



Guiding Principles on Human Rights in the Return of Trafficked Persons

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Contents

Acronyms	6
Glossary of Key Terms	7
Foreword	11
Introduction	13
Part 1: Guiding Principles of Return	17
Principle 1: Return must be safe	18
Principle 2: Due process	20
Principle 3: Protection measures when return is not an option	22
Principle 4: Special protection measures in returning child victims	24
Principle 5: Durable solution without further harm	27
Principle 6: Access to effective remedies	29
Principle 7: Co-operation and monitoring	30
Part 2: Explanatory Report to the Principles	33
Principle 1: Return must be safe	34
Principle 2: Due process	48
Principle 3: Protection measures when return is not an option	55
Principle 4: Special protection measures in returning child victims	66
Principle 5: Durable solution without further harm	74
Principle 6: Access to effective remedies	85
Principle 7: Co-operation and monitoring	90

Acronyms

CRC	The United Nations Committee on the Rights of the Child
ECHR	The European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	The European Court of Human Rights
ICCPR	The International Covenant on Civil and Political Rights
ICMPD	The International Centre for Migration Policy Development
IOM	International Organization for Migration
NGO	Non-governmental organization
ODIHR	The Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe
OHCHR	The United Nations Office of the High Commissioner for Human Rights
OSCE	The Organization for Security and Co-operation in Europe
UN	The United Nations
UNCAT	The United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
UNCRC	The United Nations Convention on the Rights of the Child
UNHCR	The United Nations High Commissioner for Refugees
UNICEF	United Nations Children's Fund
UNODC	United Nations Office on Drugs and Crime
UNTOC	The United Nations Convention against Transnational Organized Crime

Glossary of Key Terms

Best Interests Determination	A formal process with strict procedural safeguards designed to determine the child's best interest for particularly important decisions affecting the child.
Child	Any person under 18 years of age.
Complementary / subsidiary protection	Formal permission, under national law or practice, to reside in a country extended by that country to persons who are in need of international protection, even though they do not qualify for refugee status under the UN Refugee Convention.
Country of destination	In the context of trafficking in human beings, this refers to the country where a trafficked person has been taken to or is being taken to for the purpose of her or his exploitation.
Country of origin	Country or countries of nationality or, for stateless persons, of former habitual residence. In certain instances, including, for example, under the Dublin Regulation, this may also refer to a country of transit.
Human rights-based approach	A conceptual framework that is normatively based on international human rights standards and that is operationally directed at promoting and protecting human rights.
International protection	Actions taken by the international community that, on the basis of international law, aim to protect the fundamental rights of a specific category of persons located outside their countries of origin who lack the national protection of their own countries.
National Referral Mechanism	A co-operative framework within which state actors fulfil their obligations to protect and promote the human rights of trafficked persons by co-ordinating their efforts in a strategic partnership with civil society. ¹

¹ See the definition of national referral mechanism as defined in *National Referral Mechanisms – Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook*, OSCE/ODIHR, 2004.

<i>Non-refoulement</i>	Originally a concept under international (refugee) law, under which it is illegal for states to expel or return (“refouler”) refugees who have a well-founded fear of persecution upon their return. The principle is part of customary international law and is, therefore, binding on all states whether or not they are parties to the UN Refugee Convention.
Potential victim of trafficking	A person who has not been exploited, but who, due to her or his vulnerable situation, may become a victim
Presumed victim of trafficking	A person who manifests certain indicators that suggest they may be a victim of trafficking in human beings, but who has not been formally identified as such by the authorities, or who has declined to be formally identified as such.
Reflection / recovery period	Period of time granted to victims of trafficking in human beings to allow them to recover and escape the influence of the perpetrators of the crime, and to give them the opportunity to make an informed decision as to whether to co-operate with the competent authorities.
<i>Refoulement</i>	The return by a state of an individual to the territory of another state in which he or she may be persecuted for reasons of race, religion, nationality or membership of a particular social group or political opinion, or where the individual is threatened with torture or some other serious violation of her or his human rights. <i>Refoulement</i> includes any action that has the effect of returning the individual to a state where he or she faces persecution, including expulsion, deportation, extradition, rejection at the frontier or extra-territorial interception.
Refugee	A person who, owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion or membership of a particular social group, chooses to reside outside the country of her/his nationality or former habitual residence, and who is unable or unwilling to avail herself/himself of the protection of that country. ²

² See Article 1A of the *Convention of 28 July 1951 relating to the status of refugees*, as amended by the New York Protocol of 31 January 1967.

Remedy	Encompasses both a substantive right to reparations, as well as the procedural rights necessary to access reparations. In substance, this means adequate reparations for the harms suffered, which may include restitution, compensation, recovery, satisfaction and guarantees of non-repetition. In procedural terms, it refers to access to a competent and independent authority in order to successfully obtain reparations. At a minimum, this includes: the provision of information concerning rights, the reparations available and the existence of and modalities for accessing reparation mechanisms; legal, medical, psychological, social, administrative and other assistance necessary to seek remedies; and a reflection and recovery period for the trafficked person, followed by the granting of residence status while trafficked person seeks remedies. ³
Return	In the context of trafficking in human beings, the term refers to the process of returning victims of trafficking from the country in which they were identified as trafficked persons to their country of origin. The process can be voluntary, forced and assisted or, alternatively, forced and not assisted. In this document, the term is used to describe the situation of victims of trafficking who are forced to return.
Returning state / country	A state that has returned or is in the process of returning a trafficked person from its territory back to the victim's country of origin.
Separated children	Children separated from both parents, or from their previous legal or customary primary caregiver, but not necessarily from their relatives. This can include children who are accompanied by adult family members other than their parents.
Third-country nationals	Any person who is not a citizen of an EU Member State.

³ See the concept of remedies as defined in the *Draft Basic Principles on the right to an effective remedy for trafficked persons*, developed by the UN Special Rapporteur on trafficking in persons, especially women and children, and presented by the Special Representative in her thematic report to the UN Human Rights Council in 2011 (A/HRC/17/35).

Trafficking in human beings, or trafficking	The recruitment, transportation, transfer, harbouring or receipt of persons by means of the threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or 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. ⁴
Trafficking of children	The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation, even if this does not involve any threat or use of force or other forms of coercion, abduction, fraud, deception, the abuse of power or a position of vulnerability, or the giving or receiving of payments or benefits to achieve the consent of a person having control over another person. ⁵
Transnational referral mechanism	The concept of a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons, through which state actors of different countries fulfil their obligations to promote and protect the human rights of trafficked persons. ⁶
Unaccompanied children	Children who have been separated from both their parents and relatives and are not being cared for by the adult or adults who bear legal or customary responsibility for doing so.
Victim of trafficking, trafficked person	For the purposes of this document, this refers to a person who is formally identified as a victim of trafficking, a potential victim of trafficking or a presumed victim of trafficking.

⁴ See the definition of trafficking in human beings as defined in the *UN General Assembly Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, Article 3(a).

⁵ See the definition of trafficking of children, *ibid.*, Article 3(c).

⁶ See the definition of transnational referral mechanism as defined in *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe*, ICMPD (2010).

Foreword

Trafficking in human beings represents both a serious human rights violation and a threat to freedom and security. OSCE participating States experience all stages of trafficking – as origin, transit or destination countries, or as a combination of some or all of these. As such, the return of trafficked persons is a concern for all states, whether as returning or receiving countries.

Ensuring the safe return of trafficked persons and preventing their re-victimization is, moreover, a key component in the fight against trafficking. As such, it requires the co-ordinated response of state actors, law enforcement agencies and civil society organizations of the countries concerned, as well as the co-operation of international actors and organizations.

The OSCE provides a unique forum for states to respond to and co-operate in the fight against trafficking in human beings, including on the issue of return. The OSCE Office for Democratic Institutions and Human Rights (ODIHR) has introduced a number of pioneering initiatives aimed at strengthening the protection of the human rights of victims of trafficking. In particular, ODIHR has assisted participating States in the creation of national referral mechanisms, drawing on guidance provided in ODIHR's *National Referral Mechanisms – Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook* (2004). With its 2008 publication on *Compensation for Trafficked and Exploited Persons in the OSCE Region*, ODIHR paved the way in promoting trafficked persons' access to justice and effective remedies, including compensation.

The final responsibility for protecting and assisting victims of trafficking, however, lies with the state. This applies from the moment state authorities know – or should know – that a person within its jurisdiction is a victim, or presumed victim, of trafficking. That responsibility continues at least up until the victim's immediate protection and support needs are met. At that point, other obligations, such as those related to remedies, the regularization of status and the right to return, may continue to entail responsibilities of protection and support. This principle is applicable to all countries, regardless of whether they are countries of origin, transit or destination.

In recognition of their responsibility to combat human trafficking, the OSCE participating States have developed a comprehensive normative framework for combating trafficking, laid down in the 2003 Action Plan to Combat Trafficking in Human Beings, the 2005 Addendum focusing on child victims of trafficking, and the 2013 Addendum addressing the emerging trends and most pressing challenges, as well as

in a number of Ministerial Council decisions. These documents have reaffirmed the primary responsibility of OSCE participating States in addressing trafficking. They provide far-reaching recommendations on how to do so and task OSCE institutions, structures and field operations with assisting participating States in this endeavour.

These present guiding principles are intended for use by state authorities and civil society bodies, as well as inter-governmental organizations in the OSCE region involved in developing, applying, evaluating and reforming national laws, policies and practices related to trafficking, in particular to the return of trafficked persons. They provide the target audience with guidance that can be used to direct policies, procedures and practices on the return process, as well as an overview of relevant international standards. The guiding principles can also serve as an advocacy tool for civil society organizations that support a rights-based approach to combating trafficking.

I am confident that these principles will provide a solid basis for co-operation between participating States in developing policies that not only help to strengthen collective responses to human trafficking, but also contribute to advancing the security and protection needs of those who are most vulnerable to this crime.

Michael Georg Link
Director
OSCE Office for Democratic Institutions and Human Rights

Introduction

The OSCE Office for Democratic Institutions and Human Rights' approach to trafficking responses, including return, recognizes trafficking as a criminal activity with profound human rights implications for trafficked persons, as well as for states and civil society organizations. In line with this human rights-based approach, every aspect of the national or international response to trafficking is anchored in rights and obligations established by international human rights law.

The OSCE commitments address a broad spectrum of issues relevant to the prevention of trafficking, the protection of victims and the prosecution of the perpetrators of trafficking, while a number of commitments relate to the return of trafficked persons.⁷ In particular, the OSCE Action Plan to Combat Trafficking in Human Trafficking translates the OSCE commitments into concrete recommendations for participating States to implement at the national level in the areas of investigation, law enforcement and prosecution, prevention, protection and assistance.

In addition to these commitments, OSCE participating States are also signatories to other relevant standards in international law. The three main international and supra-national organizations to have developed legal standards on the subject of trafficking in human beings are the United Nations (UN), the Council of Europe and the European Union (EU).

The UN established new standards in the field with the 2000 United Nations Convention against Transnational Organized Crime (UNTOC) and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Convention (hereafter: UN Trafficking Protocol). In addition, earlier standards that paved the way for the current international legal framework for the return of trafficked persons include the 1951 *Convention Relating to the Status of Refugees* (hereafter: UN Refugee Convention) and the 1989 *Convention on the Rights of*

7 These commitments include the following: OSCE Ministerial Council Decision No.1/2000 on Enhancing the OSCE's Efforts to Combat Trafficking in Human Beings (2000); the OSCE Declaration on Trafficking in Human Beings (2002); the 2003 OSCE Action Plan to Combat Trafficking in Human Beings (hereafter: OSCE Action Plan); Ministerial Council Decision No. 8/07 on Combating Trafficking In Human Beings For Labour Exploitation (2007); Ministerial Council Decision No. 13/05 (2005) endorsing the Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: Addressing the Special Needs of Child Victims of Trafficking for Protection and Assistance (hereafter: 2005 Addendum to the OSCE Action Plan); Ministerial Council Decision No. 14/06 on Enhancing Efforts to Combat Trafficking in Human Beings, Including for Labour Exploitation, Through A comprehensive and Proactive Approach (2006); Ministerial Council Decision No. 5/08 on Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach (2008); and ,most recently, Ministerial Council Decision 7/13 (2013) endorsing the second Addendum to the OSCE Action Plan marking the decade from its adoption (hereafter: 2013 Addendum to the OSCE Action Plan).

the Child (UNCRC), which includes an Optional Protocol on the sale of children, child prostitution and child pornography (2000). In the sphere of soft law, the UN's landmark guidance documents include the UN Office of the High Commissioner for Human Rights *Recommended Principles and Guidelines on Human Rights and Human Trafficking* (hereafter: OHCHR Trafficking Principles) of 2002, as well as the 2006 UNICEF *Guidelines on The Protection of Child Victims of Trafficking* (hereafter: UNICEF Trafficking Guidelines) and the 2006 UNHCR *Guidelines on international protection* in relation to the UN Refugee Convention's applicability to trafficked persons and those at risk of being trafficked (hereafter: UNHCR Trafficking Guidelines). Furthermore, UN agencies such as UNODC and UNICEF have developed other relevant materials, including model laws and background papers, to assist states in improving their implementation of international standards and commitments.

The second organization to have developed international legal standards is the Council of Europe, which, in the field of human trafficking, has developed the *Council of Europe Convention on Action against Trafficking in Human Beings* (hereafter: Council of Europe Trafficking Convention), and the more broadly applicable *European Convention for the Protection of Human Rights and Fundamental Freedoms* (ECHR) of 1950.

The third, and perhaps the most elaborate, set of standards on the subject comes from the EU, most notably the 2011 Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings and protecting its victims (hereafter: EU Trafficking Directive). Of similar importance are the 2011 Directive of the European Parliament and Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (hereafter: EU Qualification Directive), and the 2004 EU Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

In 2008, ODIHR commissioned a series of papers on the return of trafficked persons and undocumented migrants from Germany, Italy, Spain and the United Kingdom to their countries of origin, to examine the different aspects of the process and its overall compliance with human rights standards and OSCE commitments. This was followed by ODIHR-supported fact-finding missions to Albania, Nigeria, Serbia and Ukraine in 2010 to gather information on the role of state authorities and civil society in the return and reintegration of trafficked persons and irregular migrants. In June 2009, ODIHR hosted its first expert meeting with international and national stakeholders to map the problems, human rights standards and appropriate procedures applicable to the return process. In April 2010, a second meeting was conducted with the participation of government authorities and civil society actors from both destination and origin countries to exchange experiences on the return of victims of trafficking.

The expert meetings, research and outreach work pointed to a lack of available guidance, in particular for government and civil society actors, regarding the standards that apply to the process of returning trafficked persons. To address this challenge and to promote policies, procedures and practices on return that comply with human rights standards in the OSCE region, ODIHR began developing these *Guiding Principles on Human Rights in the Return of Trafficked Persons* (hereafter: Guiding Principles) for stakeholders involved in the process of returning victims of trafficking.

The voluntary return of a trafficked person should always be the preferred option. A trafficked person does not have the right *per se* to remain in a destination country over the long term. As such, the person will probably be faced at some point with the obligation to leave the country of destination. Therefore, these guiding principles focus specifically on situations of non-voluntary return, when trafficked persons must return or be returned.

The proper identification of victims of trafficking is a crucial process, without which it is impossible to provide them with assistance and protection. This document does not deal with issues related to the process of identification *per se*, but focuses instead on the return of those who have been accurately identified as victims of trafficking by the relevant structures. Nevertheless, the importance of adequately identifying victims is briefly discussed in the context of the need for co-operation and communication between systems handling irregular migrants and those tasked with assisting trafficking victims.

This publication is divided in two parts: Part 1 establishes the guiding principles, while Part 2 provides a detailed explanation of the basis of the guiding principles. The seven guiding principles established in Part 1 are derived from international standards applicable in the OSCE region. Each principle is presented concisely and highlights key considerations and recommendations for state authorities and civil society bodies.

The guiding principles are not presented in any particular order of importance. Therefore, no single principle should be examined alone, but should be considered together with the other principles. However, Principle 1, which requires the safe return of trafficked persons, represents the cornerstone of the return process. The same principle also details the manner in which a return should be conducted, specifically addressing issues such as dignity, privacy and non-discrimination. Similarly, Principle 7 highlights the importance of co-operation between state authorities and agencies within and between returning and receiving countries, a necessary precondition for the successful implementation of the other guiding principles.

Part 2 elaborates the guiding principles and explains the international legal standards underpinning each. As such, it could serve as a particularly useful resource for civil society organizations when advocating for victims' rights and campaigning for changes to policies, practices or legislation regarding the return of trafficked persons.

Similarly, it could prove useful for state structures engaged in developing legislative or policy approaches on the subject of return.

Finally, this publication aims to contribute to improving the protection of trafficked persons by expanding understanding of the issue and its attendant problems through fostering cross-sector dialogue on different country contexts and approaches.⁸

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⁸ Individual country analyses can be found in the country reports of, for example, the UN Special Rapporteur on Trafficking in Persons, the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings and the Council of Europe Group of Experts on Action against Trafficking in Human Beings.

Part 1

Guiding Principles of Return

Principle 1:

Return must be safe

All persons have the right to leave any country, including their own.

