be met by NGOs than government officials.

The role of NGOs is crucial especially when trafficked persons are foreign migrant women workers. Despite the MOU, in many cases trafficked women are arrested and detained. In addition they are not given adequate access to translators. In Win Win's case (from Burma), FFW staff reported, "We spent a long time trying to negotiate with the police to make them accept that this is a trafficking case. There was no need to send the women to the Immigration Detention Centre. We had to argue the case with the police to follow MOU. Finally the police sent them to stay at a government shelter." In Win Win's case, she and others were provided an interpreter by FFW. In the case of the Laotian women who were trafficked to work in a fish factory, they were initially detained in jail. They were released due to the efforts of a Thai Member of Parliament, and only then sent to stay at a government shelter. Under the MOU, interpreters should be provided where needed to participate in interviews with the police as well as at trial.³⁴ The social workers claimed that the Laotian women could understand Thai.³⁵ However, FFW's staff who interviewed them found that they could not understand Thai well. In Lah's case (from Burma), there was no interpreter during the interviews with the police.

4. Legal redress and compensation

Unlike other civil law countries the victim's right to a lawyer and to be an 'injured party' in the criminal proceedings does not mean that they can link a civil claim for damages to the criminal action. The two are completely separate, and a victim must take the trafficker to the civil court in order to obtain damages. Only if it is a crime against property; i.e. theft, robbery, piracy, extortion, fraud, embezzlement and receiving of stolen property, can a claim for damages be linked to the criminal action.³⁶ In such cases, the victim does not need to join him/herself to the criminal action, but the prosecutor has a duty to demand a civil claim for the victim i.e. more like the common law system of ordering restitution or compensation. There is a Bill currently in Parliament, which expands the ability to claim damages through the criminal proceedings so it will not be restricted to crimes against property.

Currently however, in the case of criminal offences against the person, the process of obtaining compensation must be done at the civil court after the

criminal prosecutions finish. In the case of trafficked women, it seems that most trafficked women do not want to continue with the civil court procedure,

Win Win

Win Win and others brought a civil case against the trafficker (who employed them at the factory) to the Labour Court, for unpaid wages, overtime and lack of holiday pay. Since the employer locked Win Win and the other workers in the work place, they also sought compensation for confinement under the Labour Law. The judge ordered the employer to pay 2,129,622 baht³⁷ at an agreed rate of 50,000 baht³⁸ per month according to the Labour Protection Act. However, it has been difficult to enforce the court order for payment of compensation. Even though the case was taken up in light of the MOU, there was a lack of assistance from government officials to follow up and protect the rights of the workers. It is even more difficult since the women had to be repatriated to Burma.

after the criminal proceedings, as in Pen's case.

Successful compensation claims however are processed in the Labour Court. In the case of the Laotian fish factory workers, the employer was prosecuted under the Labour Act and Social Security Act and Immigration Act, though there was no criminal investigation against him. Wieng received 13,336 baht³⁹ for 31 months wages. She received this money before she was repatriated back to Laos. These workers did not have the support of a lawyer or NGO to negotiate with the employer, although Ministry of Labour officials were present in the negotiations.

III Conclusions and Recommendations

Despite the efforts of NGOs working with the Government to achieve effective changes such as the MOU, the difficulty remains in implementation. Acknowledgement of trafficking by government officials is limited. Efforts have been made to create a comprehensive definition of trafficking in persons that encompasses purposes of trafficking other than for prostitution. Yet officials still consider trafficking to be equal to prostitution, and people trafficked for other purposes are treated as illegal migrants and are generally deported without any assistance. The cases in this chapter are not 'typical', in the sense that they are the cases where NGOs could intervene and some

progress was made. Barriers in providing assistance to them are not only the language, but also the attitudes towards foreign migrants and neglecting their rights. However in the vast majority of cases, there is no NGO to inform trafficked persons of their rights nor to intervene and ensure their protection. The support of NGOs is important to empower the trafficked victim person and help them decide whether to participate in the prosecution. Trafficked persons deserve to have enough information so that they can participate in decision-making concerning their rights and their lives.

It is crucial to improve the practice of all agencies involved to treat a trafficked person as an individual who can make a decision about his or her own fate, not simply as a tool for prosecuting traffickers. It is important to provide protection when they are treated as witnesses. For migrants who are permitted to stay in Thailand for judicial proceedings, such as Win Win and the Laotian women, they should be able to work legally as these trials take up to a year. This is not only in order to earn money, but also to ensure the women are active and feel empowered. It is a challenge for agencies involved or working on this issue to make use of limited resources to ensure protection and safety of trafficked persons and also to meet their needs.

Recommendations to the Thai Government

- Change the law so that women in prostitution are not prosecuted for any offences relating to them being sex workers. This is important to develop a fundamental change of attitudes regarding trafficking and women in prostitution.
- Provide police protection in accordance with the witnesses' wishes, such as by accompanying witnesses to their home village.
- Ensure police treat rape allegations seriously.
- Ensure law enforcement officials investigate and prosecute cases of trafficking for purposes other than prostitution. Provide training for all those involved in law enforcement to sensitise them to trafficking issues, in particular prostitution, rape and dealing with migrants.
- Review application of the MOU and raise awareness of it by training police and immigration.
- Law enforcement should collaborate with NGOs, so that soon after rescue/arrest of migrants who may be trafficked persons, NGOs can inform trafficked persons of their rights.
- Ministry of Labour should grant the right to work to migrant

trafficked persons who are residing in Thailand pending civil or criminal proceedings concerning traffickers.

- Law enforcement officials and the Ministry of Public Welfare should ensure services, such as interpreters, are actually available to trafficked persons.
- Establish police guidelines for confidentiality on cases.
- Ministry of Labour should facilitate the enforcement of compensation orders, when trafficked persons are to be repatriated, to ensure they actually receive the money.

Endnotes

¹ In Thailand, the non-governmental organisation Foundation for Women in Bangkok conducted the research and prepared a report. This chapter is based on the information included in that report.

² As the organisation conducting the research assists women only, all cases in this chapter refer to women only.

³ Section 5 Trafficking Act (1997).

⁴ Section 5.

⁵ Section 7.

⁶ Section 10.

⁷ Section 11.

⁸ £4,850.27 - £4,850.42

⁹ Part 2 (1).

¹⁰ Part 5 (8).

¹¹ Part 5(9).

¹² Part 5 (6)

¹³ Under sections 5 and 6 Prostitution Act.

¹⁴ รายงานการศึกษา เรื่อง การบังคับใช้พระราชบัญญัติ"องค์กรพัฒนาการคุ้มครองเด็ก พ.ศ.2544 หน้ 15

¹⁵ Ibid. p.15.

¹⁶ Three cases were issued with separate prosecution orders under the Entertainment Act and non-prosecution orders under the Prostitution Act.

¹⁷ Ibid.

¹⁸ Ibid. p.82. Case name: Thaveesak Harkla.

¹⁹ Ibid. p.10.

²⁰ €12.18.

²¹ Foundation for Women interview, Pen's lawyer, Bangkok, October 2001.

²² Foundation for Women interview, Lah's lawyer, Bangkok, November 2001.

²³ Ibid.

²⁴ Ibid.

²⁵ name of town withheld to protect the woman's identity.

²⁶ Foundation for Women interview, GAATW, Bangkok, October 2001.

²⁷ ระเบียบกรมตำรวจเกี่ยวกับคดีเล่มที่ 1 ลักษณะที่ 8 บทที่ 6 ข้อที่ 255

ระเบียบข้อ 1 พนักงานสอบสวนต้องสอบสวนตัวบุคคลที่อยู่ของพยานมิใช่ข้าราชการ"ประจำ ทหารหรือตำรวจให้ได้อำนาจความน่าเชื่อถือที่แท้จริงให้ขอหมายเลขโทรศัพท์เอาไว้อย่างสม่ำเสมอแล้วบันทึก"ประจำวันไว้เป็นหลักฐานทุกครั้ง เพื่อให้ได้ตัวพยานมาศาล ตำรวจต้อง"พบผู้ใหญ่บ้าน หรือกำนัน เพื่อสอบถามพฤติกรรมของพยานต่างๆ ว่ามีพฤติกรรมอะไร"ลึบ"ลับ"หรือไม หรือในข้อ 5 ของข้ออยู่ กล่าวว่าการที่พนักงานสอบสวนละเลยไม่สนใจติดตามพยานสำคัญหรือผู้เสียหาย"เบียดเบียนจนเป็นเหตุให้ศาลสั่งตัดพยาน และพิพากษาจำคุกผู้ต้องหาเป็นความบกพร่องอย่างร้ายแรง ผู้บังคับบัญชาต้องพิจารณาความบกพร่องของพนักงานสอบสวนแล้ว รายงานให้กรมตำรวจทราบ ข้อ 6 การ"เบียดเบียนพยานศาล"เป็นราชการสำคัญอย่างยิ่ง เพราะฉะนั้นระเบียบกรมตำรวจออกมาโดยเฉพาะ ข้อ 256 การ"องค์กรพัฒนาสำคัญในคดีอาญาบางคดีที่มีความจำเป็น น26-27.