- All persons have the right to return to their country, or if they have no nationality or are stateless, to the country where they had the right of permanent residence at the time of entry into the receiving country, and to which return is possible.
- Measures to restrict the departure of trafficked persons, including where such restrictions are in place to combat trafficking, must meet the tests of legality, necessity, proportionality and non-discrimination.
- Requiring that victims remain in the destination country for the duration of criminal proceedings interferes with the right of return. Restrictions imposed by states in this respect must be in accordance with the law and not arbitrary or unreasonable.
- The country of origin and country of destination are to permit victims of trafficking who wish to return to their country of origin to do so without undue or unreasonable delay.

The return of trafficked persons should preferably be voluntary.

- For a return to be voluntary, the person must be able to make a free and informed choice, including through the availability of complete, accurate and objective information on the situation in the country of origin.
- Voluntary return implies the absence of coercive measures that would compel the person to return to the country of origin or to stay in the destination country.
- In addition to being based on an informed choice, a voluntary return should not be subject to undue or unreasonable delays.

The entire return process must at all times be safe and conducted with due regard for the rights and dignity of the person being returned and the status of legal proceedings.

- Forced return is permissible only when it has been established that the proposed return is safe and that it does not interfere with the rights of the person being returned, including the right to be protected from the risk of being subjected to re-trafficking, persecution, torture or inhuman or degrading treatment or punishment, and hence does not necessitate any additional protection measures.

- “Safe” refers to both the process and the outcome of return. It imposes an obligation on the returning state to individually assess and manage risks associated with return, including the different risks faced by men and women, persons of different ages and those belonging to certain groups (including minorities), to ensure that the process of return is safe and dignified, and to monitor both the process and outcome of return to assess and ensure the safety of the trafficked person.
- Returning states must conduct individualized and gender-sensitive risk assessments prior to the return of trafficked persons, to establish that they are not in danger of re-trafficking, persecution or torture, inhuman or degrading treatment or punishment.
- Risk assessments should also take into account the safety of victims’ family members, as well as their potential involvement in trafficking.
- At a minimum, risk assessments should address: the risk of reprisals by the traffickers against the trafficked person and/or her/his family; the risk of being harassed, arrested, detained or prosecuted by the authorities; the social position of trafficked persons upon return; the availability of and actual access to social assistance programmes for victims of trafficking; and the situation of the children of trafficked persons.
- In cases of trafficking in children, the solution that is in the child’s best interests must be determined in consultation with the child. This includes considerations of different alternatives, including the child’s integration in the society of the destination country, voluntary repatriation to and re-integration in her/his country or place of origin or resettlement, and integration in a third country. A risk assessment must be conducted to verify that family reunification is in the best interests of the child.

As an integral part of providing assistance and protection to trafficked persons, and in addition to a risk assessment, countries of destination should carry out a needs assessment of the trafficked person being returned. Particular attention should be paid to screening the health and medical needs of the individual in question.

States should make provisions for and provide detailed descriptions of risk and needs assessments in national legislation, as well as reserve adequate financial resources for conducting risk and needs assessments.

In addition, the manner in which the return is conducted must not violate the rights of trafficked persons, including their right to dignity.

Both returning and receiving states must protect the privacy of victims and provide them with the necessary information and legal support. In addition, both states are required to co-operate with each other to ensure that returned victims, including those who have acted as witnesses in criminal proceedings, are not subject to retaliation.

Principle 2:

Due process

The process of returning trafficked persons should not result in a violation of any of their rights, including the right to due process of law.

Decisions taken in relation to forced return must be non-arbitrary, individualized and lawful. Forced return must involve a reasonable and objective examination of the particular circumstances of each individual affected by the return.

Trafficked persons have the right to be heard prior to an individual measure being taken that will affect them, the right to be represented before a competent authority and the right to appeal a negative decision.

States should ensure that effective identification and referral mechanisms are in place, including between the authorities involved in anti-trafficking activities and those responsible for granting international protection. They should also be capable of ensuring that persons who give any indication that they could be at risk of persecution or serious harm are identified and referred to the competent national asylum authorities, while retaining their right to protection and assistance provided by the anti-trafficking system. In case there are reasonable grounds to believe that a person in the asylum system may have been trafficked or is at risk of being trafficked, he or she should be referred to the anti-trafficking systems while their claim for international protection continues to be examined.

States should grant a reflection and recovery period to persons showing reasonable-ground indications that they may have been trafficked. During this period, the state should offer unconditional support (both physical and psychological) and information tailored to an individual's gender, age and culture, with the aim of providing the victim with time and means to decide on their options, including whether they will co-operate with criminal justice agencies in the investigation and prosecution of the perpetrators.

The provision of legal assistance to trafficked persons is, along with the reflection period, a prerequisite for the realization of other rights, such as the right to protection, the right not to be prosecuted for status-related offences, the right to participate in legal proceedings and the right to a remedy. Provision of legal advice and representation

should not be made dependent on the victim's ability to pay or willingness or capacity to co-operate with law enforcement agencies of the destination country.

States should make information available to trafficked persons in an accessible form and in a language that they understand. Interpretation services should be made available and used where necessary.

A trafficked person is considered a victim regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted. As such, trafficked persons must have access to relevant services and legal proceedings.

Returning states must ensure that return is undertaken with due regard for the status of relevant legal proceedings in which that person has or could have an interest. Taking into account the potential vulnerability of trafficked persons, returning states are required to help ensure that trafficked persons are able to be present at and have their concerns and views considered during criminal proceedings against the alleged perpetrators of trafficking. In assessing the safety of return, returning states must evaluate the risks to the victim of trafficking of participating in these proceedings.

Principle 3:

Protection measures when return is not an option

In some cases, return, even when voluntary, will not be possible, owing to ongoing safety and security concerns or humanitarian considerations. In such cases, destination countries are obliged to consider complementary humanitarian or other immigration options, including the granting of temporary or permanent residence and, in the case of children and when deemed to be in the best interests of the child, resettlement in another country. States should have the capacity to provide both short-term and long-term solutions as alternatives to return.

States can regularize the status of trafficked persons for a number of reasons and in a variety of ways, including by:

- Granting a reflection and recovery period to victims of trafficking, during which support (both physical and psychological), legal advice and information tailored to an individual's gender, age and culture is given with the aim of providing victims with the time and means to decide on their options, including whether they will co-operate with criminal justice agencies in the investigation and prosecution of the perpetrators;
- Issuing a temporary residence permit on the basis of the (usually criminal) legal proceedings against traffickers for the duration of both the pre-trial and trial periods;
- Granting temporary residence on humanitarian or other grounds concerning, for example, respect of the principle of *non-refoulement*, an inability on behalf of the returning and receiving states to guarantee a safe and secure return and the risk of re-victimization, including through re-trafficking. Where the results of a risk assessment determine that a trafficked person is likely to face serious reprisals or is at risk of re-trafficking, then this may, in certain circumstances, trigger the obligation of *non-refoulement*; and
- Granting international or complementary/subsidiary protection on the basis of the right to seek and enjoy asylum from persecution. The granting of asylum should not be made conditional on the willingness of the victim of trafficking to participate in legal proceedings. Moreover, when determining the refugee status or need for other forms of international protection of a trafficked person, due consideration

should be given to the different risks of reprisals or retaliation by perpetrators of trafficking that male and female victims may face. Finally, the fact that a trafficked person entered or remained in the country of destination without legal authorization should not affect her/his access to asylum proceedings or the outcome of those proceedings.

Principle 4:

Special protection measures in returning child victims

In cases where the victim's age is uncertain and there are reasons to believe that the victim is a child, the presumption shall be that the victim is a child.

All decisions taken with respect to a child victim, regardless of whether or not they are unaccompanied, must take the child's best interests as a primary consideration.

The ultimate aim must be to ensure that the return of a child to her or his country of origin is the durable solution, and as such addresses all the child's protection needs, takes into account the child's views and, where possible, ensures that the child is not unaccompanied or separated. The search for durable solutions must start by analysing the possibility of family reunification.

In certain circumstances, a best interest determination may also be undertaken in relation to young adults of up to 21 years of age and if this is deemed necessary to address their protection needs or identify a durable solution.

In determining a durable solution for child victims of trafficking, children's views regarding their future, including their willingness and ability to return to their country or place of origin, shall be sought and given due consideration, in accordance with the age and maturity of the child. To allow for the well-informed expression of their views, children must be provided with all the relevant information, including concerning their entitlements, the services available, the asylum process, the family tracing process and the situation in their countries of origin.

Destination countries should ensure that child victims who are not nationals or residents of that country are automatically granted a temporary residence permit that entitles them to stay legally in the country until a best interests assessment is conducted and a durable solution is found.

Destination countries should appoint a legal guardian to a child victim of trafficking, and before referring the child to any procedures or proceedings, should provide the necessary legal aid. A child should be provided with a legal guardian when receiving immediate or long-term assistance, including during the child's integration in

the country of destination or return and reintegration in the country of origin or in a third country.

Return to the country or place of origin shall only be arranged if return is deemed to be in the best interest of the child, taking into consideration the different needs and interests of boys and girls. Other relevant and necessary considerations include the safety and security of the child, the availability of care arrangements, the views of the child, the level of the child's integration in the country of destination and the child's right to preserve her or his identity, including nationality, name and family relations, and the desirability of continuity in a child's upbringing. Non-rights-based arguments, such as those relating to general migration control, cannot override best interests considerations.

Child victims who are not nationals/residents of the country in which they find themselves have the right to return to their country or place of origin, as do their parents. However, return is not an option if there is a "reasonable risk" that it would result in a violation of the fundamental human rights of the child and, in particular, if the principle of *non-refoulement* applies.

The return of a trafficked child should be co-ordinated in advance between the authorities of the returning country or place and the authorities of the country or place of the child's origin, and possibly with the authorities of transit countries.

Return should only be considered when safe family reunification can be ensured, provided that further separation from family members is not determined to be in the best interests of the child due, for example, to the involvement of the child's family members in her/his trafficking.

The decision to return a child victim of trafficking can only be made once advance secure and concrete arrangements of long-term care and custodial responsibilities have been established in consultation with the responsible authorities in the country or place of origin.

Every stage of the return process must be conducted in a safe, child-appropriate and gender-sensitive manner.

States should ensure the provision of specialized needs-tailored training for officials working with children, including separated and unaccompanied children, as well as training on dealing with cases of trafficking in children.

States are required to take special measures to protect the privacy of child victims of trafficking. Children's identity and details that allow child victims of trafficking to be identified should be protected, and should only be made publicly known in exceptional circumstances concerning the child's best interests. Such exceptional circumstances

may apply in the context of return, for example, in order to locate and contact family members or support services.

The special protection measures outlined above also apply to the children of trafficked persons.

Principle 5: Durable solution without further harm

If trafficked victims are at risk of re-victimization, including prosecution, retaliation against them and/or re-trafficking upon return, then it may not be possible to ensure their safe return.

The criminalization of trafficked persons for status-related offences, such as unlawful entry or illegal work, and their arrest, prosecution and detention are common forms of re-victimization. Trafficked persons should not be detained, charged, prosecuted or penalized (including through forced return) merely on account of their illegal entry or presence in a state, or for their involvement in unlawful activities, to the extent that such involvement is a direct consequence of their situation as trafficked persons, regardless of their ability or willingness to co-operate with the authorities.

Trafficked persons should not be deprived of personal liberty (including through detention in a shelter or immigration detention facility) except where it can be demonstrated that the deprivation of liberty can be justified as legal, necessary and proportionate to its aim. In cases where detention can be justified and is imposed, states are required to ensure that the rights of the detained trafficked person are respected and protected at all times. This includes, but is not limited to, judicial or administrative oversight of the situation to determine its ongoing legality and necessity, as well as an enforceable right on the part of the victim to challenge her or his detention.

When returning trafficked persons, states must ensure that the return process is conducted without distinction of any kind, including as regards the race, colour, sex, language, religion, national or social origin, minority status and political or other opinions of the trafficked person. Due care needs to be taken to ensure that trafficked persons are not negatively affected prior to, during or after their return on account of their gender or any other status, and that they receive adequate attention and support or assistance.

The application of re-entry bans against returning trafficked persons is a punitive measure that may conflict with the principle that trafficked persons should not be penalized for status-related offences, including their illegal presence in a state or involvement in unlawful activities, to the extent that such involvement is a direct

consequence of their situation as trafficked persons. Re-entry bans may also violate the prohibition on discrimination in relation to both their intention and effect.

Reintegration measures that address the risk of re-victimization, including re-trafficking, are a critical aspect of safe return. Plans for reintegration and social inclusion should, therefore, be based on a thorough evaluation, in consultation with the victim, of her or his individual needs, as well as on a pre-departure risk assessment.

Particular focus should be given to the family and community environment to which the victim is returning. Trafficked persons who are provided with appropriate post-return assistance aimed at promoting their well-being and supporting their effective reintegration are much less likely to be re-trafficked. They may also, depending on the nature and quality of support provided, be less vulnerable to intimidation, retaliation, social isolation and stigmatization.

Principle 6:

Access to effective remedies

Trafficked persons have the right to seek and receive effective remedies for the harm committed against them. Trafficked persons should also be provided with adequate reparations for harm suffered, including restitution, compensation, recovery, satisfaction and guarantees of non-repetition.

Trafficked persons should also be provided with access to a competent and independent authority in order to successfully obtain reparations.

States should ensure that their response to trafficking, in particular in returning trafficked persons, does not impact on the right of these trafficked persons to access remedies. To this end, a trafficked person's entitlement or access to remedies should not be dependent on her or his immigration status, or on the fact that the perpetrator of trafficking has left the country of destination.

Access to remedies must be non-discriminatory and available to all victims of trafficking, including citizens of other states and stateless persons residing in the destination state in a regular or irregular manner, and remedies should be fair, adequate, appropriate and effective.

The obligation of states to provide a trafficked person with effective remedies should not depend on the availability of funds confiscated from the perpetrator of trafficking in a particular case.

Trafficked persons should be provided with legal advice and support to enable them to access remedies, and effective measures should be in place to ensure that reparation judgments are enforced, including where these judgments are passed in states other than the destination state.

Principle 7:

Co-operation and monitoring

The safe and, preferably, voluntary return of trafficked persons requires co-operation between the returning and receiving states. Receiving states must facilitate return by, for example, conducting identification checks, undertaking risk and social-inclusion assessments prior to a trafficked victim's return, issuing the necessary personal, travel and other documents, and co-operating with returning states to determine whether the planned return of a trafficked victim is safe.

Of particular importance is co-operation within a state between those agencies mandated to identify victims of trafficking and those responsible for their care and protection, as well as between authorities responsible for trafficking issues and those working in the field of migration and asylum.

States must ensure co-operation between the government and civil society organizations, including victim-support agencies, trade unions and business and employer organizations that may have a role to play in providing victims with assistance, supporting their reintegration and ensuring their safe return.

In addition, national referral mechanisms and transnational referral mechanisms are important vehicles for in-country and cross-border co-operation, respectively, as they create strategic partnerships between government agencies, civil society and other actors engaged in protecting and promoting the human rights of trafficked persons.

Mutual co-operation between returning and receiving states can help to achieve a durable solution and to ensure the full and successful reintegration of trafficked persons after their return to their communities, the education system and the labour market.

Provided that they have the consent of the trafficked person, both the returning and receiving countries should monitor the return of victims of trafficking. Monitoring activities conducted by the receiving country should be focused on ensuring the ongoing safety and security of the trafficked person. Such monitoring activities should be conducted in a non-intrusive manner and should not interfere with the rights and privacy of the individuals involved.

Monitoring should continue for a reasonable period of time – ideally for at least a year following the return. Moreover, a trafficked person’s participation in monitoring activities must be voluntary, while state authorities should co-operate with the relevant victim-support agencies as part of monitoring.

Part 2

Explanatory Report to the Principles

Principle 1: Return must be safe

The right to leave and return

OSCE participating States have committed themselves to “respect fully the right of everyone to leave any country, including his own, and to return to his country.”⁹ While the right to leave and return is not outlined in anti-trafficking regulations and policies applicable to countries in the OSCE region, they do reflect and incorporate this right into many provisions that relate directly and indirectly to the return of trafficked persons. All victims of trafficking, including both children and adults, who are not residents of the country to which they are trafficked, are entitled to leave any country, including their own, and to return to their country of origin. The right to leave and return is a critical aspect of the broader right to freedom of movement.¹⁰

In principle, the right to return is upheld throughout the OSCE area. In practice, however, this right is regularly compromised with respect to trafficked persons. Across the region, there is a general lack of clear legislation and policy for the return of trafficked persons. Only a few participating States have developed specific laws, policies or procedures for the return of trafficked persons. One potential barrier to return is the requirement that trafficked persons participate in criminal proceedings. In some OSCE participating States, victims of trafficking are given the opportunity to leave prior to the conclusion of criminal proceedings.

The right to return imposes an obligation on the destination country to permit victims to return without undue or unreasonable delay. In addition, the ICCPR prohibits arbitrary deprivation of this right.¹¹ Accordingly, a state preventing the return of a trafficked person must be able to show, in relation to each individual case, that its actions are in accordance with the law and are not arbitrary or unreasonable. The obligation on states to consider the best interests of the child is also a major consideration when

⁹ Concluding Document of the Vienna Meeting (Third Follow-up Meeting to the Helsinki Conference), Vienna, (hereafter: 1989 Vienna Document), principles, para. 20, <<http://www.osce.org/mc/40881?download=true>>.