²⁸ Number 658/2001.

²⁹ Section 8(2).

³⁰ Section 8(3).

³¹ Anti-Slavery International interview, prosecutor, Attorney General's Office, Bangkok, March 2001.

³² Email correspondence, Attorney General's Office, 6 August 2002.

³³ Foundation for Women interview, GAATW staff, Bangkok, October 2001.

³⁴ Part 5(7).

³⁵ Foundation for Women interview, Lah's Social Worker, Bangkok, November 2001.

³⁶ Email correspondence, Attorney General's Office, 6 August 2002.

³⁷ € 51,878.92

³⁸ €1,218.68

³⁹ €325.05

12. Colombia¹

1 Legislation

In June 2002 Colombia introduced a new law against human trafficking which stipulates that "anyone who promotes, induces, constrains, enables, finances, co-operates or participates in a person's transfer within the national territory or abroad by resorting to any form of violence, ruse or deception, for exploitation purposes, to lead such person to work in prostitution, pornography, debt bondage, begging, forced labour, servile marriage, slavery for purposes of obtaining financial profit or any other benefit either for himself [sic] or for another person, shall incur 10 to 15 years' imprisonment and a fine..."² This wide-ranging law replaced the previous 'trafficking' law (article 215 of Law 599 and 600 of 2000), which focused only on cross border movement into prostitution. As the research was carried out before the new law was in effect, all the case studies in this research were under the previous trafficking provision, and it remains to be seen how the new law will be implemented. Offences are aggravated if committed against someone with temporary or permanent physical or psychological injury, causing temporary or permanent physical or psychological injury, trafficking of minors, trafficking of family members or if the offender is a public servant.³ Penalties thereby increase by one third to one half. The new law also criminalises facilitation of illegal migration for the purpose of profit.⁴ It additionally has a provision regarding money laundering, and obtaining profit or property from trafficking or smuggling (amongst other crimes) punishable by six to eight years' imprisonment.⁵

II General analysis and investigation of cases

1. Investigation and prosecution of traffickers

Carla

Carla was trafficked from Colombia to Germany. Upon arrival in Germany, Carla's documents and plane ticket were taken from her, and she was told that she had to work as a prostitute and repay her 'debt'. When Carla refused to do so, her traffickers let her starve until she was finally willing to work in a club. Carla was constantly watched and observed by cameras and she had no opportunity to contact her family.

She was finally found in a police raid. Carla failed to tell the German police that she had been trafficked and was deported back to Colombia, where she also did not tell the police what had happened to her. It was only later, when her traffickers contacted her to take her to Germany again, that she became afraid and told her story to the Colombian police. The authorities succeeded in collecting evidence against Carla's traffickers, who belonged to an organised trafficking ring operating throughout Latin America. However, none of Carla's traffickers could be located and the case was suspended (effectively dropped) after several months.

Alma

Alma arranged to travel from Colombia to Spain by borrowing money from a recruitment agency. Alma was supposed to work off her 'debt' in Spain. Together with 11 other women Alma was initially brought from a provincial town to Bogota. When she arrived in Bogota, Alma and the other women were forced to stay together in an apartment. They were prevented from leaving and escorted if they made a trip outside. When Alma finally received a forged passport she became afraid and escaped. She told her story to the Colombian police who were then able to collect evidence against the agency and discovered it had been deceiving women and forcing them into prostitution in Spain. Due to a joint operation between Colombian and Spanish law enforcement officials, the traffickers were finally arrested and sentenced to five years' imprisonment under the old trafficking law (Law 360, article 311 of Colombia's Penal Code).

According to the Attorney General's Office, between 1992 and 2000, 99 cases were taken up under the offence of trafficking in persons. A total of 75 perpetrators were arrested, of whom 55 per cent were women. Female traffickers were generally recruiters, agents or involved in managing the trafficking process, while male traffickers tended to organise the actual movement across borders. Only seven of the 99 cases went to trial, with an average sentence imposed of between two and five years' imprisonment for the trafficker. Under the Colombian legal system, individuals sentenced to two years in prison are allowed to go free, as this is the minimum sentence. In two of the cases, the traffickers were sentenced to 5 years imprisonment, but their attorneys applied for anticipated sentences, which lowered prison

terms and granted the offenders domiciliary detention (i.e. at home).

Individuals convicted of trafficking usually receive only a minimum sentence. This does not encourage trafficked women to testify. According to Interpol, it is frustrating to see that, after months or years of extensive investigation, traffickers receive only short sentences or are released on bail and continue with their criminal activities after paying a fine.⁶

All of the 99 cases dealt with trafficking into prostitution, since the law at that time excluded other forms of trafficking. It is widely acknowledged that Colombian nationals are trafficked for purposes other than prostitution: "We discovered cases of servile marriage. It is easy to detect the sale of forged visas and work contracts. There are many ways in which Colombian citizens are being exploited".⁷ Fundación Esperanza⁸ reports being aware of cases of trafficking into domestic labour and forced labour, but so far have not had any such cases referred to them.

Investigation procedures can take from a few months up to several years. According to a prosecutor, some cases have been pending for more than seven years due to lack of evidence: "We have legal proceedings here dating back to 1999, we have some dating back to 1995, but unless we have evidence there's nothing we can do. The cases come to a standstill".⁹ Prosecutors, police, lawyers and service providers all agreed that lack of evidence is the main problem. The same prosecutor explained that in many cases the information provided by the trafficked person was not sufficient even to start the investigation.¹⁰ Apart from witness testimonies, other forms of evidence used include international police (Interpol) reports, photos, telephone taps, monitoring of financial transactions or confiscated forged documents. Alma's case showed a combination of different forms of evidence (telephone taps, raids, forged documents) and international co-operation resulting in a successful prosecution.

Judicial police (or criminal investigative department police) agree that the obstacles to prosecution are long delays during the investigation process due to lack of evidence and also lack of resources, "We don't have an allocated budget, costs are high, particularly investigation costs. We often have to share our staff with other departments. Ideally, there should be a well-equipped team in terms of technical means, infrastructure and budget, which would be able to operate in an autonomous way. Sometimes our

operations in the past have failed because we didn't have staff to send out or there was no transportation available during surveillance activities".¹¹ A lawyer interviewed agreed that cases are delayed due to a lack of resources at court and traffickers not being arrested.¹²

A local prosecutor summarised the unwillingness of trafficked persons to report: "There are many reasons. One of them is the lack of harsh legislation to punish traffickers; another is that victims are afraid. They are scared and don't want their families to find out that they were abroad working in prostitution. They are not willing to talk and since they are not obliged to do so, they basically refuse to tell who the trafficker is."¹³

Mia

Mia was offered a job as a domestic worker in Japan but instead was trafficked into prostitution on the street. She was constantly beaten and threatened. Seeing her situation, another Colombian sex worker provided Mia with their embassy's contact number. Mia contacted the Colombian Embassy and submitted an informal statement. She was provided with a place in a shelter where she awaited her repatriation to Colombia. After Mia returned to Colombia, she disappeared. Police and prosecution were unable to trace her, and wanted her to participate in the investigation procedure. Information Mia had previously given to the authorities was not sufficient to prosecute the traffickers. Japanese law enforcement officials were unwilling to cooperate with the Colombian authorities. Due to lack of evidence, the criminal case was closed after a few months.

Patricia

Patricia was trafficked from Colombia to Japan by her aunt and forced into prostitution. Her aunt watched her constantly in Japan and threatened to hurt Patricia's children. Before Patricia escaped, her aunt beat Patricia and threatened that if she told her story to anyone, she and her children would be killed. After she recovered from the injuries, Patricia reported her aunt to the Colombian police. Interpol was contacted and two years later her aunt was arrested upon arrival at a Colombian airport. Patricia and her parents filed statements and took part in the prosecution procedure. Patricia also filed a compensation claim for damages. Her aunt was charged under the old trafficking law. The aunt spent seven months in detention awaiting trial

until she was released due to her pregnancy. The aunt fled Colombia immediately so the trial could not be completed, it is still pending.

According to DAS,¹⁴ Interpol, local Colombian authorities and authorities in countries of destination such as Ecuador, Japan, Netherlands, Spain and United States carried out 11 raids at an international level, resulting in the arrest of 79 suspects and the rescue of 140 trafficked women. However, the judicial police criticize the "lack of co-operation between public and private institutions. In one case, for example, the telephone company didn't have the technical means to tap telephone calls. Sometimes it is the embassies that refuse to co-operate. Very often they don't provide us with the information we ask them for."¹⁵ The prosecutor in Patricia's case called for stronger co-operation between the various law enforcement agencies such as the Prosecutor's Office, the Ministry of Justice and the Technical Investigation Corps (CTI).¹⁶ This was reinforced by the judicial police, who stated ideally, a specialised team should be established, which would work together closely with Interpol, under common objectives and shared ways of investigating and prosecuting.¹⁷

Most trafficked persons refuse to make a statement to the police. They are reluctant to report their trafficker to the police out of fear for their own safety and their reputation: "The victims choose to say nothing either out of shame or out of fear, and some of them are intimidated to such a degree that they go back to the trafficker."¹⁸ Of the 99 trafficking cases recorded by the Attorney General's Office in the 1990's, 42 were reported by relatives of the trafficked person, five were reported by the trafficked persons themselves and the remaining 52 reports came from the DAS, CTI or police. Fundación Esperanza noted that: "Out of the 80 trafficked women that we have assisted between 1997 and 2000, only four have filed a formal report with the authorities. These women reported directly and on their own initiative. We advise them on which person to contact when filing the report, but they take care of all the formalities by themselves".¹⁹

Trafficked persons may report what has happened to them to the Colombian police, to DAS, to the Prosecutor's Office or directly to Interpol. The interview is long, usually taking two to five hours to make a statement, and the trafficked person must report several times to various different officials before the information she has given is evaluated and finally filed as a crime

report. In almost all of the cases it is only after the trafficked woman has made her third statement that she will be formally questioned. In most formal sessions the language used by officials is of a technical nature, which makes it difficult for the individual to understand the procedure. Apart from that, the trafficked women are usually under great pressure and the interrogation procedure seems to give no priority to their privacy. The situation tends to be worse if the trafficked woman is on her own and not accompanied by the representative of an institution or organization. Patricia recounts, "I felt badly in dealing with the authorities, having to tell the story to a stranger, and then to another, and my papers were going from hand to hand, and I would tell my story again and again".²⁰

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

Not covered here, since Colombia is a country of origin.

b) Protection from reprisals and police protection

Carla

Carla went to the authorities only because the traffickers contacted her again and wanted her to return to Germany. After reporting the traffickers, out of fear of reprisals, Carla fled her hometown and has not returned since.

Alma

When Alma reported the trafficker she was not offered any kind of protection. The traffickers contacted Alma several times by telephone saying she had to make payments to them, and making other threats. She was too scared to tell anyone, because she thought the risk would be greater if people knew.

No police protection was offered to Carla and Alma when they reported information about the traffickers to the police. Patricia's lawyer summarised the difficulties caused by the absence of witness protection measures in Colombia: "Investigation is very difficult and reporting is also very difficult due to the seriousness of the situation. The State doesn't protect witnesses of trafficking. Patricia reported her trafficker and now that her trafficker is

free she has to fear for her life and for her personal safety and that of her daughters. The State does not protect her and she put herself at risk when she reported".²¹

Colombia's police witness protection system is currently only granted to witnesses in kidnapping, terrorism and drug trafficking cases. According to the Ministry of Justice, Colombia has three types of witness protection available upon application to the Attorney General's Office. The first consists of providing witnesses with information and recommendations for their own safety. The second involves monitoring their situation to a certain degree, the third involves a change of identity. Although these could be offered to trafficked persons, so far no trafficked person has been protected under this programme.²² A DAS representative admitted: "We have not been able to provide any sort of support to the victim who reported her traffickers. The country's condition does not allow us to protect witnesses of trafficking. Our job is to provide protection to political leaders, human rights advocates, labour union leaders and presidential candidates. Unfortunately, Colombia is a country where a large number of citizens are being threatened. We do not have the resources or staff to provide protection."²³

c) In-court evidentiary protection

Alma

Alma was not asked to give evidence at trial. There was sufficient alternative evidence, including confessions from the traffickers who pleaded guilty in anticipation of a lower sentence.

Like Belgium, in Colombia the procedure tends to be a written one, and victim witnesses do not usually give evidence in court, due to the existence of other forms of evidence used at the trial. Trafficked persons must repeat their statement many times in the investigation, but not at trial itself.

DAS state that it is possible to change a witness' name in court documents to protect privacy and ensure that personal details are kept confidential.²⁴ This is the only witness protection measure used in some trafficking cases. The application of this procedure to witnesses in trafficking cases is dependent on random and individual decisions of officials in each case.

d) Right to information regarding court proceedings

There is no specific right to information on court proceedings in Colombia. The long delays in the course of pre-trial investigations mean trafficked persons are rarely kept well informed about court proceedings. This is also because trafficked persons tend to be untraceable after their first contact with police. In over 80 per cent of the cases the trafficked person had either moved residency after her first contact with police, authorities were unaware of her whereabouts, or she had left the country again. Officials reported that they were generally unable to contact the trafficked woman for further statements or testimonies. Interpol commented: "If victims of trafficking do report, they disappear afterwards and don't come back to complete their reports. It is one thing to report and another to have the case prosecuted. Once the authorities have been informed about a case and want to start with the prosecution procedure, the [trafficked] women disappear. This happens in almost all of the cases".²⁵

3. Support and assistance to trafficked persons**a) Right to a lawyer/ legal advocate in criminal proceedings**

Patricia had a lawyer in the criminal proceedings, because he was representing her civil claim joined to the criminal proceedings. There is no free access to lawyers to act in this capacity. Although Fundación Esperanza can find lawyers to provide free legal assistance to trafficked persons, this is not common practice.

b) Right to recovery (assistance measures)**Alma**

The police told Alma about Fundación Esperanza in Bogota, an organisation that could help, but Bogota was too far from her hometown. She was also scared about talking to anyone about what had happened.

None of the four trafficked women in our study received formal assistance from any institutional service agency. An integrated system for supporting victims of sexual abuse, rape, physical abuse or domestic violence exists, but no support services for trafficked persons who return to Colombia, apart from those provided by Fundación Esperanza. There are no State shelters for

women in Colombia. Fundación Esperanza explains: "When a trafficked woman returns to Colombia she has many needs, particularly of a financial nature. In most cases this was the reason why she left Colombia in the first place and, when she returns, her situation is often worse than when she left. Unfortunately, Fundación Esperanza only provides returning trafficked women with emergency assistance. Our work regarding reintegration is very limited."²⁶ Although it is widely acknowledged by NGOs, lawyers and DAS that Colombia is in need of an official victim protection and support scheme for victims of trafficking, this has not been established so far, and there are no signs of one being prepared. DAS explained, "Victim protection and support is necessary so that trafficked persons feel encouraged to report to the police. It would also make the victims feel that their situation is recognised and that those responsible for trafficking pay for their actions." The trafficked women in our case studies received no assistance in terms of reintegration into Colombian society, their home communities or into the job market. Patricia did manage to find a temporary job through her own initiative and with the help of some friends.

4. Legal redress and compensation

As in other civil law jurisdictions, it is possible to have legal representation in the criminal case as an "injured party" and in order to link a claim for compensation to the prosecution. Due to the lack of success of criminal prosecutions, payment of compensation is extremely rare. Up until now, Patricia's case is the only known case in which a trafficked person has filed a claim for compensation. Her case is still pending, since her trafficker absconded.