¹⁰ See the Universal Declaration of Human Rights (hereafter: UDHR) (adopted 10 December 1948), UNGA Res 217A (III), art. 13(2); the International Convention on Civil and Political Rights (hereafter: ICCPR) (adopted 16 December 1966), UNGA Res 2200A (XXI), art. 12(2)(4); and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights (hereafter: ECHR), as amended) (adopted 4 November 1950), protocol 4, art. 3(2).

¹¹ ICCPR, art. 12(4). For a more detailed discussion on the subject of limiting freedom of movement for trafficked persons residing in shelters, see Anne Gallagher and Elaine Pearson, “Detention of trafficked persons in shelters: A legal and policy analysis”, *Australian Agency for International Development*, 2008, p. 13. Moreover, according to the Human Rights Committee, restrictions on this right must conform to the principle of proportionality (*ibid.*, p. 14).

it comes to upholding the right to return in relation to child victims. In OSCE Ministerial Council Decisions, participating States have repeatedly reaffirmed the need to ensure the safe return of children.¹²

Although most OSCE participating States have adopted, either formally or informally, the standard of “safe and, preferably, voluntary return” of trafficked victims, the meaning of “voluntary” remains ambiguous.¹³

There is apparent consensus that, in order for return to be truly voluntary, returnees must be fully informed of all their available options, including returning to their country of origin, remaining in the destination country or resettling in a third country.¹⁴ In the case of a child victim, both the child and the child’s guardians should be fully informed and consulted.¹⁵

The OSCE participating States have explicitly committed to assisting victims “in – preferably – voluntary return to the country of origin”.¹⁶ The preference of voluntary return has also been recognized by the United Nations,¹⁷ and reaffirmed in the Council of Europe’s legal instruments.¹⁸

The concept is, moreover, recognized by the European Union, which affirmed in a 2009 Declaration that returns shall, as far as possible, be voluntary.¹⁹ As such, the preamble to the Directive of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-coun-

12 See OSCE Ministerial Council, Decision No. 2/03, “Combating Trafficking in Human Beings”, Maastricht, 2 December 2003, para. 8, <<http://www.osce.org/mc/40379?download=true>>; and OSCE Ministerial Council, Decision No. 14/06, “Enhancing efforts to combat trafficking in human beings, including for labour exploitation, through a comprehensive and proactive approach”, Brussels, 5 December 2006, para. 4, <<http://www.osce.org/mc/23048?download=true>>.

13 See “Programmes and Strategies in the EU Member States fostering Assisted Return to and Reintegration in Third Countries”, the European Migration Network, March 2011, p. 15, <http://rem.sef.pt/PagesPT/DocsPT/EstudosSinteseEuropeus/programmes_strategies_assisted_return_reintegration.pdf>.

14 Both the UNHCR and the EU have highlighted the importance of informed consent as an essential aspect of a genuinely voluntary decision regarding return. See UNHCR, “Handbook on Voluntary Repatriation: International Protection” (Geneva: UNHCR, 1996), part 4.2; and the Council of the European Union, 2683rd Council Meeting, Justice and Home Affairs, 12645/05 (Presse 247), 12 October 2005, p. 23. The Council of the European Union has recommended that information on the possibility of voluntary return should be made readily available and as early as possible. This can include the provision of pre-return information and counselling, including with respect to the conditions and circumstances in the country of return. See the Council of the European Union, 2683rd Council Meeting, Justice and Home Affairs, 12645/05 (Presse 247), 12 October 2005, p. 24.

15 “Report of the Experts Group on Trafficking in Human Beings”, EU Group of Experts, European Commission, 22 December 2004 (hereafter: Report of the EU Group of Experts), rec. 113.

16 OSCE Ministerial Council, Decision No. 2/03, part V, para. 7.1, <<http://www.osce.org/mc/40379?download=true>>.

17 United Nations Global Plan of Action against Trafficking in Persons, UNGA Res A/64/L.64 (adopted on 30 July 2010) (hereafter: UN Global Plan of Action), para. 34.

18 Convention on Action against Trafficking in Human Beings (adopted on 16 May 2005), the Council of Europe, CETS No. 197 (hereafter: Council of Europe Trafficking Convention), art. 16(2).

19 “2009 October Declaration on Trafficking in Human Beings: Towards Global EU Action against Trafficking in Human Beings” (hereafter: EU Declaration on Trafficking in Human Beings), EU Ministerial Conference, 19-20 October 2009, para. 15.

try nationals (hereafter: EU Return Directive) states that, “[w]here there are no reasons to believe that this would undermine the purpose of a return procedure, voluntary return should be preferred over forced return and a period for voluntary departure should be granted”.²⁰ In addition, the EU Group of Experts recommends that return and social assistance programmes should rest on, inter alia, principles of voluntariness.²¹

Although voluntary return should always be the preferred option, in the majority of cases trafficked persons choose to remain in the country of destination, but are unable to do so unless they qualify for additional protection measures (discussed in detail under Principle 3).

Nevertheless, regardless of whether the return is voluntary or forced, the overarching principle is that the returning country must conduct the return process in a manner that is safe and that does not expose the trafficked persons to risks.

Safe return

The definition of safe return goes beyond guaranteeing the immediate physical security of the trafficked person and of her/his family members. It also involves ensuring the sustainability of return, including the well-being of trafficked persons, and preventing their re-victimization or re-trafficking.

All OSCE participating States that are member states of the EU provide some form of pre-return counselling to third-country nationals, as part of the assisted voluntary-return programmes provided to returning migrants, including victims of trafficking.²² While such counselling is sometimes used to ascertain an individual’s wishes with respect to return, the aim is often to provide information on the return process and return assistance available to individuals and, thus, to facilitate their safe return.

International treaty law requires that the safety of the trafficked person must be given due consideration when facilitating their return.²³ As such, governments are required to ensure that the trafficked person faces no danger of retaliation or other harm upon return, including arrest or prosecution for leaving the country or engaging in prostitution abroad if such activities are criminalized in the receiving country.²⁴

²⁰ Directive 2008/115/EC of the European Parliament and of the Council on common standards and procedures in Member States for returning illegally staying third-country nationals, 2008 OJ L 348/98 (hereafter: EU Return Directive).

²¹ Report of the EU Group of Experts, rec. 113.

²² “Programmes and Strategies in the EU Member States”, European Migration Network, *op. cit.*, note 13, p. 62.

²³ See UN General Assembly, “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime”, 15 November 2000, (hereafter: UN Trafficking Protocol), arts. 8(1), 8(2); Council of Europe Trafficking Convention, arts. 16(1), 16(2); and OSCE Ministerial Council, Decision No. 14/06, para. 4.

²⁴ *Model Law against Trafficking in Persons*, United Nations Office on Drugs and Crime (UNODC), 2009, p. 62 (hereafter: UNODC Model Law).

In particular, the OSCE commitments require that victims of trafficking and their families are provided with assistance that considers their safety upon return.²⁵

The UN Trafficking Protocol obliges the country of origin to receive its returning nationals without undue or unreasonable delay.²⁶ In addition, their return should be conducted with due regard for the safety of the trafficked person and should, preferably, be voluntary.²⁷

The Council of Europe Trafficking Convention also requires that States Parties take into consideration the victim's safety and protection needs,²⁸ and that return be undertaken "with due regard for the rights, safety and dignity" of the victim.²⁹

The European Union imposes similar requirements on its member states, which are obliged to conduct returns with due regard to the rights, safety and dignity of the trafficked victims.³⁰ Both returning and receiving states have a clear legal obligation to consider the safety of the trafficked person at all stages of their return. The 2012 EU Strategy on trafficking aims at developing guidelines on safe return and, where return is deemed to be in the child's best interests, ensuring the safe and sustainable return of trafficked children.³¹

In the same vein, the European Commission Group of Experts on Trafficking in Human Beings (hereafter: EU Group of Experts) recommends that all member states establish appropriate return procedures "with due regard to the privacy, safety, dignity and health of the trafficked person, in close partnership with NGOs, IOs and, where applicable, embassies and consulates".³² Moreover, the obligation of safe return was reiterated during an EU Ministerial Conference in 2009, which declared that "return shall be carried out with due regard for the rights, safety and dignity of the victim."³³

Within the CIS, the question of how to ensure the safe return of victims of trafficking has been highlighted as one of the areas of legislation that need to be improved and harmonized.³⁴

25 OSCE Permanent Council, Decision No. 557/Rev.1, "OSCE Action Plan to Combat Trafficking in Human Beings", Vienna, 7 July 2005, part V, para. 7.1 (hereafter: OSCE Action Plan); and OSCE Permanent Council, Decision No. 1107/Corr.1, "Addendum to the OSCE Action Plan to Combat Trafficking in Human Beings: One Decade Later", Vienna, 6 December 2013, part IV, para. 2.5 (hereafter: 2013 Addendum to the OSCE Action Plan).

26 UN Trafficking Protocol, art. 8(3).

27 UN Global Plan of Action, para. 34.

28 Council of Europe Trafficking Convention, art. 12(2).

29 Council of Europe Trafficking Convention, art. 16(2).

30 EU Declaration on Trafficking in Human Beings, para. 15.

31 The EU Strategy towards the Eradication of Trafficking in Human Beings 2012-2016, COM(2012)286 final, 2012 (hereafter: EU Strategy), para. 2.1(1), 2.1(3).

32 Report of the EU Group of Experts, rec. 109. According to the EU Group of Experts, these procedures should be set out in specific protocols for the return of trafficked persons and should apply to all involved agencies.

33 EU Declaration on Trafficking in Human Beings, para. 15.

34 "The CIS Program on Co-operation of CIS Members in combating trafficking in Human Beings 2014-2018", 25 October 2013, para. 1.1 v.

Risk and needs assessments

The requirement that return be conducted with due regard for the safety of victims and their families imposes an obligation upon state authorities to conduct a pre-return risk assessment with the participation of the victim, service providers and authorities in the countries of origin and destination in order to assess the safety of return.³⁵

Risk assessments are conducted to examine risks to the individual associated with return, and to ascertain whether planned protection measures are sufficient or additional measures are needed to ensure the safety of the individual concerned, while considering the different needs of men and women, as well as those belonging to different groups (e.g., age groups and minorities).

In most participating States, pre-return risk assessments are not routinely carried out.³⁶ For example, a recent study on victim assistance and protection in the Baltic Sea region found that risk assessments involving law enforcement personnel, service providers and victims were not a regular and established practice.³⁷ The study also noted discrepancies in understanding among law enforcement agencies and service providers of their respective roles and responsibilities in safe return, with service providers expressing the feeling that they were disproportionately burdened with responsibility for ensuring victim protection.³⁸

In some countries, there is no legal or policy requirement to undertake a pre-return risk assessment. Rather, it appears that pre-return risk assessments are only carried out in cases where the victim makes an application for asylum, or when the victim is returned through a voluntary return programme implemented by the International Organization for Migration (IOM)³⁹ or a non-governmental organization that conducts risk assessments. In some countries, non-governmental organizations conduct pre-return interviews and risk assessments and send their findings to the IOM. Where necessary, and with the approval of the trafficked person, IOM uses these findings to consult with country offices and authorities in the country of origin.

35 Report of the EU Group of Experts, recs. 95 and 114. In particular, the Group of Experts has stated that: "In order to ensure that trafficked persons are not sent back to a situation that endangers their life, health or personal freedom and/or would submit them to inhuman or degrading treatment, any decision to deport or return a trafficked person, including trafficked children, should be preceded by a risk assessment." See also "Proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons", EU Group of Experts, European Commission, Opinion No. 7/2010, 2010. On the persons and institutions to be involved in a risk assessment, see also *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons: South-Eastern Europe*, International Centre for Migration Policy Development (ICMPD), 2009 (hereafter: ICMPD TRM Guidelines).

36 "Report on the implementation of anti-trafficking policies and interventions in the 27 EU Member States from a human rights perspective (2008 and 2009)", European NGOs Observatory on Trafficking, Exploitation and Slavery (hereafter: E-notes Report), 2009, p. 25.

37 UNODC, *Human Trafficking in the Baltic Sea Region: State and Civil Society Cooperation on Victim's Assistance and Protection* (New York: UNODC, 2010), p. 43.

38 *Ibid.*

39 Alison Jobe, *The Causes and Consequences of Re-Trafficking: Evidence from the IOM Human Trafficking Database* (Geneva: IOM, 2010), p. 47.

Neither the UN Trafficking Protocol nor the OSCE Action Plan specifically mentions the need to carry out a risk assessment.⁴⁰ The OSCE Action Plan does, however, stress that return be carried out with “due regard” for the victim’s safety.⁴¹ A similar approach is included in the Council of Europe Trafficking Convention, although the Convention does require that a security and risk assessment be carried out in cases of trafficked child victims.⁴²

Nevertheless, states are still obliged to assess the risks of return in accordance with the principle of *non-refoulement*.⁴³ This principle is central to the realization of the right to seek and enjoy asylum, as outlined in the Universal Declaration of Human Rights,⁴⁴ and is a fundamental principle of the 1951 UN Refugee Convention,⁴⁵ which prohibits states from returning persons to a territory where this threatens their life or freedom and/or exposes them to persecution.⁴⁶

The UNHCR has issued guidelines on the application of the UN Refugee Convention in cases of victims of trafficking or those at risk of being trafficked.⁴⁷ While the guidelines do not give technical step-by-step guidance on risk assessment, they do explain in detail the concepts that need to be evaluated when considering whether a victim or potential victim of trafficking falls within the definition of a refugee. These concepts include a well-founded fear of persecution, the agents and places of persecution and the causal link. The causal link is related to the fact that, in order to qualify for refugee status, an individual’s well-founded fear of persecution must relate to one or more of the grounds foreseen in the UN Refugee Convention, including persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion. Pursuant to the UNHCR Trafficking Guidelines, the forcible or deceptive

40 However, risk assessment is a standard promoted by the UNODC Model Law. See UNODC Model Law, art. 33, p. 63-65.

41 OSCE Action Plan, part V, para. 7.1. The 2013 Addendum to the OSCE Action Plan uses a formulation suggesting that “safe” return is a presumed standard (see 2013 Addendum to the OSCE Action Plan, part IV, para. 2.5).

42 Council of Europe Trafficking Convention, art. 16.7.

43 According to the UNHCR, *non-refoulement* is “a core principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened.” (UN High Commissioner for Refugees (UNHCR), *UNHCR Master Glossary of Terms*, June 2006, rev.1, p. 15).

44 UDHR, Art. 14.

45 United Nations Convention Relating to the Status of Refugees (adopted 28 July 1951), 189 UNTS 137 (hereafter: UN Refugee Convention), art. 33.

46 Also the EU Trafficking Directive refers to the *non-refoulement* principle (EU Trafficking Directive, recital 10).

47 UN High Commissioner for Refugees, *Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, 7 April 2006, HCR/GIP/06/07 (hereafter: UNHCR Trafficking Guidelines).

recruitment of women and children for the purposes of prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution.⁴⁸

In addition, UNCAT obliges the returning states to carry out a risk assessment regarding risk to returned person of being tortured in the receiving state. Moreover, states must also assess the individual circumstances of a person and not only the “consistent patterns of gross, flagrant or mass violations of human rights” within the receiving country.⁴⁹ States cannot return a person if there is a risk of harm – for example, re-trafficking and retaliation that may amount to torture – or, in accordance with ECHR standards, if there is a risk of other forms of ill-treatment.

Where states know of conditions in the receiving country that would expose the returnee to the risk of inhuman or degrading treatment, proceeding with the return would amount to a breach of the ECHR, including if the receiving country is an EU Member State. Recent decisions of the ECtHR have also confirmed the obligations of states in the return of persons to their country of origin, or to transit countries under the Dublin Regulation.⁵⁰

The CRC and UNICEF provide more concrete guidance concerning the conduct of risk assessment in cases of child victims of trafficking. The CRC highlights that risk assessments should be conducted in an age- and gender-sensitive manner, in particular taking into account the serious consequences for children of the insufficient provision of food or health services.⁵¹ According to UNICEF Trafficking Guidelines, the competent authority in the country where the child is identified shall, in consultation with the child, determine the best solution for the child among the following: integration into the destination country, voluntary repatriation and re-integration in the country or place of origin, or resettlement and integration in a third country.⁵² A risk assessment

48 UNHCR Trafficking Guidelines, para. 19. UNHCR also prescribes that assessing the “well-founded fear of being persecuted” needs to be fact-based, focusing on both the individual and the contextual circumstances of the case. The availability and effectiveness of state protection needs to be carefully assessed based on reliable and up-to-date country of origin information (see UN High Commissioner for Refugees, *Guidelines on International Protection No. 9: Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 23 October 2012, HCR/GIP/12/09 (hereafter: UNHCR Guidelines on International Protection No. 9)), paras. 28, 37).

49 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (Vienna: OSCE, 2013), p. 33.

50 See *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011; and *Mohammed v. Austria*, Application no. 2283/12, Council of Europe: European Court of Human Rights, 6 June 2013.

51 UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6: Treatment of unaccompanied and separated children outside their country of origin*, 1 September 2005 CRC/GC/2005/6 (hereafter: CRC General Comment No. 6), para. 27.