III Conclusions and recommendations

Colombia lacks basic schemes for protection and support services for victims of trafficking, reintegration of victims and witness protection mechanisms for those who agree to act as witnesses in trafficking cases. This is mainly due to a lack of resources in terms of staff and budget and concerns not only NGOs but also Colombian government agencies such as DAS, CTI, judicial police and the Ministry of Justice. There are also difficulties in regard to trafficking cases during investigation and prosecution procedures. Again, this is due to a lack of resources, implemented structures and specialised agencies, services or groups. Colombia's trafficking legislation was weak and failed to

cover all aspects of trafficking in persons. The new legislation will broaden and strengthen the law. However, it remains to be seen how the law will actually be implemented, particularly as no new resources are being provided to law enforcement agencies. In Colombia, the political will to improve the situation of trafficked persons and prosecute traffickers more firmly and with stronger sentences seems to exist throughout the different institutions and authorities concerned with the issue of trafficking. This is a good and promising start for changing what has until now been a rather bleak reality for victims of trafficking in Colombia.

Recommendations to the Colombian Government

- Encourage an international funder to provide money to a local non-governmental organisation to inform all relevant authorities, NGOs and Colombian society at large about the new trafficking law and existing mechanisms to access the law.
- Ensure trafficking is made a priority for different national institutions and authorities, especially the judiciary.
- Strengthen co-operation between countries of origin, transit and destination. Ministry of Justice and police should establish guidelines and working practices.
- Exchange expertise and technical advice between Colombia and countries with greater experience in fighting trafficking in human beings, as well as co-operation with international organizations. International assistance should be provided to Colombia for this purpose.
- Train officials who are in charge of receiving reports from trafficked persons in different skills e.g. interviewing techniques, collecting evidence etc.
- Law enforcement officials should introduce a standard way of recording information about trafficking cases. This should emphasise the need to maintain the privacy and anonymity of victims of trafficking. Repeated questioning and interrogations should not occur and reports should be coded to guarantee confidentiality.
- Judicial police should establish specialised regional teams and units for investigating and prosecuting trafficking cases. Team members should receive special training on the issue of trafficking and be provided with the necessary resources and equipment and include women.

- The Ministry of Justice should develop and implement a legal assistance system for victims of trafficking through which trafficked persons can be provided with information on procedures and receive free legal services. Lawyers should be specialized in the issue of trafficking in persons and in compensation claims against traffickers.
- The Ministry of Justice and police should develop and implement victim and witness protection and support measures. These measures should include free legal assistance (see above), psychological counselling, relocation of trafficked person and family members if necessary, social support and assistance with reintegration into Colombian society.
- Develop and strengthen NGOs working on the issue of trafficking in persons.

Endnotes

¹ In Colombia, Fanny Polania Molina conducted the research and prepared a report. This chapter is based on the information included in that report.

² Article 188A of Penal Code (Bill no 190-S/01 173-C/01, signed 19 July 2002).

³ Article 188B.

⁴ Article 188.

⁵ See article 8 of Bill No. 190-S/01 173-C/01.

⁶ Interview by Fanny Polania Molina, Interpol, Bogota, 4 December 2001.

⁷ Interview, Ministry of Foreign Affairs, Ipiales, 23 November 2001.

⁸ Fundación Esperanza is an NGO based in Colombia that works on the issue of trafficking in Colombian women. In 2000, it provided assistance to 57 trafficked women who returned to Colombia.

⁹ Interview by Fanny Polania Molina, Prosecutor's Office, Bogota, 14 November 2001

¹⁰ *Ibid.*

¹¹ Interview by Fanny Polania Molina, judicial police, Cali, 3 December 2001.

¹² Interview by Fanny Polania Molina, Patricia's lawyer, Bogota, 16 November 2001.

¹³ Interview by Fanny Polania Molina, prosecutor, Bogota, 14 November 2001.

¹⁴ Administrative Department of Security.

¹⁵ Interview by Fanny Polania Molina, judicial police, Cali, 3 December 2001.

¹⁶ CTI is a department attached to the Prosecutor's Office.

¹⁷ Interview by Fanny Polania Molina, judicial police, Cali, 3 December 2001.

¹⁸ Interview by Fanny Polania Molina, Ministry of Justice, Bogota, 28 November 2001.

¹⁹ Interview by Fanny Polania Molina, Fundación Esperanza, Bogota, 19 November 2001.

²⁰ Interview by Fanny Polania Molina, Patricia, Bogota, 14 November 2001.

²¹ Interview by Fanny Polania Molina, Patricia's lawyer, Bogota, 16 November 2001.

²² Interview by Fanny Polania Molina, Ministry of Justice, Bogota, 28 November 2001.

²³ Interview by Fanny Polania Molina, DAS, Cali, 11 December 2001.

²⁴ *Ibid.*

²⁵ Interview by Fanny Polania Molina, Interpol, Bogota, 4 December 2001.

²⁶ Interview by Fanny Polania Molina, Fundación Esperanza, Bogota, 19 November 2001.

13. Ukraine¹

I Legislation

1. Criminal Laws

a) Article 149 Criminal Code

Ukraine was the first former Soviet country to adopt a law on human trafficking in 1998 (article 124-1 of the Criminal Code). The USSR did not have a standard provision dealing with trafficking. Article 124-1 was in turn replaced by article 149 in the new Criminal Code only two years later in 2001. Article 149 Criminal Code defines trafficking in human beings as the sale or another form of paid transfer of a person, as well as any other illegal transaction with respect to a person, when that person crosses the frontier of Ukraine, leaving or entering the country, illegally or legally, with or without the person's consent, with the aim of further selling or transferring for money the person to someone else for either sexual exploitation, involvement in commercial pornography ('porno business'), engagement in criminal activities, debt bondage, adoption for commercial purposes, use in armed conflict, or the exploitation of the labour of that person.

Infractions of article 149 may be punished by three to eight years imprisonment. Article 149 also recognizes a series of aggravated circumstances, if the same acts are committed against a minor, involve several persons, are part of a regular activity or occur with the collusion of officials or of someone in a position of authority over the trafficked person. This increases the sentence from five to 12 years imprisonment with confiscation of property.

The previous law (article 124-1) was widely criticised as providing a definition of trafficking that was too vague to be used effectively, and article 149 does bring the definition of trafficking more closely in line with the Trafficking Protocol. However, human rights activists still have concerns about article 149. Trafficking has to be across borders, and 'with the aim of a further sale or paid transfer'. Terms such as 'sexual exploitation' and 'porno business' have not previously appeared in the criminal law and are not defined.² The law only targets those directly involved in sale or transfer, and ignores other intermediary roles.³ It requires an initial sale or illegal transfer to occur in the

Ukraine, which is often not the case.

b) Others laws used to prosecute traffickers

Under Article 303 Criminal Code prohibits most activities related to prostitution. It contains a provision⁴ dealing with prostitution through coercion, deception, threats, violence, destruction or damage to property, blackmail or fraud punishable by one to three years in prison. Penalties increase if those responsible are part of an organised group,⁵ or if it is an organised group with the objective of obtaining profits from prostitution.⁶ Women engaging in prostitution are criminalised and liable to pay a fine or carry out community service.⁷ NGOs have expressed concern that the effect of the complete criminalisation of prostitution may deter trafficked persons in the sex industry from reporting traffickers for fear of prosecution themselves, although in theory defences of physical or psychological coercion⁸ and extreme necessity⁹ are available.

In addition, traffickers may be prosecuted under various other articles of the Criminal Code such as article 302 (pimping), article 190 (fraud) and article 146 (unlawful imprisonment).

2. Other laws and policies affecting trafficked persons

Governmental programmes to combat trafficking

Whilst efforts have been made to increase the number of successful prosecutions, progress has been slow. In 1999, a programme was introduced to amend anti-trafficking legislation in line with international agreements and to increase the activities of law enforcement agencies and other departments to prevent, combat and assist trafficked persons.¹⁰ This involved the Ministries of Interior, Foreign Affairs, Youth and Family Affairs, Labour and Social Policy as well as the State Committee on State Border Protection, youth social services and various governmental and non-governmental organisations. However it proved ineffective due to lack of funding and expertise, and it only focused on trafficking in women for prostitution. Since then, a new programme has been adopted,¹¹ involving a working group of NGOs, intergovernmental organisations and Government officials to deal with all forms of trafficking. However concerns remain regarding both a lack of clear co-ordination mechanisms for different actions, and programme financing.

II General analysis and implementation in cases

1. Investigation and prosecution of traffickers

Special units to combat crimes related to trafficking in persons were created within the main Criminal Investigation Department of the Ministry of Interior and in the regional Interior Affairs Departments in 2000. Their responsibility is to prevent and detect trafficking in human beings. In 2001 under the Code of Criminal Procedure, responsibility for investigation of offences was transferred from prosecutors to police investigators.

From March 1998 to December 2001, 145 cases were initiated under articles 149 (and the previous 124-1) of the Criminal Code to prosecute traffickers. During January 2002 eight cases were opened under article 149. Out of these 153 cases, 57 have been investigated and brought to trial. In 2001 alone, 129 suspected traffickers were arrested (60 men, 69 women). Only 10 cases resulted in convictions, the rest are still awaiting trial.¹² A significant number of cases pending trial are returned to the prosecutor's office for additional

Alana

Alana applied for a dancing job in the Middle East, advertised in a Ukrainian newspaper. When she arrived there, her passport was taken away and she was forced to work as a prostitute. Local police visited the club and knew women were forced into prostitution but were paid off by the club owner and did nothing. The women contacted their parents in Ukraine and told them about their situation. With the help of Ukrainian police, a Ukrainian NGO and the Ukrainian and Russian Embassies, Alana and other women were rescued and repatriated to Ukraine. All of them filed charges against their traffickers soon after returning to Ukraine. One trafficker in Ukraine was arrested and remanded in custody for nine months. The trafficker was prosecuted under article 124-1 and the trial started; however, it was suspended due to a lack of evidence that the trafficker actually benefited financially from the crime. The trafficker was allowed bail on condition that he did not travel outside the country. The case is still pending.

investigation due to lack of evidence.

In Alana's case, the lengthy process has meant the trafficker is now effectively free and unpunished. The trial has been suspended due to lack of evidence, despite the testimonies of Alana and the other women due to the law's requirement that financial gain be proved. This is still a problem under the revised article 149. The prosecutor had little hope of any further action in this case.

Katerina and Nadia's cases show two successful prosecutions for trafficking

Katerina

Katerina was trafficked to Turkey, raped and forced into prostitution. One of her clients kidnapped Katerina and locked her up for a month. Katerina managed to escape and went to the police. She had to stay in a deportation centre for one month until she was deported to Yugoslavia, since she had Yugoslavian false documentation. Upon her arrival in Yugoslavia, Katerina did not know where to go or who to ask for help. When a man offered her a job as a waitress in a bar she accepted. However, she ended up in a brothel again. After one month, Katerina was able to escape the club/brothel and started to look for another job. She had no money to go back to Ukraine or even to make a phone call to inform her family and ask for help. She finally found a job as a genuine waitress in a café, which she liked. She then informed her family about her whereabouts. After her return to Ukraine, Katerina reported her case to the police and one of the traffickers, a woman, who initially arranged her travel to Turkey, was arrested. She was accused of trafficking in human beings and convicted under article 124 of the Penal Code and sentenced to eight years in prison.

Nadia

Nadia was trafficked from Ukraine to Turkey by a 'friend' to whom she owed some money. Although she knew it was for prostitution, her friend sold her to a pimp and she was threatened that if she did not continue to work, her pimp would sell her to Turkish pimps. After Nadia returned to Ukraine she repaid her friend, but also filed charges against her traffickers. Due to her statement and statements of other women and girls, two of the traffickers were convicted and sentenced to six years imprisonment and three and a half years imprisonment respectively.

in the Ukraine:

All the prosecutions under article 149 have involved cross-border trafficking for prostitution. No cases have been initiated under article 149 concerning other forms of exploitation although such cases are known to occur. For example in 2000, the Kiev Regional Department to Combat Trafficking (which is one of the special units established to combat trafficking), received information about such exploitation but a formal case was not opened due to lack of evidence. Such cases may be prosecuted under other laws, such as a case involving trafficking of people to the Czech Republic for economic exploitation, which was prosecuted under article 143 (fraud).¹³

The requirements of article 149, requiring trafficking to involve crossing a border, has meant other legislation is used to prosecute internal trafficking, such as laws on prostitution. Successful prosecutions under article 149 are also difficult due to poor communication between law enforcement bodies in countries of origin and destination. A representative of the Department to Combat Trafficking explained that successful investigation of cases depended upon his own informal good relations with Turkish law enforcement agencies.¹⁴ Trafficking is a transnational organised criminal activity, and those caught in the Ukraine tend to be the recruiters, who are often the lowest link in the organisation. Trafficked persons rarely report traffickers or agree to testify because of fear, threats, intimidation and bribery, a lack of willingness to testify in public about what happened to them, lack of support during and after proceedings, lack of possibilities for compensation, possible criminalisation for prostitution, concerns about police and official corruption and the belief that traffickers are unlikely to be punished properly.

All trafficking victims interviewed for this study made the comment that testifying in court was one of the most difficult stages of the process, in particular due to the need to describe what had happened to them in front of the traffickers and to the public. The slow process of investigating and prosecuting trafficking cases, lack of proper resources for investigation, and reliance on witness testimony, rather than other forms of investigation, are the main hindrances to successful prosecutions. Both prosecutors and lawyers felt that lack of training and understanding by the judiciary of specific issues in trafficking cases also hindered successful prosecutions.

3. Procedures affecting trafficked persons and measures of protection

a) Residency rights

Not covered here, since Ukraine is a country of origin. There are no recorded prosecutions for trafficking into the Ukraine and no specific legal provision providing residency status for migrants who might be trafficked to Ukraine.

b) Protection from reprisals and police protection

There is a witness protection law¹⁵ providing the right to safety and protection for those who act in criminal proceedings. The law defines a range of safety measures including personal protection, protection of home and property, rapid assistance if in danger, use of surveillance, telephone taps, change of identity and documentation, relocation as well as in-court protection for witnesses giving evidence (see below). An official department exists for witness protection, but officials in this department lack training and understanding of the special needs of trafficking witnesses. A Ministry of the Interior official explained that full-blown witness protection measures are not available to trafficked persons during investigations.¹⁶ Fully comprehensive witness protection is expensive and mechanisms for witness protection are hardly developed in general. In addition, police protection and safety measures are more often applied to court officials, not witnesses or trafficked persons.¹⁷ In none of the cases studied were formal safety measures used, and all those questioned (officials, NGOs, service providers and lawyers) commented that there was no need for them.

Physical police protection and a safe place to stay during the investigation and trial are used in a few trafficking cases. Although these fall under the witness protection law, in practice shelters are operated by NGOs and provided in co-operation with the authorities. For example, the Kiev Department to Combat Trafficking initiated a case in May 2000 when three trafficked persons returned from Israel and agreed to testify. They could not stay at home during the investigation and prosecution since they were afraid of threats made by the traffickers. The Department co-ordinated housing in a shelter through La Strada (Ukraine) for the duration of the investigation. Law enforcement bodies provided additional physical security during this period. The trial occurred in December 2001, and these arrangements were for the duration of the trial only. However, this was a rare case of successful protection. There is no legal provision or protocol regarding provision of long-

term protection for trafficked persons following a trial and NGOs are unable to provide a safe place after a trial.

Interviews with law enforcement officials revealed a clear perception on their part that there was no need to provide trafficked women with protection. Police and prosecutors believed that the women were not at serious risk of any danger from traffickers. However, in practice it seems they underestimate the risk of reprisals because of the relative success of NGO involvement in providing safe and secure shelters. Threats from traffickers or their associates to the victim witness were reported in two of the interviews with trafficked women. Police were aware of these threats, but the trafficked women were never informed whether any action was taken.

Katerina

The trafficker's relatives threatened Katerina's family during chance meetings in the street. They reported it to the police. However, Katerina's mother was still worried, and Katerina has since moved abroad again to find work.