52 UNICEF warns that it is critical to take special measures in situations where children have been involved in activities with a high risk of stigma, such as prostitution and sexual exploitation, as a result of trafficking. Preparations for the reunification of these children must take into account the need to shield them against discrimination, targeted attacks, further recruitment or re-trafficking (see UN Children’s Fund (UNICEF), *Guidelines on the Protection of Child Victims of Trafficking*, September 2006 (hereafter: UNICEF Trafficking Guidelines), para. 8.2).

should be conducted to determine whether family reunification is in the best interests of the child.⁵³

In conducting risk assessments, the EU Group of Experts recommends that the following factors be addressed:⁵⁴

- The risk of reprisals by the traffickers against the trafficked person and/or her/his family;⁵⁵
- The risk of being harassed, arrested, detained or prosecuted by the authorities;⁵⁶
- The social position of the trafficked person on return;⁵⁷ and
- The availability of and actual access to social assistance programmes, including safe accommodation, medical, legal and psychological aid.⁵⁸

In addition, ICMPD has elaborated Standard Operating Procedures for developing transnational referral mechanisms in EU countries that offer similar guidance in conducting risk assessments.⁵⁹

Civil society practitioners have identified two layers of risks that need to be considered when carrying out a risk assessment: first, the acute risks affecting the trafficked person on return, including physical security and health risks; and, second, the social context that can lead to the trafficking victim's marginalization and stigmatization in

53 UNHCR Trafficking Guidelines, para. 24. According to the UNHCR, the best interest determination is "a formal process with specific procedural safeguards and documentation requirements that is conducted for certain children [...], whereby a decision-maker is required to weigh and balance all the relevant factors of a particular case, giving appropriate weight to the rights and obligations recognized in the CRC and other human rights instruments, so that a comprehensive decision can be made that best protects the rights of children." See also UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013 (hereafter: CRC General Comment No. 14).

54 Report of the EU Group of Experts, rec. 114, and the Explanatory Paper 13 thereto, pp. 200-202.

55 Issues include, for example, whether family members/friends or associates in the country of origin have been contacted and/or threatened by (associates) of the trafficker/trafficking network (note that, while in a number of cases, it is the country of origin that will conduct a risk assessment, in cases where stateless persons are concerns, the place of habitual residence would be responsible for conducting the risk assessment. In certain instances under the Dublin Regulations, for example, the person may also be returned to a transit country); whether the trafficked person her/himself has been threatened during her/his stay in the country of destination or during legal proceedings; whether the place of residence of the trafficked person and/or her/his family is known to (associates of) the trafficker/trafficking network; and whether the trafficker made up part of the social circle of the trafficked person in the country of origin. For a full list of considerations, see *ibid.*, p. 200.

56 Issues include, for example, whether the trafficked person runs the risk of being arrested, detained or prosecuted by the authorities in the country of origin for offences related to her/his situation as a victim of trafficking, such as prostitution, the use or possession of false documents or illegal exit. For a full list of considerations, see *ibid.*, p. 201.

57 Questions include the following: is the situation of the trafficked person known to her/his social environment? Will the trafficked person be able to talk about her/his experience with her/his family or friends? Will the trafficked person be accepted and supported by her/his social environment; including family, friends and the community in which the trafficked person lived before departure? For a full list of questions, see *ibid.*, p. 201.

58 This includes whether the trafficked person has access to immediate and long-term assistance services, such as safe accommodation and medical, legal and psychological aid. For a full list of considerations, see *ibid.*, p. 202.

59 ICMPD TRM Guidelines, pp. 81-82.

the receiving state.⁶⁰ Consequently, the risk assessment should comprise the following three steps:

- Compiling information about the individual history of the trafficked person, including an evaluation of their family,⁶¹ the person's circumstances in the country of origin,⁶² the risks they face as a result of trafficking⁶³ and the risks of stigmatization on return;⁶⁴
- Compiling information on the country of origin, drawing on reliable information provided by both non-governmental organizations and government authorities;⁶⁵ and
- Shaping security scenarios of the country of origin, developed in co-operation between the non-governmental organization carrying out the risk assessment and the government authorities, and with the active involvement of the trafficked person.⁶⁶

Although recent research suggests that individual risk assessments are only carried out in as few as four OSCE participating States (all of which are EU member states),⁶⁷ the situation is likely to improve among EU member states following the adoption of an EU Directive establishing minimum standards on the rights, support and protection of victims of crime.⁶⁸ This directive, which must be transposed into the national legislations of EU member states by 16 November 2015, will oblige states to conduct

60 "Quality standards for risk assessment and the safe return and reintegration of trafficked persons", LEFÖ (2011), p. 9.

61 For a list of questions to consider, see *Quality standards for risk assessment and the safe return and reintegration of trafficked persons*, LEFÖ (2011), p. 10.

62 For a list of questions to consider, see *ibid.*

63 *Ibid.*

64 *Ibid.*, pp. 10-11.

65 *Ibid.*, pp. 11-12.

66 For some issues to consider, see *ibid.*, pp. 12-13.

67 E-notes Report, p. 91.

68 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 OJ L 315/57.

individual assessments to identify a victim's specific protection needs.⁶⁹ However, the directive does not consider the need for individual assessments in the context of return, but rather aims to identify the "specific protection needs" of victims, and also to determine whether the special measures provided for in the directive⁷⁰ are beneficial to trafficked persons who are returned to their countries of origin. It remains to be seen the extent to which such individual assessments will apply to issues relating to return.

A risk assessment is not, in itself, sufficient to guarantee safe return. Therefore, it is essential that any assessment be accompanied by a detailed plan that is specifically designed to minimize identified risks to the extent possible.⁷¹

In addition to conducting risk assessments, it is also important to assess the individual needs of trafficked persons who are returned. While no international norm explicitly obliging states to carry out needs assessments exists *per se*, these should be viewed as an integral element of the obligation to provide assistance and protection to trafficked persons. As such, parties to the UN Trafficking Protocol and Council of Europe Trafficking Convention, for example, must take into account the special needs of victims of trafficking.⁷² One exception to this can be found in approaches to the return of child victims of trafficking, for which the CRC has stressed that the referral process must also include multi-disciplinary assessments of the short- and long-term needs of the child, caregivers and the family.⁷³ In the case of unaccompanied and separated children, the assessment must consider their particular vulnerabilities, including their

69 *Ibid.*, art. 22, which provides:

"2. The individual assessment shall, in particular, take into account:

(a) the personal characteristics of the victim;
(b) the type or nature of the crime; and
(c) the circumstances of the crime.

3. In the context of the individual assessment, particular attention shall be paid to victims who have suffered considerable harm due to the severity of the crime; victims who have suffered a crime committed with a bias or discriminatory motive which could, in particular, be related to their personal characteristics; victims whose relationship to and dependence on the offender make them particularly vulnerable. In this regard, victims of terrorism, organized crime, human trafficking, gender-based violence, violence in a close relationship, sexual violence, exploitation or hate crime, and victims with disabilities shall be duly considered.

4. For the purposes of this Directive, child victims shall be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimization, to intimidation and to retaliation. To determine whether and to what extent they would benefit from special measures as provided for under Articles 23 and 24, child victims shall be subject to an individual assessment as provided for in paragraph 1 of this Article.

6. Individual assessments shall be carried out with the close involvement of the victim and shall take into account their wishes including where they do not wish to benefit from special measures as provided for in Articles 23 and 24.

7. If the elements that form the basis of the individual assessment have changed significantly, Member States shall ensure that it is updated throughout the criminal proceedings."

70 *Ibid.*, arts. 23 and 24.

71 The ICMPSD recommends such a plan, and also notes that the plan should be reviewed regularly and that the victim should be fully informed about the risks identified, as well as the measures undertaken to address those risks (see ICMPSD TRM Guidelines, pp. 87-88).

72 UN Trafficking Protocol, art. 6(4); Council of Europe Trafficking Convention, art. 12(7). Specific forms of protection are prescribed in: UN Trafficking Protocol, art. 6(3); UN General Assembly, *United Nations Convention against Transnational Organized Crime* (hereafter: UNTOC), 8 January 2001, A/RES/55/25, art. 25; and Council of Europe Trafficking Convention art. 12(1).

73 UN Committee on the Rights of the Child (CRC), General Comment No. 13: *The right of the child to freedom from all forms of violence*, 18 April 2011, CRC/C/GC/13, para. 50.

health, physical, psychosocial, material and other protection needs, including those deriving from domestic violence, trafficking or trauma.⁷⁴

In particular, practitioners consulted by ODIHR have highlighted the importance of conducting thorough health screenings of trafficked persons.⁷⁵ The implications of any health problems suffered by the trafficked person must be assessed following the person's return, including whether adequate treatment is available in the receiving country. In addition, the trafficked person may need to be accompanied by a medical expert during the return process. Among other health issues, victims of trafficking may suffer from substance addiction or HIV as a result of their trafficking experience.⁷⁶

The manner in which return is conducted

The manner in which returns are conducted can profoundly influence the actual or perceived safety of the victim both during and after return. Victims have reported feeling reassured when they are accompanied and/or met at their destination, particularly where they feared reprisals by their traffickers or were nervous about the transportation process.⁷⁷ NGOs have also reported that some forms of transport, such as planes, are generally safer than others, such as buses, and should be preferred where possible.⁷⁸

In a number of OSCE participating States, the assisted return of all migrants, including those who have been trafficked, is regulated by and conducted in accordance with existing national legal frameworks, including laws on migration, asylum or foreigners' residence.⁷⁹ Some OSCE participating States provide return assistance for specific groups of migrants, including trafficked persons.⁸⁰ In addition, some countries have in place specific provisions and procedures for the return of trafficked persons. In OSCE participating States where the IOM implements assisted voluntary return programmes,⁸¹ trafficked persons may be returned either through general programmes for migrants or through return programmes developed specifically for trafficked persons. Besides providing return assistance to a number of different types of migrants,

74 CRC General Comment No. 6, para. 31.

75 OSCE/ODIHR Expert Meeting, Warsaw, Poland, 11-12 February, 2014.

76 UN Office on Drugs and Crime (UNODC), *Toolkit to Combat Trafficking in Persons*, October 2008 (hereafter: UNODC Trafficking Toolkit), pp. 376 and Tool 8.11.

77 Rebecca Surtees, *Listening to Victims: Experiences of identification, return and assistance in South-Eastern Europe* (Vienna: International Centre for Migration Policy Development, 2007), pp. 110-111.

78 Interview with representative of the Crisis Center of the Animus Association Foundation, Sofia, 24 November 2011.

79 "Programmes and Strategies in the EU Member States", European Migration Network, op. cit., note 13, p. 40.

80 Blanka Hancilova and Camile Massey, *Legislation and the Situation Concerning Trafficking in Human Beings for the Purpose of Sexual Exploitation in EU Member States* (Vienna: International Centre for Migration Policy Development, 2009); "Programmes and Strategies in the EU Member States", European Migration Network, op. cit., note 13, p. 85.

81 "Programmes and Strategies in the EU Member States", European Migration Network, op. cit., note 13, p. 7; Barbara Cuzuioc-Weiss and Chantal Lacroix, *Study on Post-Trafficking Experiences in the Czech Republic, Hungary, Italy, and Portugal* (Vienna: International Centre for Migration Policy Development, 2010), p. 104.

the IOM has also developed special procedures for victims of trafficking.⁸² Most EU member states provide some form of “assisted voluntary return” to irregular migrants and asylum seekers whose claims for refugee status have been denied.⁸³ Often, these programmes are not run by the government but by an international organization, such as the IOM,⁸⁴ and usually with the support of local NGOs. In some countries, multiple programmes are available.

Without a formal framework in place for implementing return programmes and procedures, including safeguards for the protection of victims’ rights, states risk undermining the right of all persons to leave any country and enter their own country, as well as their obligation to facilitate the safe return of trafficked persons.

Research confirms that victims are left feeling vulnerable and anxious by inadequate return processes that fail to provide assurances of their safety, information on the return process, including potential difficulties they may encounter, and arrangements for the victim to be met at their destination.⁸⁵ The manner and conduct of return is also important in terms of ensuring respect for the rights and dignity of the trafficked person. It is also important to acknowledge that identifying victims as trafficked persons during the transportation process could be problematic in some circumstances, as it may lead to the victim’s stigmatization or harassment.⁸⁶

Under international and regional laws, OSCE participating States are required to protect the privacy and identity of victims of trafficking as much as possible and to the extent that it does not compromise the rights of others, including accused persons. Relevant policies, including those developed under the auspices of the OSCE, affirm this standard and the connection between respect for privacy and safe return. In recognition of their particular vulnerabilities, special and additional obligations apply with respect to trafficked children. National laws in the OSCE region generally protect the right to privacy and identity. However, only some OSCE participating States have provisions in place that directly address the privacy concerns of trafficked persons.

82 Jobe, *The Causes and Consequences of Re-Trafficking*, *op. cit.*, note 39, p. 48; the International Organization for Migration (IOM), *Handbook on Direct Assistance for Victims of Trafficking* (Geneva: IOM, 2007), Chapter 3. In some countries, the IOM is involved from the identification stage to the reintegration stage, while in others it may only be responsible for the return itself. The IOM return assistance also depends on arrangements with governments and local service providers, as well as on the legal and policy frameworks in place (Jobe, *The Causes and Consequences of Re-Trafficking*, p. 45). All IOM country-office operations in relation to trafficked persons, including returns, are to be conducted in accordance with the IOM Handbook. The IOM also has a specific policy concerning the voluntary return of trafficked persons that provides information on legal frameworks and practical guidance on the conduct of returns. In addition to receiving assistance for safe return, trafficking victims may also receive housing and shelter, educational and vocational training and financial and medical assistance.

83 Generally understood as “the provision of (logistical, financial and/or other material) assistance for the Voluntary Return of a returnee” (see “Programmes and Strategies in the EU Member States”, European Migration Network, *op. cit.*, note 13, p. 16).

84 For example, La Strada administers the return programme in Poland. UNODC, *Human Trafficking in the Baltic Sea Region*, *op. cit.*, note 37, p. 39.

85 Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 107.

86 See Self-Empowerment Program for Migrant Women (SEPOM), ‘*Trafficked’ Identities as a Barrier to Community Reintegration: Five Stories of Women Rebuilding Lives and Resisting Categorisation*, GAATW Feminist Participatory Action Research Series (Bangkok: GAATW, 2010).

The issues of privacy and the protection of identity are of particular relevance in the context of return, when contact is made with authorities, service agencies and family members in the victim's country of origin. The OSCE commitments stress the need to safeguard the privacy of victims, including by raising awareness among the media of the risks involved in public disclosure of the victim's identity or of any other confidential information that could undermine the victim's safety or access to justice in criminal proceedings.⁸⁷

The Council of Europe Trafficking Convention requires State Parties to protect the private life and identity of victims.⁸⁸ To this end, the Convention requires that personal data regarding victims be stored and used in conformity with the "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data".⁸⁹ The identity of or details that may identify a child victim of trafficking must not be made publicly known except in exceptional circumstances, where such details are used to facilitate the tracing of family members or to otherwise secure the well-being and protection of the child.⁹⁰

Personal data protection standards of the EU provide that data may only be stored, transmitted or disseminated if certain conditions are met.⁹¹ In particular, appropriate technological and organizational methods must be applied to prevent the unauthorized disclosure of or access to data, particularly when data are transmitted over a network.⁹² Of particular relevance in the context of return is the requirement that personal data only be transferred to a third country if an adequate level of data protection is provided by the third country.⁹³

Practitioners also recommend that the returning country's law enforcement agencies not reveal to the authorities in the receiving country that the person being returned has been trafficked, without first obtaining that person's explicit consent. This is

87 OSCE Action Plan, para. 7.4.

88 Council of Europe Trafficking Convention, art. 11(1).

89 Council of Europe Trafficking Convention, art. 11(1). Article 7 of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data requires that appropriate security measures be taken for the protection of personal data stored in automated data files against, amongst other actions, unauthorized access, alteration or dissemination (see Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (adopted on 28 January 1981; entered into force on 1 October 1985), the Council of Europe, CETS No. 108. According to the convention, states must also establish appropriate sanctions and remedies for violations of such measures (article 10).

90 Council of Europe Trafficking Convention, art. 11.

91 EU Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, 1995 OJ L 281. These conditions include, *inter alia*, that the subject has given consent, that the processing is necessary for compliance with legal obligations or to protect the vital interests of the data subject.

92 *Ibid.*, art. 17.

93 *Ibid.*, art. 25. The EU Group of Experts recommends that, before personal information is exchanged with the country of origin, authorities should ensure that an appropriate level of data protection is guaranteed, and that all persons with access to personal data are bound by a duty of confidentiality. They also recommend that co-operation agreements between law enforcement authorities and those who are working with victims include provisions guaranteeing that the identity and other personal data of the trafficked person will not be forwarded without the consent of the trafficked person or the proper authority to do so (see Report of the EU Group of Experts, rec. 40, pp. 23-24).

important both in ensuring the person's safety (for example, should there be corruption-related concerns in the country of origin) and in protecting the victim of trafficking from possible stigmatization.⁹⁴ A clause to that end has been included in the UNODC's Model Law.⁹⁵

⁹⁴ Anti-Slavery International, *Human traffic, human rights: redefining victim protection* (London: Anti-Slavery International, 2002), rec. 42.

⁹⁵ Art. 33(5) of the UNODC Model Law: "In case of the return of a victim [or witness] of trafficking in persons to his or her country of origin, no record shall be made in the identity papers of that person relating to the reason for his or her return and/or to the person having been a victim of trafficking in persons, nor shall personal data to that effect be stored in any database that may affect his or her right to leave his or her country or enter another country or that may have any other negative consequences."