The inadequacy of protection measures for trafficking victims in the Ukraine has led to women trafficked from the Ukraine being granted refugee status in the United Kingdom and Canada on the grounds that they have a well founded fear of persecution and that the Ukrainian authorities were unable to provide the women with sufficient protection from organised crime. In a case in the United Kingdom, a trafficked woman who did not report her trafficker was granted asylum on the grounds of fear of being persecuted by the organised criminal gang in her home country. It was held that if she returned to the Ukraine it was likely that the organised gang would kill her and, owing to the climate of corruption, the authorities were unable or unwilling to provide sufficient protection.¹⁸

c) In-court evidentiary protection

Alana testified in pre-trial hearings and again at the investigative court. She had legal representation, and her lawyer was able to ensure the court was closed to the public.

The witness protection law has provisions regarding confidentiality, anonymity and closed trials for witnesses; however, these are rarely used in trafficking cases. Upon request from a witness via the prosecution, a judge can order a closed trial in cases involving sex crimes or in the interests of safety of the witnesses, but witnesses are rarely informed of this possibility. There have been only three closed trials in trafficking cases. Problems still exist in closed trials, because this still does not prevent relatives of the defendant from being present outside the court and abusing or intimidating victims there. NGOs assist in an informal way, by accompanying witnesses to court and preparing them for the trial.

d) Right to information on court proceedings

There is no standard practice on passing on information on court proceedings against traffickers, although police or social service providers may try to keep the trafficked persons informed about the case. This is not always so. For example, Katerina was not provided with any information about the progress of the investigation or prosecution, apart from the summons to court to testify. Katerina and her family were unaware that the trafficker had been convicted and sentenced until interviewed for the purposes of this research.

3. Support and assistance to trafficked persons

a) Right to a lawyer/ legal advocate in criminal proceedings

As in other civil law countries, victims of crime can join themselves to the court as an injured party and have access to legal representation. This gives them access to the court proceedings and ability to add missing information to the case and improves their ability and confidence to give testimony at trial. NGOs generally assist in finding and paying lawyers assisting trafficked persons, as in Alana's case.

Alana

Alana's lawyer joined a civil claim for compensation to the criminal case. Her lawyer was able to take part in the formal questioning of victim witnesses, other witnesses and the defendant, and in scrutinising the evidence in the prosecution's file. The lawyer assisted the victim witnesses, enabling them to tell their stories accurately without leaving out important aspects of their story due to the trauma

of testifying in court.¹⁹ The prosecutor commented subsequently that the presence of the lawyer in that case was very important to help Alana and the other women to be able to tell their stories in court.²⁰

However, in Katerina and Nadia's cases, they were seen as witnesses, rather than victims of crime. Thus they were not referred to NGOs or informed about the possibility of having a lawyer or claiming compensation.

b) Right to recovery (assistance measures)

Alana

Alana and the other trafficked women received assistance, including a social worker, lawyer, medical and psychological assistance and computer training through a local NGO. Alana was able to enrol in some education and training courses.

The Comprehensive Programme to Counteract Trafficking in Human Beings 2002-2005 developed by and consisting of NGOs, intergovernmental organisations and government officials proposes a range of measures for trafficked persons. These include the creation of reintegration centres, providing necessary medical, psychological and legal assistance for victims of offences linked to trafficking in human beings or other violence. However, these are yet to be implemented, in the meantime access to recovery is provided by NGOs.

Non-governmental assistance includes a wide range of reintegration measures for trafficked persons. NGOs provide social assistance for trafficked persons returning to Ukraine, including medical, psychological, legal assistance and training and advice on employment possibilities. However, the problem remains that many trafficked persons who contact the police and report traffickers, are not considered to be either trafficked persons or victims of crime and so are not referred to NGOs, as in Nadia and Katerina's cases. Katerina left the Ukraine shortly after testifying, because she needed to earn money for herself and there are few job opportunities in Ukraine. In Nadia's case, the police recognised that she and the other women needed legal assistance and social assistance (particularly psychological counselling and financial assistance) but they did not refer her to any help,

due to their lack of knowledge and understanding about the existence of relevant NGOs and the role they can play.

To overcome the impediment of non-referral of trafficked persons, La Strada has developed an application form for police to give to trafficked persons at the time of first contact, which explains the availability of NGO assistance to a trafficked person. Experience shows that this practice has been successful not only in encouraging trafficked persons to contact NGOs, but also to cooperate with law enforcement bodies. Social assistance to trafficked persons is vital to ensure they can recover from their experience. Trafficked women interviewed for this study identified their immediate needs after escaping from their traffickers as money, freedom of movement, the ability to return home, and to seek redress against the traffickers. Other needs became apparent only later, such as legal, medical and psychological assistance.

4. Legal redress and compensation

Under Ukrainian legislation a person who has suffered 'material, physical or moral damage' from a crime has a right to join a civil claim to the criminal case against the trafficker or another person who has benefited financially from the offence.²¹ Traffickers' assets that are seized by the authorities go to the Federal Treasury, and trafficked persons must claim compensation from the Federal Treasury, rather than being granted compensation directly out of the confiscated assets. Financial compensation depends on the specific circumstances of the crime. In Alana's case, she joined a claim to the criminal prosecution, and claimed her financial damage (actual costs incurred) was 300 Ukrainian Hryvna²² and her moral damage was estimated at Ukrainian Hryvna 10,000.²³ The social service provider was a lawyer and assisted her in bringing the civil claim.

Although the law gives a right to compensation, its implementation in practice is very difficult due to the Federal Treasury's bureaucratic mechanisms for compensation and a lack of awareness amongst victims about compensation mechanisms. The police did not inform Katerina that she could ask for compensation, because she was treated as a witness rather than the victim of a crime. In none of the three cases reviewed was compensation awarded. If a suspect is acquitted, a civil claim can be submitted separately and is considered under the terms of the Civil Code.

III Conclusions and recommendations

Despite the shortcomings of the Ukraine's legislation, more trafficking cases are now being investigated and prosecuted and there are legal provisions that can be used to protect witnesses. Co-operation between law enforcement agencies and NGOs has improved in recent years. NGOs are able to provide support to victims, regardless of their status or willingness to testify in criminal proceedings. However, there are significant failings of the system. The legislation does not cover all cases of trafficking and the requirement for trafficking to have involved crossing a border is unnecessarily restrictive. There are difficulties in obtaining testimony from witnesses. Witness protection programmes are not specifically aimed at trafficked persons and rarely available in practice. Trafficked persons returning to Ukraine in most cases remain unprotected. There is a lack of training in the special needs of trafficked persons at all levels of law enforcement. Co-operation between NGOs and law enforcement agencies is only at an informal level, and there is no formal State provision for victim protection or assistance. Provisions for compensation are ineffective.

Recommendations to the Ukrainian Government

- Reform the trafficking law, in line with the Trafficking Protocol.
- Increase international and cross border co-operation by exchanging experience and expertise with other countries on trafficking.
- Police should establish guidelines for identifying and assisting or referring trafficked persons.
- Remove the Trafficking in Human Beings Department from the Crime Investigation Department and establish a separate department.
- Create special trafficking investigators, including women since some trafficked women are more comfortable talking about their experiences with women than men.
- Ministry of Justice should review possibility of using of pre-trial testimony and video recordings of testimony in trafficking cases.
- Ministry of Justice should increase use of closed courtrooms for trafficking cases.
- Provide free legal advice and assistance to trafficked persons regarding the right and procedure for compensation.
- Create clear guidelines on the procedure and minimum amount for 'moral compensation'.
- Ukrainian police should seize assets of traffickers at time of arrest.
- Create a State compensation fund for trafficked persons.

14. Poland

I Legislation

1. Criminal Laws

a) Article 253 §1 of the Penal Code 1998

Article 253 §1 Penal Code 1998 criminalises trafficking in persons so that, "Whoever traffics in persons, even with their consent, will be sentenced to a minimum three years' imprisonment". There is no definition of trafficking in persons. Under the Penal Code, slavery and slave trading are also prohibited.² The previous Penal Code 1969 had also criminalised slave trading, procuring, enticing or abducting a person for the purposes of prostitution (even with consent), trafficking of women (even with consent) and trafficking of children.

b) Other laws used to prosecute traffickers

Use of deception, threats, violence or abuse of authority in connection with prostitution is punishable by one to 10 years imprisonment under article 203 Penal Code. Article 199 criminalises abuse of a person's vulnerability to lead them into sexual relations (i.e. not only prostitution) punishable by up to three years imprisonment. Other provisions used to prosecute traffickers relate more to third party involvement in prostitution. Under article 204 §1 Penal Code, "Whoever for purposes of material benefit, incites a person to prostitution or facilitates prostitution of a person" is penalised with imprisonment for up to three years. The penalty increases up to 10 years where the offender entices or abducts a person into prostitution abroad,³ or if the person is a minor.⁴ Deprivation of liberty,⁵ torture connected to deprivation of liberty,⁶ facilitation of illegal migration⁷ and involvement in organized criminal activities⁸ are all criminal offences.

2. Other laws and policies affecting trafficked persons

a) Residency permits: article 14 Immigration Law

There is no specific provision regarding residency permits for trafficked persons. Generally undocumented migrants trafficked to Poland are deported. Under article 14 Immigration Law⁹ there is provision for migrant victim witnesses to legally stay in Poland in order to give testimony. This is

rarely applied to trafficked persons, because there are no regulations on providing financial assistance and basic support for victim witnesses who stay.¹⁰

II General analysis and comparison of cases

1. Investigation and prosecution of traffickers

The new stand-alone trafficking offence under article 253 has been criticised as being too general (and therefore unconstitutional) to constitute a penal offence, since the term 'traffic in persons' is not defined and therefore is not precise enough for an offender to understand what conduct is illegal.¹¹ Although it could be used to prosecute different forms of trafficking, article 253 is seldom used. Article 253 was successfully applied in the following case, but this was because charges were also laid under article 204 §4 (enticement into prostitution abroad).

Aurelia

Aurelia, from a former Soviet State, was sold by a Polish border official to a trafficker who took her to Warsaw and forced her into prostitution. On one occasion, Aurelia was beaten and gang raped by a police officer and his colleagues. She was eventually rescued during a police raid. She made a preliminary statement to the police and prosecutors. Charges of gang rape and bribery by border officials were not pursued due to lack of evidence. The traffickers were convicted of trafficking under article 204 (4) and 253. They received sentences of four years imprisonment.

Prosecutions for trafficking for purposes other than prostitution are extremely rare, and none of the cases in this chapter reflect trafficking for other purposes. Neisner and Jones-Pauly state that: "Most cases involving trafficking for the purpose of prostitution or sexual activity are brought under article 204 §4 and article 199".¹² From 1995 to 2000, for crimes related to trafficking and migrant prostitution,¹³ there were 191 investigations completed, 39 cases were suspended and 152 were brought before a primary court (indicted).¹⁴ The most common reason for suspending investigations was due to lack of evidence. From 1995 to 1999, there were 80 trials resulting in 151 convictions (and five acquittals).¹⁵ All but one of the sentences were

less than five years imprisonment. One third of convictions (53 persons) received a suspended sentence. Most of the suspended sentences were for female defendants in recruiting trafficked persons and sex workers. Until 1998, most trafficking cases in Poland were due to German police discovering and prosecuting crimes in Germany¹⁶ and passing evidence gathered to Polish authorities, in order to prosecute recruiters. The situation started to change in 1999, when 12 investigations began on the basis of reports by trafficked persons themselves; eight cases were initiated as a result of operational work by Polish police and only six based on evidence from law enforcement officials in other countries. Although the Penal Code allows a number of options in prosecuting offences related to trafficking, a prosecutor commented that use of the laws is limited and only the most serious cases involving a large number of victims will be investigated on the prosecutor's initiative.¹⁷

Daria

Daria was trafficked from Poland to Germany and forced into prostitution. She escaped and was deported from Germany to Poland. She reported the traffickers to the Polish police, but the authorities did not treat her case seriously. An investigation commenced three months after Daria gave her initial statement to police but was badly conducted, with no regard for Daria's safety (see b) protection from reprisals and police protection below). Daria's case was dropped due to lack of evidence and inability to identify the traffickers.

The operational capacity of police and poor investigative procedures, in particular delays in investigations and lack of adherence to police guidelines, have all been identified as major obstacles to prosecutions in Poland. There is widespread concern about corruption of police and other officials. Polish police have also identified difficulties with international cross-border co-operation with other police forces. Lack of witness protection and restrictive migration policies were identified by NGOs as major problems. Poland is a country of origin, transit and destination, however, detection of trafficking in regard to Poland as a country of transit and destination is very low, due to Poland's policy of immediately deporting trafficked migrants.¹⁸ Migrant trafficked persons in Poland are largely deprived of the possibility to press charges against traffickers.

2. Procedures affecting trafficked persons and measures of protection

a) Residency rights

Migrant trafficked persons who are undocumented in Poland are usually deported within 48 hours. Law enforcement officials prioritise combating illegal migration over investigation of potential trafficking offences. There is a lack of training and procedures to identify trafficked persons as victims of crime, and to institute the appropriate mechanisms. There is a lack of facilities and information for trafficked persons. Even if trafficked persons are able to remain in Poland, the lack of financial provision for such migrants presents serious problems, with reliance on NGO support, or if no support is available, the trafficked person may return to the traffickers as although they violated them, they may be the only people the victim knows in Poland.

Martyna

Martyna was trafficked from a former Soviet State to Poland and forced into prostitution. She experienced a particularly brutal gang rape by a group of seven men. She escaped and, with the support of La Strada who assisted her, reported the traffickers and the group of men who raped her to the police. Martyna returned home, because there was no possibility for her to remain in Poland. She returned to Poland to give her testimony and to identify the traffickers, but without any formal assistance or protection. La Strada provided her with both financial support to pay for the travel costs and social support.

b) Protection from reprisal and police protection

Poland has no established system of police witness protection. Very little protection by authorities is offered or available to trafficked persons in Poland. Only Aurelia was provided with 24-hour police protection when she returned to give evidence for the trial, and this was due to requests from La Strada who provided a safe place to stay for Aurelia.

Ewa

Ewa was trafficked from Poland to Germany where she was confined to a house, made to undertake dangerous work, and repeatedly raped. She escaped and reported the matter to the German police. The case was suspended and she returned to Poland, where she made a

preliminary statement to the Prosecutor's Office. She received repeated threats by telephone allegedly from the traffickers. Although she reported the threats to the Polish police, the case was dropped after four months due to lack of evidence. She did not receive any police protection. La Strada provided and paid for safe accommodation both during the case, and for three months after the case was closed. The accommodation had to be changed on three occasions due to threats.

Daria

On her return to Poland, Daria reported her case to the Polish police. Daria was provided shelter by an NGO, as she was at risk from her traffickers. However the shelter was of poor quality and she did not feel safe. Three months after the initial statement, police took Daria to a place she had identified as where the traffickers lived. No protection was provided for her, and she was left to make her own way home by public transport, waiting several hours alone for a bus in a place where she knew her traffickers could be. After this she felt afraid of the police and did not want to assist them.

Aurelia

In Aurelia's initial statement to the police, she told them her passport was missing. The police told her it was probably still with her trafficker and she should go back to retrieve the passport. After Aurelia assisted in the investigation, she returned to her home country. She was harassed and received threatening phone calls.

Martyna

Martyna returned to Poland in order to assist police investigations, but was not provided any police protection in terms of police escorts, safe place to stay or financial assistance to cover the costs of travel and accommodation. This was all provided by NGOs.

In all cases, it appears that the only protection provided to trafficked persons was from NGOs.

c) In-court evidentiary protection

Aurelia

Aurelia gave a preliminary deposition (statement) regarding what had happened to her. She was then able to return home to a country that was formerly part of the Soviet Union. Her written testimony was used at the preliminary hearing, and she only had to attend the trial for one day to give evidence. Aurelia came back to Poland to testify against the traffickers. She was able to testify in court without the presence of the defendant, so as to reduce the trauma of having to retell the story of what had happened to her.