Principle 2:

Due process

The legal frameworks of some OSCE participating States do not fully respect due process in the right to return. Many participating States require that certain information is provided to trafficked persons, while others go further in providing victims with access to legal counselling or assistance. However, concerns have been raised about the consistency and quality of the information and assistance provided. In some countries, identification failures that result in victims of trafficking being held in immigration detention centres can prevent or obstruct their ability to access assistance and information. In others, trafficked persons are denied access to assistance and information if no criminal investigation has been opened. Access to information concerning the rights of trafficked persons and available legal and other forms of assistance, as well as the provision of a reflection period, represent procedural rights that are essential to the trafficked person's ability to seek remedies (discussed further in Principle 6).

The importance of proper identification in the context of forced return

The importance of the proper identification of victims of trafficking cannot be overstated. The failure to identify victims of trafficking accurately and in a timely manner is a persistent problem throughout the OSCE area, and one which exposes victims to the risk of forced return and the denial of their rights. This problem reflects other shortcomings in national responses to trafficking, including failing to fully recognize and act upon the crime of trafficking, to establish effective identification and referral mechanisms and to properly train frontline officials (such as police, border guards and immigration officers) in identifying trafficking victims of all of all ages and genders.

Most countries do not have standard procedures that border officials, immigration officers and police must follow in order to ascertain if apprehended migrants have been trafficked. Since trafficked victims are unlikely to hold valid residence permits, visas or even passports, if intercepted by the police or border officials they face detention, transfer to an expulsion centre and removal from the country, all of which can take place within a relatively short period of time. As such, there is a risk that trafficked persons caught up in procedures designed to manage asylum and migration cases will not be identified as victims of trafficking. Even when victims of trafficking are correctly identified, they may remain at risk of deportation as a result of procedural failures or miscommunications among the authorities.

In addition, policies aimed at countering irregular migration can place victims of trafficking at risk of arbitrary forced return. Such policies include denial of entry at border points and expedited return procedures, including as part of re-admission agreements. Accelerated re-admission procedures may lead to cases of *refoulement*, whereby the victim of trafficking is denied access to asylum procedures at the border. Victims of trafficking can also be negatively impacted by an asylum decision made on the basis of a flawed assessment of safe country concepts (i.e., whether or not the country of origin or third country is deemed to be safe) leading to a risk of *refoulement*. As such, there are concerns that, in some countries, approaches to combating trafficking have focused on the prevention of illegal migration, to the detriment of the human rights of trafficked persons.

The proper identification of victims of trafficking is key to ensuring that they are not expelled as irregular migrants and that they are accorded the rights to which they are entitled. Accurate and timely identification requires a formal identification system that functions effectively. ODIHR recommends that such identification systems are integrated into a national referral mechanism, staffed by appropriately-trained officials.⁹⁶ In this vein, Ministerial Council Decision No.5/08 calls on states not to expel potential victims of trafficking until the identification process is complete. More recently, the 2013 Addendum to the OSCE Action Plan recommends that participating States ensure that decisions regarding referrals can be reviewed in compliance with national law.⁹⁷

The Council of Europe affirms that, where there are reasonable grounds to believe that a person has been a victim of trafficking, that person must not be removed from the territory of a country until the identification process is complete.⁹⁸ The EU requires its member states to “take the necessary measures to establish appropriate mechanisms aimed at the early identification of, assistance to and support for victims, in co-operation with relevant support organizations”.⁹⁹ The EU also prohibits the enforcement

96 OSCE/ODIHR, *National Referral Mechanisms: A Practical Handbook* (Warsaw: ODIHR, 2004), p. 59.

97 2013 Addendum to the OSCE Action Plan, part IV, paras. 1 and 1.3.

98 Council of Europe Trafficking Convention, art. 10(2). The *Twenty Guidelines on Forced Return*, issued by the Council of Europe’s Committee of Ministers to identify best practice in the return of non-nationals, state that a removal order shall only be issued on the basis of a reasonable and objective examination of the particular case of each individual concerned, and shall take into account the circumstances of the specific case (see Committee of Ministers of the Council of Europe, *Twenty Guidelines on Forced Return*, CM(2005)40, guideline 3). This requires that the individual circumstances of the person be examined, and that individuals are not removed on the basis of their membership of a particular group or nationality. See also *Conka v. Belgium*, Application No. 51564/99, Council of Europe: European Court of Human Rights, 5 February 2002.

99 EU Trafficking Directive, art. 11(4).

of a return order during the reflection period, during which time identification procedures are finalized and victims are provided with assistance to help them recover.¹⁰⁰

The reflection period

A significant number of OSCE participating States have in place legal or policy provisions that grant trafficked persons time to recover and reflect on their experiences, as well as the right to remain in the destination country during legal proceedings and, in some cases, access to assistance. The effectiveness of procedures designed to regularize a victim's status depends on the capacity of those responsible for administering them. In some countries, decisions concerning a victim's status are taken by law enforcement officers, immigration officers and personnel from other front-line agencies.¹⁰¹

An increasing number of states in the OSCE region offer a reflection and recovery period to trafficked persons (and presumed victims), who would otherwise not have the right to remain in the country. The importance of providing reflection and recovery periods to victims of trafficking is outlined in several OSCE documents. The OSCE Action Plan suggests that periods of reflection are needed to allow victims to decide whether or not to act as witnesses during legal proceedings.¹⁰² In line with the OSCE commitments, participating States should provide victims with a reflection period¹⁰³ and ensure that deportation is not enforced during the reflection and recovery period.¹⁰⁴

The concept of a reflection and recovery period was not well established at the time the UN Trafficking Protocol was drafted and, therefore, it is not reflected in that instrument. However, it is included and clarified in the Council of Europe Trafficking

100 Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities, 2004 OJ L 261, pp. 19 – 23, art. 6(2). While the EU Return Directive sets out the procedures for the return of third-country nationals illegally present in EU member states, it does not fully define “illegally staying third-country nationals”, nor does it provide any guidance to states on how or under what standards persons are to be assessed as falling within its scope. It is clear, however, that persons with an entitlement to be recognized as having been trafficked (and thereby to legal recognition of at least a temporary right to stay) do not fall within its scope of application, at least until any trafficking-related right to stay expires or is terminated.

101 Regarding participating States who are EU member states, the European Commission has noted problems with regard to failure to assign responsibility for informing victims of temporary residence options, and failure to specify the content of such information; failure to identify victims, leading to the detention of victims as irregular migrants; requiring the presentation of identity documents as a pre-requisite for issuing residence permits; failure to make specific provisions for psychological assistance; failure to introduce explicit provisions for the safety and protection of victims; failure to specifically provide for the best interests of the child to be given due account; and lack of targeted social assistance programmes (see European Commission, Report from the Commission on the application of Directive 2004/81, COM(2010) 493 final, p. 10).

102 OSCE Action Plan, part V, para. 8.1; and the 2013 Addendum to the OSCE Action Plan, part IV, paras. 2 and 2.3.

103 OSCE Ministerial Council, Decision No. 8/07, “Combating Trafficking in Human Beings for Labour Exploitation”, Madrid, 30 November 2007, para. 2, <<http://www.osce.org/mc/29464?download=true>>.

104 OSCE Ministerial Council Decision No. 5/08, “Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach”, Helsinki, 5 December 2008, para. 5, <<http://www.osce.org/mc/36545?download=true>>.

Convention, which requires that a reflection period lasting at least 30 days be mandated by law.¹⁰⁵ This is to allow victims to recover, fully extricate themselves from their exploiters and have sufficient time to make an informed decision about whether or not to co-operate with the authorities. During this period, the victim is to be provided with protection and assistance measures¹⁰⁶ and must not be expelled.¹⁰⁷ Although States Parties are free to choose the method used to prevent the forced return of victims, they must create a legal framework to allow victims to remain on their territory for the duration of the recovery period and provide them with the relevant authorization documents.¹⁰⁸

EU legislation also provides for a reflection period, but leaves member states to determine how long the reflection period should last.¹⁰⁹ During the reflection period, return orders cannot be enforced against third-country nationals, who should be “granted standards of living capable of ensuring their subsistence” and access to emergency medical treatment, including psychological assistance, where necessary.¹¹⁰

Access to justice

The OSCE Action Plan, the 2013 Addendum and Ministerial Council Decisions No. 14/06 and No. 8/07 all underline the importance of access to justice for trafficked persons and, in this context, the need to provide them with legal assistance. Such assistance should include legal counselling and information about the legal rights of victims in a language that they can understand. It is important to note that Ministerial Council

105 Council of Europe Trafficking Convention, art. 13.1. The recovery period is intended to apply to victims of trafficking who are illegally present in a Party's territory or who are legally resident but with only a short-term residence permit. Council of Europe, Explanatory Report to the Council of Europe Trafficking Convention, CETS No. 197, para. 172.

106 Council of Europe Trafficking Convention, Art. 13(2), 12(1)(2).

107 Council of Europe Trafficking Convention, Art. 13(1).

108 Explanatory Report to the Council of Europe Trafficking Convention, para. 178.

109 Council Directive 2004/81/EC, art. 6. The Directive has been criticized for insufficiently addressing the needs and rights of victims to receive support and assistance (see EU Group of Experts, Opinion No. 4/2009, On a possible revision of Council Directive 2004/81/EC, para. 3). The EU Group of Experts has recommended a reflection period of no less than three months as the minimum time necessary to ensure adequate assistance and support, to enable the victim to make an informed decision on co-operation in criminal proceedings, to pursue compensation claims or to return home. As regards residence permits, the Group stated that these should not be tied to the victim's co-operation with investigation or prosecution. The Group has also noted that, in many cases, victims may not have relevant information, traffickers may not be able to be prosecuted or victims may fear significant harm to themselves or their families if they co-operate. However, this does not diminish the victims' status as being in need of assistance and support. The Group recommends that both adult and child victims be granted a temporary but renewable residence permit for at least six months, including the right to work and to access social assistance programmes, regardless of the victim's willingness to co-operate (see EU Group of Experts, “Explanatory Paper 10: Reflection Period and Residence Status”, p. 171). See also Anne T. Gallagher, *The International Law of Human Trafficking* (New York: Cambridge University Press, 2010), pp. 298-301.

110 EU Council Directive 2004/81/EC, art. 7. In addition, the EU Trafficking Directive also makes reference to the reflection period in its preamble and confirms, that in cases where the victim does not reside lawfully in the relevant member state, assistance and support should be provided unconditionally, at least during the reflection period (paragraph 18). A group of UN bodies has recommended the inclusion of a reflection and recovery period of a minimum of 90 days for all trafficking victims (see OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Prevent, Combat, Protect: Human Trafficking - Joint UN Commentary on the EU Directive - A Human Rights-Based Approach*, p. 44).

Decision 8/07 suggests that states should consider options allowing for alternative representation when the victim is unable to participate in legal proceedings in person.

The UN Trafficking Protocol requires states to ensure that measures are taken to provide victims with information on relevant court and administrative proceedings, as well as assistance in presenting their views and concerns in criminal proceedings. The UN Trafficking Protocol also recommends that States Parties consider providing counselling and information, in particular concerning the legal rights of victims, in a language that they can understand.¹¹¹ Pursuant to the UN Draft Basic Principles on the right to an effective remedy for trafficked persons, procedural rights for victims of trafficking include access to a competent authority, the provision of information about their rights, legal and other forms of assistance and the granting of a reflection period.¹¹²

According to practitioners, it is not uncommon in some OSCE participating States for a trafficked person to be denied the status of a victim of trafficking. This is often the case where no criminal investigation has been initiated, sometimes as a result of the trafficked person's unwillingness to co-operate with the authorities. Consequently, the person either has no or limited access to relevant assistance services. In accordance with UN principles relating to victims of crime, as well to victims of gross violations of international human rights law, trafficked persons are to be considered victims regardless of whether the perpetrator in a particular case has been identified, apprehended, prosecuted or convicted.¹¹³ Likewise, the UN Draft basic principles on the right to an effective remedy for trafficked persons foresee that all trafficked persons have a legally enforceable right to obtain compensation, irrespective of whether their perpetrator has been convicted.¹¹⁴

In a similar vein, the Council of Europe Trafficking Convention obliges States Parties to provide counselling and information in a language that the victim can understand, along with assistance to enable their rights and interests to be presented during criminal proceedings.¹¹⁵ Victims must be afforded access to information on relevant legal and administrative procedures from their first contact with the competent authorities.¹¹⁶ This includes victims who are present in a country illegally, who should be informed about their rights regarding residence¹¹⁷ so that they have time to consider

¹¹¹ UN Trafficking Protocol, arts. 6.2 and 6.3(b).

¹¹² UN Draft basic principles on the right to an effective remedy for trafficked persons, UN Doc. A/HRC/17/35, 13 April 2011, art. 1(5).

¹¹³ UN General Assembly, Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985, A/RES/40/34; UN General Assembly Resolution on Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Human Rights Law of 16 December 2005, A/60/509/Add.1.

¹¹⁴ Draft basic principles on the right to an effective remedy for trafficked persons, art. 2(c).

¹¹⁵ Council of Europe Trafficking Convention, art. 12(1)(d), art. 12(1)(e).

¹¹⁶ Council of Europe Trafficking Convention, art. 15(1). See also Explanatory Report to the Council of Europe Trafficking Convention, para. 192.

¹¹⁷ Explanatory Report to the Council of Europe Trafficking Convention, para. 194.

their options and file relevant applications. Parties must establish conditions according to which victims of trafficking are provided with legal aid free of charge.¹¹⁸ When considered together with standards set out in the ECHR and the case law of the ECtHR, the right to free legal assistance may, in certain circumstances, be extended to civil matters, such as claims for compensation or immigration proceedings.¹¹⁹

In this vein, EU law foresees that trafficked persons be provided with the relevant information and necessary legal assistance to be able to protect their legal rights, including their rights of residency and return. It also requires that victims be provided with legal counselling “without delay”.¹²⁰ Victims should be afforded access to legal representation for the purpose of claiming compensation and in accordance with the role of the victim in the relevant criminal justice system (for example, where victims have the status of parties to criminal proceedings). In case the victim does not have sufficient resources, legal representation and counselling is to be provided free of charge by the EU member state concerned.¹²¹ In addition, UN agencies have recommended that states implementing the EU Trafficking Directive ensure that access to free legal aid is not restricted to criminal proceedings. It should also cover all legal proceedings relating to a person’s victim status, including criminal, civil or labour procedures, for the purpose of compensation, as well as proceedings in relation to immigration status or asylum.¹²²

Possibility to appeal

In order to ensure that due process is afforded to trafficked persons during the return process, it is essential that they are provided with the means to appeal against the return decision. Of particular relevance in this context are the OSCE commitments on ensuring effective means of redress against administrative decisions, according to which OSCE states should endeavour to provide judicial review of administrative regulations and decisions.¹²³

118 Council of Europe Trafficking Convention, art. 15(2); Explanatory Report to the Council of Europe Trafficking Convention, paras. 195 and 196.

119 These circumstances include where the complexity of proceedings and the emotional character of a matter may prevent a person from presenting their case properly and effectively (Explanatory Report to the Council of Europe Trafficking Convention, paras. 195 and 196). It is likely that in all civil matters involving a trafficking victim, such as claims for compensation or asylum applications, the complexity of proceedings and emotional character of the case and the issues to be discussed necessitate the provision of legal aid for the trafficking victim.

120 EU Trafficking Directive, art. 12(2).

121 *Ibid.*, art. 12(2). As victims of crimes, trafficked persons also fall within the scope of Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 OJ L 315/57. This Directive, to be transposed by the EU Member States by 16 November 2015, requires that victims be recognized and treated in a respectful and sensitive manner, with the rights granted by the Directive applied in a non-discriminatory manner. The European Parliament has recently stated that victims should be provided with professional help including free legal aid, bearing in mind that they often lack financial means and would thus be unable to pay for such assistance (see European Parliament, Resolution of 10 February 2010 on Preventing Trafficking in Human Beings, P7_TA(2010)0018, para. 18).

122 UNHCR et al., *Prevent, Combat, Protect: Human Trafficking*, p. 66.

123 Document of the Moscow Meeting of the Conference on the Human Dimension of the OSCE, 3 October 1991 (hereafter: 1991 Moscow Document), para. 18.4.

Under the EU's Return Directive, all decisions relating to the return and removal of persons must be issued in writing, providing reasons in fact and in law, and must be subject to effective review or appeal.¹²⁴ In addition, decisions must provide information about the availability of judicial review or appeal mechanisms. EU member states are required to ensure that the necessary legal assistance or representation is provided on request and free of charge, in accordance with national laws on legal aid.¹²⁵ They are also required to respect the *non-refoulement* principle and to postpone removal in case this principle might be violated.¹²⁶

If the returning country is a State Party to the ECHR, a trafficked person who has initiated proceedings before the ECtHR can request that the court indicate interim measures to the particular State Party.¹²⁷ Interim measures are urgent measures that, according to ECtHR case law, apply only where there is an imminent risk of irreparable harm. In the majority of cases, applicants request the suspension of an expulsion or an extradition, including on account of the risks they face of sexual exploitation¹²⁸ and family vengeance.¹²⁹

124 EU Return Directive, arts. 12(1) and 13.

125 *Ibid.*, art. 13(4).

126 *Ibid.*, art. 9(1).