Aurelia's case was unusual in that she returned to Poland to give testimony. In many cases, it is not possible to find the witness again once they leave the country. For example, in cases such as Ewa's, when trafficked persons are being threatened, they may move house many times in order to feel safe, especially if there is no protection by the State. If this protection is not provided by NGOs, then it is practically impossible to trace a trafficked person who is trying not to be found. This highlights the importance of preliminary deposition of evidence, which is possible under article 316 §3 of the Code of Criminal Procedure. The use of preliminary deposition means that, as part of the investigation, the witness gives a sworn statement (deposition) in front of a magistrate. The deposition can be used at the later trial, and the witness may be examined regarding the statement at a preliminary hearing or at trial. If it is not possible to locate the witness, it is still possible to use the deposition in evidence. Prosecutors see the benefit of preliminary depositions in providing evidence that can be used should the migrant witness subsequently leave Poland and fail to return for a later trial.¹⁹ However, it would appear that the use of preliminary depositions can also cause migrant witnesses to be deported immediately after a statement has been taken.

Under Polish law, there is also the possibility of anonymity, and according to Neisner and Jones-Pauly, this was used in three trafficking cases between 1995 and 1998.²⁰ As mentioned elsewhere, anonymity is thought to be of limited use in most trafficking cases, since the trafficked person is usually easily identifiable by the nature of the testimony. Of more importance is the right of victim witnesses to testify in the absence of the accused, where there

is evidence that the presence of the accused may influence the testimony of the witness (as in Aurelia's case).

d) Right to information regarding court proceedings

Police and prosecution have no obligation to inform victim witnesses regarding the status of proceedings. In Aurelia's case she was kept well-informed, but this was because she had her own lawyer. In Martyna's case, the NGO kept her informed regarding the progress of the case and liaised with the authorities.

3. Support and assistance to trafficked persons

a) Right to lawyer/legal advocate in criminal proceedings

Trafficked persons may be supported in court by a lawyer or by a 'social representative', usually from an NGO, who can make written and oral statements. Both of these are dependent upon the agreement of the prosecutor. Trafficked persons can also join themselves to the criminal proceedings at the indictment stage as an injured party, which gives them the right to a lawyer, who has the right to attend and ask questions of the defendant and witnesses, and address the court regarding verdicts.²¹ In Aurelia's case, the prosecutor stated that Aurelia's lawyer played an active role in the proceedings, exercising the full range of rights in the court.²²

b) Right to recovery (assistance measures)

Social welfare is only available to individuals with refugee or permanent residence status. Therefore migrant trafficked persons have no access to social welfare, and are dependent on NGOs for support services, including the provision of safe accommodation, as well as legal, psychological, medical and financial assistance. This includes support during the investigation and court procedures such as travel expenses to and from the trial if they have returned to their country of origin, as in Aurelia's and Martyna's cases. Even in terms of Polish trafficked women who return home, assistance is provided mostly by NGOs as opposed to State agencies, especially in regard to safe accommodation, legal advice, psychological assistance and education/training opportunities. It is unusual for trafficked persons to get adequate support or assistance from the State without NGO involvement.

Ewa

Ewa was provided housing in a shelter and counselling by La Strada. She also received financial support from social welfare. The contact person from social welfare had been trained by La Strada and had previously worked with them. La Strada staff felt the support she was given influenced Ewa's decision to testify, and helped her recover from her fear of the trafficker.

The role of NGOs as opposed to the State in providing these services can be problematic, for example in respect to safe housing, it is difficult for NGOs to provide proper security arrangements. As one prosecutor commented, "the main burden of responsibility in helping victims of trafficking fell on La Strada Foundation. In many cases where women decided to testify it was possible for them to do so because they have social and financial help from La Strada. It is necessary to think about creating governmental programmes in this regard, for example as in the Netherlands and Germany".²³ Assistance measures provided in each of the cases by NGOs helped make trafficked persons feel safer, more self-confident, and helped them to recover from their ordeal.

4. Legal redress and compensation

Trafficked persons may join a compensation claim to the criminal proceedings as an injured party or separately in a civil action. According to Neisner and Jones-Pauly, the claim for damages must be joined to the criminal case at the start of the trial, and the criminal court may order a defendant to pay restitution as part of the sentence.²⁴ In none of the cases studied were compensation claims submitted with the criminal case. In Aurelia's case, it was stated she would bring a separate civil claim after the criminal case had finished.²⁵ It is difficult to bring civil claims once the trafficked person is no longer in Poland.

III Conclusions and recommendations

In Poland, there are significant institutional, legal and practical obstacles to the effective prosecution of trafficking and protection of trafficked persons' rights. Poor operational capacity of authorities and lack of awareness about

the risks to victim witnesses have meant slow investigations with little police protection, with victims in many cases being exposed to additional risks without any precautions for their safety, except those provided by NGOs. At the legal level, the lack of a clear definition of trafficking is problematic because legal institutions lack awareness and training in respect of trafficking. In practical terms, support for trafficking victims is reliant on NGOs. While they clearly have an important role in providing support, NGOs cannot adequately replace State structures, especially in regard to safety measures.

Recommendations to the Polish Government

- Comprehensive training of police, immigration, judiciary, prosecutors and other agencies on trafficking, in particular to identify migrant victims and to improve police operational policies in investigation and prosecution of trafficking.
- Create a national plan to combat trafficking and an inter-disciplinary working group of immigration, police, social welfare and NGOs to monitor implementation of this plan.
- Develop programmes to combat corruption by officials.
- Police and immigration officials should increase international and cross-border co-operation with their counterparts. Police and immigration officials should exchange experience and expertise with other countries on trafficking.
- Police and immigration officials should establish guidelines and working practices regarding treatment and protection of victims and investigation of trafficking cases.
- Raise public awareness in order to improve attitudes towards trafficking considering it a human rights issue.
- Ensure implementation of article 14 of the Immigration Law granting the right to stay to trafficked persons who act as witnesses.
- Provide State funding for those who remain under article 14 of the Immigration Law.

Endnotes

¹ In Poland, the non-governmental organisation, La Strada Foundation against Trafficking in Women, Warsaw, Poland, conducted the research and prepared a report. This chapter is based on the information included in that report. The legal analysis in this chapter is substantially based on Niesner, E. and Jones-Pauly, C. *Trafficking in Women in Europe*, Kleine Verlag, 2001, p.88 - 110.

² Article 8, Introduction, Kodeks karny (effectively Penal Code 1998).

³ Article 204 §4.

⁴ Article 204 §3.

⁵ Article 189 §1.

⁶ Article 189 §2.

⁷ Article 264 §3.

⁸ Article 258.

⁹ Law of 25 June 1997.

¹⁰ La Strada interview, prosecutor, Warsaw, 27 November 2001.

¹¹ Gardocki, L., *Prawo Karne*, 3 Wydanie, Warszawa, Wydawnictwo C.H. Beck 1998, p.514, as mentioned in Niesner, C. and Jones-Pauly, M., p.92.

¹² Niesner, C. and Jones-Pauly, M., p.92.

¹³ Under articles 199, 203, 204 §4 and 253.

¹⁴ Karsznicki, Krzysztof, *Handel kobietami w świetle badań postępowań karnych prowadzonych w latach 1995-1999*. Aniol Stróż, Przedstawiciel społeczny wobec ofiary handlu kobietami, materiały szkoleniowe. La Strada, Warszawa, 2001.

¹⁵ *Ibid.*

¹⁶ Germany is a major destination country for Polish women trafficked into prostitution.

¹⁷ La Strada interview, prosecutor, Warsaw, 27 November 2001.

¹⁸ La Strada interview, prosecutor, Warsaw, 27 November 2001.

¹⁹ La Strada interview, prosecutor, Warsaw, 27 November 2001.

²⁰ Niesner, E. and Jones-Pauly, C., p.109.

²¹ Article 53 Penal Procedures Code.

²² La Strada interview, prosecutor, Warsaw, 27 November 2001.

²³ *Ibid.*

²⁴ Niesner, E. and Jones-Pauly, C., p.108.

²⁵ La Strada interview, Aurelia's case worker (social assistance), Warsaw, 10 December 2001.

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The index has been created in word-by-word alphabetical order. Entries marked in bold refer to major coverage of the subject on those pages. Where alternative terms may be used to find a subject, a **SEE** reference has been created to lead to the preferred term of the text eg: Anna **SEE** Katya and Anna. **SEE ALSO** references have been used to direct the reader to further useful references eg: residency status **SEE ALSO** trafficked persons - residency permits.

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