127 "Rules of Court, European Court of Human Rights", Registry of the Court, 1 January 2014, Rule 9.

128 *M. v. the United Kingdom*, Application No. 16081/08, Council of Europe: European Court of Human Rights, 1 December 2009.

129 *H.N. v. the Netherlands*, Application No. 20651/11, Council of Europe: European Court of Human Rights, 3 October 2012.

Principle 3:

Protection measures when return is not an option

In some circumstances, the return of a trafficked person to her or his country of origin or former habitual residence is impossible, dangerous or otherwise in violation of that person's human rights. Victims who are not granted legal refugee status or who are not otherwise deemed in need of international protection may still be afforded protection measures, including as a result of personal circumstances, once the reflection period has expired. However, these alternatives are often only available on a temporary basis.

Victims of trafficking may be granted the "right to remain" for a number of reasons and in a number of different ways. Once the reflection period has expired (discussed under Principle 2), one of the first options to follow is to grant a *temporary residence permit* linked to proceedings against the traffickers, although this usually requires victim co-operation. Trafficked persons can also be granted *international protection or temporary residence on humanitarian grounds* on the basis of, for example, the principle of *non-refoulement* and an inability to guarantee a secure return. In addition, victims may be granted *permanent residence* on humanitarian grounds. Victims claiming international protection may also have an entitlement, separate from or in addition to any other entitlements accorded them as victims of trafficking, to remain for the duration of that claim.

Temporary residence for the duration of legal proceedings

In most OSCE participating States, whether or not a trafficked person is permitted to remain and participate in criminal proceedings depends on the assessment of law enforcement or prosecuting authorities as to the usefulness of the trafficked person's testimony. Such is the case where the right to remain is conditional on the trafficked person's co-operation with the investigation and/or prosecution processes. The right to remain for the purpose of civil proceedings, for example to claim compensation, is largely absent from the legal frameworks of OSCE participating States. As a result, victims are reportedly often returned to their countries of origin (voluntarily or otherwise) before having had the opportunity to make or finalize a claim for compensation.¹³⁰ Victims who have received residence permits on the basis of their co-oper-

¹³⁰ OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw: ODIHR, 2008), p. 36.

ation in legal proceedings are rarely offered the possibility to remain in the country of destination once proceedings are concluded.¹³¹ Where permits are available, they may be conditional on the outcome of the criminal proceedings and only offered where a conviction is made or the victim “does their best to co-operate”.¹³²

As with reflection periods, some EU countries impose additional requirements for granting residence permits, including by requiring that the victim provide identity documents.¹³³ Such requirements can be impossible for victims to fulfil, as they may not have possessed valid documents in the first place or may have had their documents confiscated by traffickers.

The UN Trafficking Protocol requires that destination countries conducting return take into consideration the status of any related legal proceedings involving the individual who is to be returned.¹³⁴ The presence of the trafficked person in the country in which remedies are being sought is often a practical – and sometimes a legal – requirement. When returning countries do not take this into account, then this will inevitably obstruct the free and effective exercise of the trafficked person’s right to remedies. At the very least, returning countries should defer deportation and provide a temporary residence permit to allow the victim to participate in legal proceedings.

The OSCE Action Plan and Ministerial Council Decision No. 8/07 urge states to consider providing victims of trafficking with temporary and permanent residence permits.¹³⁵ In the OSCE context, such permits are not explicitly linked to judicial proceedings. While Ministerial Council Decision No. 8/07 does not specify the purposes of these permits, the Action Plan mentions them in connection with potential dangers to victims’ safety. The OSCE commitments call on states to consider granting work permits to victims for the duration of their stay in the destination country.¹³⁶ The commitments also recommend that states provide a reflection delay and enhance employment opportunities available to victims during their stay, including through information on and the provision of work permits.¹³⁷

Although Council of Europe and EU standards both envisage the provision of temporary residence permits to victims of trafficking, there are differences in terms of eligibility criteria. The Council of Europe Trafficking Convention obliges States Parties to issue residence permits to victims of trafficking if the competent national authority considers their stay necessary either due to their personal circumstances, or for the

¹³¹ Hancilova and Massey, *Legislation and the Situation Concerning Trafficking in Human Beings*, *op. cit.*, note 80, 2009, p. 82.

¹³² Sarah Craggs and Ruzayda Martens, *Rights, Residence, Rehabilitation: A Comparative study Assessing Residence Options for Trafficked Persons*, International Organization for Migration, 2010, p. 97.

¹³³ *Ibid*, p. 55.

¹³⁴ UN Trafficking Protocol, art. 8.

¹³⁵ Reiterated also in the 2013 Addendum to the OSCE Action Plan, part IV, paras. 2 and 2.3.

¹³⁶ OSCE Action Plan, part V, paras. 8.2-8.3; OSCE Ministerial Council, Decision No. 8/07, para. 2; 2013 Addendum to the OSCE Action Plan, part IV, paras. 2 and 2.3.

¹³⁷ OSCE Ministerial Council, Decision No. 8/07, para. 2.

purposes of co-operation in an investigation or criminal proceedings.¹³⁸ The personal situation requirement covers a range of situations, including the victim's safety, state of health and family situation.¹³⁹ In the case of child victims, the residence permit should be issued in accordance with the best interests of the child, and should be renewed, where necessary, on that basis.¹⁴⁰ EU legislation provides for the granting of residence permits on or before the date that the reflection period is due to expire.¹⁴¹ However, granting the residence permit is entirely conditional upon the co-operation of victims, and does not take into account their personal circumstances. A permit may be granted where the victim has shown a clear intention to co-operate, has severed relations with the traffickers and can be of assistance to investigations or judicial proceedings.¹⁴² The Brussels Declaration states that short-term residence permits must be made available to victims who agree to co-operate with the criminal justice system.¹⁴³

The obligation of *non-refoulement*

The principle of *non-refoulement* is central to the realization of the right to seek and enjoy asylum and is enshrined, *inter alia*, in the UN Refugee Convention,¹⁴⁴ which prohibits states from returning a person to a territory where there is a risk that her or his life or freedom would be threatened and the person would be subjected to persecution. The principle of *non-refoulement* is also codified in regional law instruments

¹³⁸ Council of Europe Trafficking Convention, art. 14.

¹³⁹ Explanatory Report to the Council of Europe Trafficking Convention, para. 184.

¹⁴⁰ Council of Europe Trafficking Convention, art. 14(2). There is no provision as to the length of the residence permit or its renewal for either child or adult victims.

¹⁴¹ See EU Council Directive 2004/81/EC. Under this Directive, a residence permit must be valid for at least six months and is renewable if the conditions continue to be met art. 8(3).

¹⁴² The EU Group of Experts has stressed that the requirement for co-operation should be understood to mean not only formal involvement in legal proceedings, but also other less formal means of co-operation, such as giving information (see EU Group of Experts, Opinion No. 4/2009, para. 14. The link between entitlement to stay and the right to participate in legal proceedings has been highlighted by the EU Group of Experts, which has recommended that a trafficked person who decides to be a witness in a criminal case or who wishes to claim compensation in a civil case be entitled to a temporary residence permit at least until the end of the legal proceedings (see EU Group of Experts, Explanatory Report 10: Reflection Period and Residence Status, p. 173). As regards criminal proceedings, this recommendation is largely in effect through the application of the EU Council Directive 2004/81/EC on residence permits for victims of trafficking. However, the Directive does not allow victims to stay if their testimony is not regarded as useful, or if victims wish to claim compensation through civil proceedings. The preamble of EU Directive 2009/52/EC requires that member states define in national law the conditions for granting temporary residence permits linked to the length of the relevant national criminal proceedings (see European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/81 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of action to facilitate illegal immigration, who cooperate with the competent authorities, COM (2010), p. 493). Please note that this Directive has been subject to review and that, at the time of writing, amendments to the Directive to improve its protection of trafficking victims are being considered.

¹⁴³ European Union, *Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, 29 November 2002, 14981/02 (hereafter: Brussels Declaration), p. 16.

¹⁴⁴ UN Refugee Convention, art. 33.

and forms a rule of customary law and, as such, is binding on all states irrespective of whether or not they are party to the UN Refugee Convention.¹⁴⁵

This prohibition of *refoulement* in international refugee law is complemented by *refoulement* prohibitions under human rights law, most notably the ICCPR and the UNCAT. While the UNCAT limits the principle to cases of torture, the ECtHR has also applied the *non-refoulement* principle to cases of cruel, inhuman and degrading treatment.¹⁴⁶ The principle of *non-refoulement* is mentioned in the OSCE Action Plan,¹⁴⁷ as well as in the UN Trafficking Protocol,¹⁴⁸ the Council of Europe Trafficking Convention¹⁴⁹ and the EU Trafficking Directive.¹⁵⁰

The principle of *non-refoulement* does not, as such, represent a right to be granted asylum in a state. However, it means that for the removal of an individual from the territory of a state to be lawful, states must examine whether the removal would result in a breach of their *non-refoulement* obligations. Even if no request for asylum has been filed, states are still bound by their *non-refoulement* obligations. This is of particular importance for border guards and immigration officials when handling the cases of trafficked persons.¹⁵¹

In a case involving a victim or a presumed victim of trafficking, determining whether the principle of *non-refoulement* applies would require that the authorities take into account various factors concerning the nature of the persecution feared, as well as the willingness and capacity of the origin state to prevent and protect the individual in question from trafficking.

Under UNCAT, the state cannot “expel, return or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being

145 See UN High Commissioner for Refugees (UNHCR), *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol*, 26 January 2007, paras. 14-16; UN High Commissioner for Refugees (UNHCR), *Note on Diplomatic Assurances and International Refugee Protection*, 10 August 2006, para. 15; UN High Commissioner for Refugees (UNHCR), *Declaration of States Parties to the 1951 Convention and or Its 1967 Protocol relating to the Status of Refugees*, 16 January 2002, HCR/MMSP/2001/09, preamble, para. 4; UN High Commissioner for Refugees (UNHCR), “Summary Conclusions: the principle of *non-refoulement*”, in Erika Feller, Volker Turk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003), p. 178; Nils Coleman, “Renewed Review of the Status of the Principle of *Non-Refoulement* as Customary International Law”, *European Journal of Migration and Law*, Vol. 5, No. 1, 2003, p. 23.

146 Although article 3 of the ECHR prohibits torture and other forms of ill-treatment, it does not refer to *refoulement*, while the ECtHR has still interpreted it as prohibiting return if an individual would face a real risk of torture or inhuman or degrading treatment or punishment (see *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (Vienna: OSCE, 2013), pp. 28-29).

147 OSCE Action Plan, part V, para. 9.1

148 UN Trafficking Protocol, art. 14.

149 Council of Europe Trafficking Convention, art. 40.

150 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15 April 2011, 2011/36/EU (hereafter: EU Trafficking Directive), recital 10.

151 UNHCR et al., *Prevent, Combat, Protect: Human Trafficking*, p. 58

subjected to torture”.¹⁵² Cases fulfilling the “substantial grounds” requirement must contain a foreseeable, real and individualized risk of torture that goes “beyond mere theory of suspicion” or “a possibility of torture”, although the risk posed to the individual does not have to be “highly probable”.¹⁵³ The danger has to be “personal and present”, and the authorities must also assess the particular situation of the victim and not only the general context of the risk of torture in the state where the victim is to be returned to.¹⁵⁴ If the victim’s individual circumstances show that he or she may be at risk of being tortured, the UNCAT provision of protection from *refoulement* applies regardless of whether a consistent pattern of torture or other mass human rights violations have emerged.¹⁵⁵

Under the ECHR, a trafficked person would need to demonstrate that there are substantial grounds to believe that, if expelled, the person would face a real risk of treatment contrary to Article 3 of the ECHR in the receiving country to which he or she is being sent.

The principle of *non-refoulement* can, therefore, offer victims an additional protection option.¹⁵⁶

Long-term residence options

Many OSCE participating States provide long-term residence permits to persons who qualify for refugee status or subsidiary protection. In principle, such permits are available to trafficked persons who meet the criteria of being a refugee or a person “in need of international protection”. In some countries, “complementary protection” is also provided on the basis of international obligations concerning family unity, health, children and other human rights concerns.¹⁵⁷ In many countries, general clauses also allow protection to be granted in the exercise of executive discretion on “humanitarian grounds” or “compassionate grounds”.¹⁵⁸ Other obstacles to return, including legal, technical or practical reasons that make return impossible, may also serve as a basis for granting a temporary residence permit.¹⁵⁹

The EU Group of Experts has recommended that victims of trafficking be made eligible for a residence permit in certain circumstances, regardless of their level of co-operation with the national authorities. The Group has set out criteria according to which residence permits should be granted on humanitarian grounds, as follows:

¹⁵² UNCAT, art. 3.

¹⁵³ *Trafficking in Human Beings Amounting to Torture and other Forms of Ill-treatment* (Vienna: OSCE, 2013), p. 30.

¹⁵⁴ *Ibid.*

¹⁵⁵ *Ibid.*

¹⁵⁶ *Ibid.*, p. 39.

¹⁵⁷ European Council on Refugees and Exiles, *Complementary Protection in Europe*, 29 July 2009, p. 5.

¹⁵⁸ *Ibid.*, p. 7.

¹⁵⁹ See, for example, Mathilde Heegaard Bausager, Johanne Köpflø Møller and Solon Ardittis, “Study on the situation of third-country nationals pending return/removal in the EU Member States and the Schengen Associated Countries”, European Commission, March 2013, HOME/2010/RFX/PR/1001.

- the risk of retaliation against the trafficked person and/or her or his family, and the capacity and/or willingness of the authorities in the home country to provide protection against such reprisals;
- the risk of criminal or administrative prosecution by the authorities of the home country for status-related offences, including for crossing the border illegally or for working in the sex industry;
- the lack of perspectives for victim's social inclusion in her or his community in the country of origin, including an insufficient standard of living, taking into account the specific background of the trafficked person, the possible disruption of family ties and, in the case of trafficking for prostitution, social attitudes (stigmatization and discrimination) and state policies on prostitution;
- the lack of adequate, confidential and non-stigmatizing support services; and
- the presence of children.¹⁶⁰

The only piece of EU legislation to specifically provide for the long-term (but not permanent) residence status of refugees in the destination country is the EU Qualification Directive, which allows those qualifying for refugee status to be granted a residence permit valid for at least three years, with the possibility of renewal, provided that there are no compelling reasons of national security or public order that require otherwise.¹⁶¹

Asylum

All persons, including those who have been trafficked, have the right to seek and enjoy asylum from persecution.¹⁶² International refugee law sets out to provide legal protection to persons who are forced to flee their countries of origin due to well-founded fears of persecution on the grounds of race, religion, nationality, membership of a particular social group or political opinion.¹⁶³

Persons who are identified as victims of trafficking and who find themselves in either an asylum procedure system or in victim protection and assistance schemes are often treated within one system only, with no referral or information sharing – as may be relevant in individual cases – between these systems. Without a robust system of referral, the international protection needs of trafficked persons may not be properly identified or addressed.¹⁶⁴ A UNHCR study noted that in most of the countries surveyed, systems for referring trafficked persons to asylum procedures or other

¹⁶⁰ Report of the EU Group of Experts, p. 174.

¹⁶¹ EU Qualification Directive, art. 24(1).

¹⁶² See UDHR, art. 14; UN General Assembly Resolution 217 (A) of 10 December 1948. For more information on defining the expression “to enjoy asylum”, see, for example, Alice Edwards, “Human Rights, Refugees, and the Right ‘To Enjoy’ Asylum”, *International Journal of Refugee Law*, Vol. 17, No. 2, 2005, pp. 293–330.

¹⁶³ UN Refugee Convention, art. 1A(2).

¹⁶⁴ A British NGO has recommended including an independent asylum adviser in the early stages of the trafficking identification process, to ensure respect for the victims' right to receive information, including on asylum. Sarah Richards, *Hope Betrayed: An Analysis of Women Victims of Trafficking and Their Claims for Asylum*, The POPPY Project, 2006, p. 22.

international protection mechanisms were found to be non-existent or inadequate.¹⁶⁵ In most countries, referral systems were characterized as “ad hoc at best”. In general, protection and assistance systems for victims of trafficking and asylum systems operate separately, with little or no communication between the two.¹⁶⁶

Trafficked persons may face time limits or other restrictions when applying for asylum. In some states, asylum claims can only be received within a definite period of time, and failure to make a claim within the stipulated period without a reasonable explanation can result in the application being rejected.¹⁶⁷

It has been reported that some EU member states have not implemented the relevant EU legislation requiring states to consider previous persecution or serious harm committed against the asylum applicant as a serious indication of the risk of future persecution and harm. It was also found that some EU member states failed to take into account events taking place since the applicant left the country of origin that may necessitate international protection.¹⁶⁸ Failure to properly implement these provisions may restrict the ability of trafficked persons to successfully claim protection and, therefore, pose risks to their right to life and freedom from persecution. In this context, some states have provided a narrow interpretation of the term “non-state actor” that excludes criminal organizations and the perpetrators of gender violence, including honour crimes and domestic violence.¹⁶⁹ Moreover, some EU member states

165 UN High Commissioner for Refugees (UNCHR), *The Identification and Referral of Trafficked Persons to Procedures for Determining International Protection Needs*, October 2009, PPLAS/2009/03, p. 21.

166 Sarah Richards, *Hope Betrayed*, op. cit., note 166, para. 3.1, p. 21. The study identified the following necessary features for an effective referral mechanism for trafficking victims: a functioning domestic procedure for identifying and registering trafficked persons, including the provision of free legal counselling; an effective additional system for addressing international protection needs; and a consistent and competent mechanism for referring trafficked persons from the first to the second procedure.

167 EU Qualification Directive, art. 4(1), stipulates that member states may consider it the duty of the applicant to submit “as soon as possible” all elements needed to substantiate the application for international protection. However, there is no provision on the consequences of failure to do so, and a recent European Commission report noted that there is no uniform understanding among member states of what “as soon as possible” means. European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, COM(2010)314, assessment of article 4. See also UN High Commissioner for Refugees (UNHCR), *Beyond Proof, Credibility Assessment in EU Asylum Systems: Summary*, May 2013 for a full discussion on article 4 of the EU Qualification Directive and the implications of late application.

168 European Commission, Report from the Commission to the European Parliament and the Council on the application of Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection, COM(2010)314, assessment of article 5. Note that Directive 2004/83/EC was repealed as of 21 December 2013 and replaced by Directive 2011/95. The practice of the EU member states under that directive remains to be assessed.

169 European Council on Refugees and Exiles (ECRE) and European Legal Network on Asylum (ELENA), *The Impact of the EU Qualification Directive on International Protection* (2008), pp. 15-16.

have taken a comprehensive approach to granting subsidiary protection, but a narrow one on questions of refugee status.¹⁷⁰

The OSCE Action Plan recommends that states ensure that their anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including victims of trafficking, to seek and enjoy asylum, in particular by ensuring the effective application of the principle of *non-refoulement*.¹⁷¹ This recommendation is also provided for in the UN Trafficking Protocol,¹⁷² the Council of Europe Trafficking Convention¹⁷³ and the EU Trafficking Directive.¹⁷⁴ Moreover, the risk of reprisals or retaliation by traffickers may constitute persecution in the meaning of the word applied in the UN Refugee Convention. In this vein, the Commentary to the Council of Europe Trafficking Convention reaffirms that the “fact of being a victim of trafficking in human beings cannot preclude the right to seek and enjoy asylum and Parties shall ensure that victims of trafficking have access to appropriate and fair asylum procedures”.¹⁷⁵

The deportation of groups of trafficked persons without conducting individual assessments of the situation of each person and the individual risks he or she faces can, in addition to compromising the right to seek and receive asylum from persecution, also violate the prohibition of *refoulement* as discussed above, as well as the prohibition on collective expulsions.¹⁷⁶ As set out in the UN Refugee Convention, asylum claims are to be considered on their substantive merits and not on the basis of the applicant’s means of entry.¹⁷⁷

In order to be recognized as a refugee, the individual concerned must be found to have a “well-founded fear of persecution” that is linked to one or more of the grounds included in the UN Refugee Convention.¹⁷⁸ The UNHCR Trafficking Guidelines

170 *Ibid.* However, under EU Qualification Directive art. 6(c), non-state actors are considered actors of persecution or serious harm if it can be demonstrated that the state or parties or organizations controlling the state or a substantial part of the territory of the state, including international organizations, are unable or unwilling to provide protection against persecution or serious harm as defined in article 7 of the Directive.

171 See OSCE Action Plan, part V, para. 9(1).

172 UN Trafficking Protocol, art. 14.

173 Council of Europe Trafficking Convention, art. 40.

174 EU Trafficking Directive, recital 10.

175 Explanatory Report to the Council of Europe Trafficking Convention, para. 377.

176 See ECHR, protocol 4, art. 4; and UN General Assembly (UNGA), *International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families*, 18 December 1990, A/RES/45/158, art. 22(1). See also European Union: Council of the European Union, *Charter of Fundamental Rights of the European Union (2007/C 303/01)*, 14 December 2007, C 303/1, art. 19, on protection in the event of removal, expulsion or extradition, which prohibits collective expulsions. For more information on the distinction between *refoulement* and collective expulsions, see UN Office of the High Commissioner for Human Rights (OHCHR), *OHCHR intervention before the European Court of Human Rights in the case of Hirsi et al. v. Italy*, 5 May 2011, Application No. 27765/09.

177 See UN Refugee Convention, art. 31. See also Guy S. Goodwin-Gill, “Article 31 of the 1951 Convention Relating to the Status of Refugees: Non-penalization, detention, and protection”, in Erika Feller, Volker Türk and Frances Nicholson (eds.), *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (Cambridge: Cambridge University Press, 2003) pp. 185-188. See also, for example, Tyler Marie Christensen, *Trafficking for sexual exploitation: victim protection in international and domestic asylum law*, UN High Commissioner for Refugees (UNHCR) Research Paper No. 206, April 2011.

178 These grounds can be found in the UN Refugee Convention, art. 1A(2).

acknowledge that not all victims or potential victims of trafficking fall within the scope of the refugee definition, and that being a victim of trafficking does not, *ipso facto*, represent a valid ground for claiming refugee status.¹⁷⁹ However, “in some cases, trafficked persons may qualify for international refugee protection if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the *UN Refugee Convention* definition, in the absence of effective national protection.”¹⁸⁰

What amounts to a well-founded fear of persecution that would validate a claim to asylum depends on the facts of each individual case. In the present context it is important to note that acts of persecution that warrant a claim to refugee status can be perpetrated by private individuals if they are “knowingly tolerated by the authorities or if they refuse, or prove unable, to offer effective protection”.¹⁸¹ It is also clear that common forms of trafficking-related exploitation, such as forced labour, constitute serious violations of human rights that will generally amount to persecution. The fear of persecution can also be specific to the experience of being trafficked. For example, victims may face reprisals and re-trafficking, as well as ostracism, discrimination or punishment should they be returned. In this regard, the UNHCR has confirmed that potential reprisals from traffickers that amount to persecution could constitute a well-grounded fear of persecution, depending on the seriousness of the acts; that the threat of re-trafficking usually constitutes a well-grounded fear of persecution; and that the prospect of suffering severe ostracism, discrimination or punishment may also constitute a well-grounded fear of persecution, particularly if aggravated by a trafficking-related trauma or if linked to an increased risk of re-trafficking.¹⁸²

The highly gendered nature of trafficking is also relevant in this context. For example, certain forms of trafficking, such as trafficking for sexual exploitation, can be characterized as gender-based violence and, as such, amount to persecution on that basis.¹⁸³ The gender of the victim can affect their vulnerability to severe reprisals, re-trafficking, ostracism and discrimination.¹⁸⁴ Gender considerations should not be restricted

179 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked*, 7 April 2006, HCR/GIP/06/07. See also Ryszard Piotrowicz, “The UNHCR’s Guidelines on Human Trafficking”, *International Journal of Refugee Law*, Vol. 20, No. 2, 2008, p. 242; and UNHCR Trafficking Guidelines, para. 6.

180 UN High Commissioner for Refugees (UNHCR), *Global Consultations on International Protection/Third Track: Refugee Protection and Migration Control: Perspectives from UNHCR and IOM*, 31 May 2001, EC/GC/01/11, para. 32.

181 UN High Commissioner for Refugees (UNHCR), *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, January 1992, HCR/IP/4/Eng/REV.1, para. 65.

182 UNHCR Trafficking Guidelines, paras. 15, 17-18.

183 UNHCR Trafficking Guidelines, para.19; UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/01, para. 18. See also UNHCR, *Guidelines on International Protection No. 9*; and Council of Europe, *Council of Europe Convention on preventing and combating violence against women and domestic violence*, 11 May 2011, art. 60(1).

184 UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No. 2: “Membership of a Particular Social Group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 7 May 2002, HCR/GIP/02/02 (hereafter: UNHCR Guidelines on International Protection No. 2), para. 18.

to women and girls, as men and boys can also be subject to gender-based violence associated with trafficking.¹⁸⁵

In order to qualify for refugee status, an individual's "well-founded fear of persecution" must relate to one or more of the grounds specified in the definition contained in the Refugee Convention, namely "race, religion, nationality, membership of a particular social group or political opinion". It is sufficient for the ground to be a relevant factor contributing to the persecution, and it does not need to be the sole or even dominant cause.¹⁸⁶ The UNHCR has noted the possibility that a number of grounds included in the Convention are being used by traffickers to target and select victims of trafficking. For example, members of a particular race or ethnic group may be especially vulnerable to trafficking as a result of conflict, owing to specific market demands¹⁸⁷ and/or because they may be less effectively protected by authorities in the country of origin.¹⁸⁸

In order to make a positive determination of the risks facing an individual owing to her or his "membership of a particular social group", it is first necessary to demonstrate that members of this group share innate and unchangeable characteristics (other than being persecuted) and that they are generally recognized as a group.¹⁸⁹ However, not all members of the social group need to be at risk of persecution: it is sufficient to show that the claimant's well-founded fear of persecution is based on her or his membership of that group.¹⁹⁰ Women, men and children (as well as subsets of these groups, such as unaccompanied children) may constitute particular social groups for the purposes of refugee status determination. As such, the fact of belonging to one of these groups might contribute to an individual's fear of being subject to persecution, including sexual exploitation, through trafficking.¹⁹¹ Former victims of trafficking might also be considered as constituting a social group for whom future persecution could involve reprisals, punishment and ostracism,¹⁹² provided that they either share a common characteristic other than the risk of being persecuted or are perceived as a group by society.¹⁹³

The final criterion, the "absence of effective state protection", requires that a decision be made as to whether or not the state is willing and able to protect returning victims from feared persecution. This depends on a range of factors, the most important of which being whether mechanisms are in place to prevent and combat trafficking, and whether such mechanisms are being effectively implemented. The UNHCR Trafficking Guidelines state that where a "State fails to take such reasonable steps as are within

185 See also UNHCR Guidelines on International Protection No. 9, para. 14.

186 UNHCR Trafficking Guidelines, para. 29.

187 UNHCR Trafficking Guidelines, paras. 32 and 34.

188 UNHCR Trafficking Guidelines, para. 32.

189 UNHCR Trafficking Guidelines, para. 37. See also UNHCR Guidelines on International Protection No. 2.

190 UNHCR Guidelines on International Protection No. 2, para. 17

191 UNHCR Trafficking Guidelines, para. 38.

192 *Ibid.*, para. 39.

193 *Ibid.*, para. 37.

its competence to prevent trafficking and provide effective protection and assistance to victims, the fear of persecution of the individual is likely to be well founded”.¹⁹⁴

Under EU legislation (specifically, the EU Qualification Directive), those qualifying for refugee status can be granted a residence permit valid for at least three years and with the possibility of renewal, provided that there are no compelling reasons of national security or public order that require otherwise.¹⁹⁵

Complementary/subsidiary protection

Subsidiary protection refers to legal mechanisms for protecting and according status to persons in need of international protection who do not fall within the scope of the definition of refugee as laid out in the UN Refugee Convention. If an individual does not qualify as a refugee, this does not automatically disqualify that person from being entitled to international protection on other grounds, such as humanitarian grounds, or on the basis of other serious threats to life, liberty or security of person that face the individual on return to her or his country of origin. For example, international human rights law prohibits the removal of individuals who face a real risk of suffering torture or other cruel, inhuman or degrading treatment or punishment or other forms of serious harm if returned to their country of origin, and provides that such individuals have a claim to international protection from the state in which they find themselves. The principle of *non-refoulement* in international refugee law is thus complemented by international human rights law.

In the case of OSCE participating States who are also EU member states, subsidiary protection has been regulated by the EU Qualification Directive, which provides a detailed description of conditions that apply to persons who may be in need of subsidiary protection. It defines a person eligible for subsidiary protection as a “third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to her or his country of origin, or in the case of a stateless person, to her or his country of former habitual residence, would face a real risk of suffering serious harm”, and who is “unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.¹⁹⁶ As such, under the EU Qualification Directive, permits may also be granted on the basis of subsidiary protection if the person is at risk of serious harm. However, while these permits are renewable on the same terms

¹⁹⁴ *Ibid.*, para. 23.

¹⁹⁵ EU Qualification Directive, art. 24(1). In addition, Council Directive 2005/85/EC of 1 December 2005 on Minimum Standards on Procedures in Member States for Granting and Withdrawing Refugee Status, 13 December 2005, OJ L 326/13 establishes common standards of safeguards and guarantees for accessing a fair and efficient asylum procedure. This Directive is valid until 21 July 2015, when the new recast version of 26 June 2013 (OJ L 180/60) becomes applicable. Council Directive 2003/9/EC of 27 January 2003 Laying Down Minimum Standards for the Reception of Asylum Seekers in Member States, 6 December 2003, OJ L 31/18 establishes common standards for the living conditions of asylum applicants. As of 21 July 2015, it will be replaced by a recast version of 26 June 2013 (OJ L 180/96), which will ensure that applicants have access to housing, food, health, medical and psychological care and employment.

¹⁹⁶ EU Qualification Directive, art. 2(e).

as permits granted for refugee status, they are only required to be valid for a minimum of one year.¹⁹⁷

¹⁹⁷ EU Qualification Directive, art. 24(2).

Principle 4: Special protection measures in returning child victims

International law requires that child victims of trafficking be accorded special measures of protection and assistance. The majority of OSCE participating States have not established standard procedures for determining the best interests of child victims with regard to status, residency, care arrangements or the determination of durable solutions. Practice shows that a commitment to the principle of the best interests of the child, even if enshrined in law, is not sufficient to guarantee the effective implementation of that principle. Even when such procedures are in place, they are not always followed.¹⁹⁸ In terms of the protection and assistance measures that are in place in the OSCE area, some OSCE participating States have introduced legal provisions for the appointment of a temporary legal guardian for unaccompanied child victims of trafficking.¹⁹⁹

The number of unaccompanied minors returned from or to OSCE participating States is low. Such returns are usually voluntary and undertaken via programs implemented by international organizations such as the IOM.²⁰⁰ There are reports that unaccompanied and sometimes undocumented children are being returned to country borders, without prior assessment of their best interests and outside the terms of the EU readmission agreement.²⁰¹ Recorded cases of return by IOM indicate that, prior to return, assessments are routinely conducted to determine the best interests of the child.²⁰² In the EU, according to a recent study, most member states do not forcibly return unaccompanied children but do return children as part of a family unit, and in some cases return children under voluntary return programmes.²⁰³

198 E-notes Report, p. 90; European Union: European Agency for Fundamental Rights, *Child Trafficking in the European Union: Challenges, Perspectives and Good Practices*, 7 July 2009, p. 95.

199 E-notes Report, p. 90.

200 European Migration Network (EMN), *Policies on Reception, Return and Integration arrangements for, and numbers of, Unaccompanied Minors – an EU comparative study*, May 2010, pp. 71-75.

201 UN Office of the High Commissioner for Human Rights (OHCHR), UN Special Rapporteur on the Human Rights of Migrants, *Statement on Mission to Albania*, December 2011.

202 European Migration Network, *Policies on Reception, Return and Integration*, *op. cit.*, note 200, pp. 116 and 119.

203 European Council on Refugees and Exiles, *Comparative Study on Practices in the Field of Return of Minors: a Checklist to Achieve Good Practices When Considering the Return of Children to Third Countries: A Tool for Quality Planning for Member States*, December 2011, HOME/2009/RFXX/PR/1002, p. 12.

A recent study indicates that countries often struggle with gathering information on the situation of a child, tracing family, restoring family links and assessing the family situation for the purposes of reunification.²⁰⁴

Best interests of the child²⁰⁵

The best interests of the child must be the primary consideration in all decisions and measures that concern child victims. This principle that applies to all branches of government, including those structures engaged in implementing returns and return-related processes.²⁰⁶ The CRC has underlined how the concept of a child's best interest is three-fold.²⁰⁷ First, it is a substantive right, meaning that the right of the child to have her or his best interests assessed and treated as the primary consideration when considering different interests to reach a decision on the issue at stake. According to the CRC, the relevant provision (Art. 3(1)) of the convention is directly applicable (self-executing) and can, therefore, be invoked before a court.²⁰⁸ Second, it is a legal principle and, as such, if it is open to more than one interpretation, then the one that most effectively serves the child's best interests should be chosen.²⁰⁹ Third, it is a rule of procedure and requires that the decision-making process include an evaluation of the possible impact of the decision on the child or children concerned.²¹⁰

An assessment of the child's best interests should be conducted for each individual case, and should consider the specific circumstances of each child. This includes circumstances relating to the individual characteristics of the child, such as age, sex, level of maturity, experience, belonging to a minority group and having a physical, sensory or intellectual disability, as well as the child's social and cultural context, such as the presence or absence of parents and the existence of quality alternative means available to the family, extended family or caregivers, among other factors.²¹¹ An assessment of the best interests of the child should begin as soon as child victims are identified as such, and should continue throughout the child's displacement until a durable solution is identified and implemented.²¹² Other elements that must be considered when assessing the child's best interests include the child's views, identity,

204 European Council on Refugees and Exiles, *Comparative Study on Practices in the Field of Return of Minors*, op. cit., note 203, p. 13.

205 This section is drawn from the following: CRC General Comment No. 6; CRC General Comment No. 14; UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008; UN High Commissioner for Refugees (UNHCR), *Field Handbook for the Implementation of UNHCR BID Guidelines*, November 2011; UN Children's Fund (UNICEF), *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, Section 9.2. For a more detailed examination, see Gallagher, *The International Law of Human Trafficking*, pp. 323-336; and the United Nations Office of the High Commissioner for Human Rights (OHCHR), *Commentary to the OHCHR Trafficking Principles and Guidelines*, pp. 161-174.

206 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577 (hereafter: UNCRC), art. 3(1).

207 CRC General Comment No. 14, para. 6.

208 *Ibid.*

209 *Ibid.*

210 *Ibid.*

211 CRC General Comment No. 14, para. 48.

212 UNICEF Trafficking Guidelines, p. 25.

preservation of the family environment, safety and care, health, education and the child's vulnerability.²¹³ The latter is particularly relevant in cases of child victims, in which case other potentially relevant rights must be considered (for example, those under the UN Refugee Convention). The CRC has also highlighted that the best interests of a child in a specific situation of vulnerability are not the same as those of all the children in the same vulnerable situation.²¹⁴ In the context of the return of trafficked children, two points in particular need to be highlighted. First, parents have primary decision-making responsibility on behalf of their children; however, if they fail to make the child's best interests a basic concern, for example by being complicit in the trafficking of that child, the state may intervene to protect those interests. Second, states should not put other considerations, such as those related to immigration control or public order, before the best interests of a child victim of trafficking.²¹⁵

The concept of the best interest of the child is likewise reflected in the OSCE Action Plan, as well as the plan's 2005 Addendum and 2013 Addendum.²¹⁶ The EU Trafficking Directive also stipulates that the best interests of the child be a primary consideration,²¹⁷ and requires that member states take all necessary measures to ensure that all activities to assist and support child victims in their physical and psycho-social recovery, in the short and long terms, are undertaken following an individual assessment of the special circumstances of each child victim. In addition, assessments must take due account of the child's views, needs and concerns, with a view to finding a durable solution for the child.²¹⁸ EU Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime requires that member states ensure that, where the victim is a child, the child's best interests are made a primary consideration and are assessed on an individual basis.²¹⁹ Likewise, it

213 CRC General Comment No. 14, paras. 52-79.

214 CRC General Comment No. 14, para. 75-76.

215 See CRC General Comment No. 6, para. 19-22; UN Office of the High Commissioner for Human Rights (OHCHR), *Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1 (hereafter: OHCHR Commentary to the Recommended Principles and Guidelines), pp. 165-166; CRC General comment No. 14.

216 See the 2005 Addendum of the OSCE Action Plan, preamble and Section V, 10(1), 13(1); and the 2013 Addendum to the OSCE Action Plan, Section III 1.3.

217 EU Trafficking Directive, art. 14(1)

218 In determining a durable solution, the views of the child should be taken into consideration. Forcing a trafficked child to return to her or his country of origin is unlikely to be a durable solution, since children who do not wish to return home are likely to seek out new opportunities to leave, exposing them to the risk of being re-trafficked (UNICEF, *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, pp. 80 and 86). In order for the child to have an informed view, he/she should be provided with relevant information suitable to her/his age, and should have this information and relevant procedures explained to them in a language that they can understand (see Separated Children in Europe Program, *SCEP Statement of Good Practice*, March 2010, 4th Revised Edition, p. 18). The *EU Action Plan on Unaccompanied Minors* states that a durable solution should be based on an individual assessment of the best interests of the child, and that return is only one of the options to be considered. The Plan further states that, "In all cases, the return must be conducted in a safe, child appropriate and gender-sensitive manner" (see European Union: European Commission, *Communication from the Commission to the European Parliament and the Council. Action Plan on Unaccompanied Minors* (2010 – 2014), 6 May 2010, COM(2010) 213/3 (hereafter: EU Action Plan on Unaccompanied Minors), para. 5).

219 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA, 2012 OJ L 315/57.

states that “a child-sensitive approach, taking due account of the child’s age, maturity, views, needs and concerns, shall prevail”.²²⁰

Presumption of age, young adults and affording a status

The best interest principle governs the order of priority of the protection needs in each case, starting from a prioritized identification of the victim as a child.²²¹ If the age is uncertain, but there are reasons to believe that the person is a child, the person will be presumed to be a child.²²² Pending the verification of the victim’s age, the person may not be removed from the state’s territory until the identification process has been completed.²²³

In certain circumstances, the UN promotes undertaking formal best interests determination procedures for young adults – in this case, those living together with unaccompanied children, possibly sharing the same experiences of flight.²²⁴ In such cases, the UNHCR may conduct a formal best interest determination procedure for young adults of up to 21 years of age, should this be necessary to identify their protection needs or a durable solution.²²⁵

OSCE participating States are committed to providing child victims of trafficking who are not nationals or residents of the destination country with a status that entitles them to stay, at least temporarily, in the country and be eligible to receive immediate assistance, which should include safe shelter, medical and psychological care, legal assistance, social services and education.²²⁶ In case the age of a victim is uncertain and there are reasons to believe that the victim may be a child, the Council of Europe Trafficking Convention foresees that the special protection and assistance measures for child victims provided for in the convention shall be accorded to the victim pending verification of her or his age.²²⁷ Although not explicitly stipulated in the UN Trafficking Protocol, a similar principle is outlined in the UNODC *Legislative Guides for the implementation of the United Nations Convention against Transnational Organized Crime and the Protocol thereto*.²²⁸ Similarly, EU legislation stipulates that, in cases where the age

220 *Ibid.*, art. 1.2.

221 CRC General Comment No. 6, para. 31.

222 *Ibid.*, also UNICEF Trafficking Guidelines, p. 15.

223 UNICEF Trafficking Guidelines, p. 15.

224 UN High Commissioner for Refugees (UNHCR), *UNCHR Guidelines on Determining the Best Interests of the Child*, May 2008, p. 49.

225 *Ibid.*, p. 49. The UNHCR highlights that efforts should be made to ensure that the best interest determination process is implemented before a child reaches 18 years of age. For more information on this and on best interest determination for young adults, see *Field Handbook for the Implementation of UNHCR BID Guidelines*, UNHCR, 2011, pp. 72-73.

226 2005 Addendum to the OSCE Action Plan, rec. 8.

227 Council of Europe Trafficking Convention, art. 10(3). An almost identical requirement is also found in: Council of Europe, *Council of Europe Convention on the Protection of children against sexual exploitation and sexual abuse*, 12 July 2007, CETS No. 201, art. 11(2).

228 UN Office on Drugs and Crime (UNODC), *Legislative Guides for the Implementation of the United Nations Convention Against Transnational Organized Crime and the Protocols Thereto* (New York: United Nations, 2004), part 2, para. 65.

of victim of trafficking is uncertain and there are reasons to believe that the person is a child, member states must ensure that the victim is presumed to be a child so that he or she can receive immediate access to assistance, support and protection.²²⁹

Allowing the child some form of right to remain in the country of destination is a prerequisite to assessing the child's best interests.²³⁰ UNICEF recommends that the relevant authorities in the destination country be required to provide foreign child victims with temporary documents and temporary legal authorization to remain, in order to ensure that the child is not deported before a durable solution has been found.²³¹

There is a lack of EU legislation and policy addressing the situation of children who cannot be returned and, as such, the granting of residence permits for humanitarian or other reasons is a matter of national legislation.²³²

Legal guardian and legal representation

In cases of unaccompanied or separated children, the CRC sees the prompt appointment of a guardian as a key procedural safeguard for ensuring that the best interests of the child are met.²³³ A child should not be referred to any other procedures before a guardian has been appointed, and when so referred to administrative or judicial proceedings, the child should, in addition to the guardian, be provided with a legal representative.²³⁴ The guardianship should be maintained until the child reaches majority or permanently leaves the territory and/or jurisdiction of the destination state.²³⁵

While the preferred option in the case of a separated child is that guardianship be assigned to an accompanying adult family member, in cases of trafficking, the suitability of family members needs to be carefully assessed in terms of their potential role in the child being trafficked in the first place.²³⁶

229 EU Trafficking Directive, art. 13 (2).

230 See CRC General Comment No. 6, para. 20. The UNICEF Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe states that "Promptly regularizing the child's legal status is an important step in the protection process so that a trafficked child is not repatriated inappropriately. At a minimum this means granting the child temporary legal status that allow her or him to remain in the country to which they have been trafficked and now find themselves – at least until risk and security assessments are carried out and a durable solution for the child is determined. This process is likely to take months rather than weeks." (See UN Children's Fund (UNICEF), *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, 2006, p. 75).

231 Authorities also have the responsibility to ensure that immigration services are instructed not to deport any child who is believed to be a victim of trafficking, regardless of whether the child is legally entitled to remain (see UNICEF *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p. 76).

232 EU Action Plan on Unaccompanied Minors, p. 14.

233 CRC General Comment No. 6, para. 21.

234 *Ibid.* In cases of unaccompanied or separated children, legal representation should be provided free of charge (*Ibid.*, para. 69). See also CRC General Comment No. 14, para. 97.

235 CRC General Comment No. 6, para. 33. See also UNICEF Trafficking Guidelines, pp. 16-17.

236 *Ibid.*, para. 34. See also UNICEF *Reference Guide on Protecting the Rights of Child Victims of Trafficking in Europe*, p. 52.

The OSCE commitments recommend the appointment of “a legal guardian and/or legal representative at all stages of the child’s assistance, (re)integration and/or return”.²³⁷ While not mentioned in the UN Trafficking Protocol, the Legislative Guide to the Protocol encourages states to consider appointing, as soon as the child victim is identified, a guardian to accompany the child throughout the entire process until a durable solution in the best interests of the child has been identified and implemented. If possible, the same person should be assigned to the child victim throughout the entire process.²³⁸

In addition to the above, the Council of Europe Trafficking Convention requires that, as soon as an unaccompanied child is identified as a victim, a legal guardian, organization or authority be appointed to act in the best interests of the child.²³⁹ EU legislation also requires that a guardian be appointed to an unaccompanied child “where appropriate”,²⁴⁰ as well as to other children in cases when the holders of parental responsibility are unable to ensure the child’s best interests or to represent the child.²⁴¹

Return as a durable solution

The ultimate aim in assisting a child victim is to find a durable solution that addresses all their protection needs, taking into account the child’s views.²⁴² A durable solution is a long-term arrangement for a child victim, and can include local integration, return to the country (or place) of origin or resettlement in a third country.²⁴³

The first step in finding a durable solution is to look at the possibility of family reunification.²⁴⁴ To honour the non-separation standard stipulated in the UNCRC,²⁴⁵ all efforts should be made to return the unaccompanied or separated child to her or his parents, except in cases when continued separation would actually be in the child’s best interests.²⁴⁶

To help states balance the child’s best interests with other factors, the UN Committee on the Rights of the Child has clarified that, in exceptional cases, return to the home country may be arranged also on the basis of rights-based considerations that override the best interests of the child, but only after carefully balancing the child’s best

237 2005 Addendum to the OSCE Action Plan, Rec. 6. See also ICMPD TRM Guidelines, p. 37.

238 For more additional guidance on the responsibilities of guardians, see UNODC *Legislative Guides*, *op. cit.*, note 229, para. 4.2. See also General Comment No. 6, para. 231.

239 EU Trafficking Directive 2011/36/EU, preamble para. 24 and art. 10(4)(a).

240 EU Trafficking Directive 2011/36/EU, art. 16(3).

241 EU Trafficking Directive 2011/36/EU, art. 14(2).

242 CRC General Comment No. 6, para. 79.

243 UNICEF Trafficking Guidelines, pp. 3, 28. See also UN High Commissioner for Refugees (UNHCR), *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008; and *Field Handbook for the Implementation of the UNHCR BID Guidelines*, UNHCR, 2011, pp. 50-52;

244 CRC General Comment No. 6, para. 79.

245 Art. 9 of the UNCRC.

246 CRC General Comment No. 6, paras. 81, 82.

interests with the rights-based considerations in question.²⁴⁷ When determining the best interests, the following aspects shall be considered:²⁴⁸

- The safety, security and other conditions, including socio-economic conditions, awaiting the child upon return;
- The availability of care arrangements;
- The views of the child;²⁴⁹
- The child's level of integration in the destination country, and the duration of her or his absence from the home country;
- The child's right "to preserve his or her identity, including nationality, name and family relations";²⁵⁰ and
- The "desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background".²⁵¹

If it has been determined that family unification is not an option, then the return can only take place if secure and concrete arrangements of care and custodial responsibilities upon return are established in advance.²⁵²

In the opinion of the CRC, the return may, exceptionally, go ahead if there are other rights-based considerations that override the best interests of the child,²⁵³ including situations in which the child constitutes a serious risk to the security of the state or to the society.²⁵⁴ Non-rights-based arguments, such as those relating to general migration control, cannot override considerations of the child's best interests.²⁵⁵

The 2005 Addendum to the OSCE Action Plan requires that participating States provide assistance and protection for return "when it is in the best interest of the child to return her/him to the country of origin". It also requires that states provide the child with appropriate care during the return process, and that the child's well-being upon return is monitored by the authorities in the country of origin.²⁵⁶

The Council of Europe Trafficking Convention prevents states from returning a child victim if there is an indication, following a risk and security assessment, that the

247 CRC General Comment No. 6, para. 85.

248 CRC General Comment No. 6, para. 84.

249 UNCRC, art. 12.

250 UNCRC, art. 8.

251 UNCRC, art. 20.

252 *Ibid.*, para. 84.

253 *Ibid.*, para. 85.

254 *Ibid.*

255 *Ibid.*

256 2005 Addendum to the OSCE Action Plan, para. 10.

return would not be in the best interests of the child.²⁵⁷ This implies that the returning country should also consider the possibility of resettling the child in a third country. According to the EU Group of Experts, child victims “should never be forcibly returned to their country of origin if their family has not been traced, does not agree with the return of the child or is not able to provide her/him immediate and long term care”.²⁵⁸

OSCE participating States have also committed to making every effort to find a durable solution for child victims of trafficking, consisting of either: (a) return to and reintegration in the country of origin; (b) local integration into the country in which they are identified; or (c) relocation to a third country.²⁵⁹ In line with the OSCE commitments, participating States should make the decision to return a child to her or his country of origin only after having considered all the circumstances of a child victim’s case, and having ensured that there is a family member or special institution in the country of origin to provide for the child’s safety, protection, rehabilitation and reintegration.²⁶⁰ The starting point in the search for a durable solution is to consider the possibility of family reunification.²⁶¹ The Council of Europe Trafficking Convention requires that, as soon as an unaccompanied child is identified as a victim, every effort be made to locate the family, provided that this is considered to be in the best interests of the child. In the case of unaccompanied children, EU legislation requires that states take the necessary measures towards finding a durable solution based on the best interests of the child.²⁶²

257 Council of Europe Trafficking Convention, art. 16.7

258 Report of the EU Group of Experts, “Explanatory Paper 13: Return and Social Inclusion”, pp. 198-199. This limitation is contained in the EU Return Directive, which requires that removal of an unaccompanied minor only be undertaken if the authorities of the member state are satisfied that the child will be returned to a member of her or his family, a nominated guardian or adequate reception facilities in the state of return (see EU Return Directive). The EU Group of Experts recommends that once the child reaches the age of majority, if no other type of residence permit is available, for example for work or study, permission to remain should be granted on humanitarian grounds (see Report of the EU Group of Experts, para. 96).

259 2005 Addendum to the OSCE Action Plan, rec. 9.

260 OSCE Action Plan, part V, para. 10.2.

261 UNHCR et al., *Prevent, Combat, Protect: Human Trafficking*, p. 83.

262 EU Trafficking Directive, art. 16(2). The joint UN Commentary on this directive notes that “a durable solution is one that seeks to provide a long-term and sustainable solution for the child” and should be a “concrete and secure solution” (see UNHCR et al., *Prevent, Combat, Protect: Human Trafficking*). The Commentary also notes that, when identifying a durable solution in the best interests of the child, security and risk assessments of each of the possible durable solutions should be conducted (see *ibid.*, p. 83). It also recommends that states provide a formal “best interests” determination procedure for all decisions having a long-term impact on the child’s future, including when identifying a durable solution (see *ibid.*, p. 71). This obligation is also contained in EU Directive 2004/81/EC on residence permits for victims of trafficking (art. 10(c)). In relation to unaccompanied children, Council Directive 2003/9/EC obliges states to trace family members as soon as possible. If there is a threat to the life or integrity of a child or her/his close relatives, care must be taken to ensure that the collection, processing and circulation of information is undertaken on a confidential basis, so as to avoid jeopardizing their safety (art. 19(3)). Note that Council Directive 2003/9/EC will be repealed and replaced as of 20 July 2015 by Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, 29 June 2013, L 180/96. The recast directive provides that, in assessing the best interests of the child, EU member states shall take due account of safety and security considerations, in particular where there is a risk of the minor being a victim of human trafficking (see Directive 2013/33/EU, art. 23.2(c)).

Principle 5: Durable solution without further harm

A number of OSCE participating States have not yet adopted legislation to protect victims from prosecution for crimes committed while being trafficked. This is particularly problematic, since acts that are commonly committed by victims in the course of being trafficked, including unauthorized entry or stay and prostitution, are usually criminal offences. Most EU member states have adopted provisions to ensure that trafficked persons forced to commit crimes in the course of being trafficked shall not be prosecuted, while in some states these provisions are limited to certain types of crimes, such as prostitution or immigration offences.²⁶³

Several OSCE participating States have specific legal or policy provisions regarding the detention of trafficked persons. In other countries, those identified as trafficked persons who are residing illegally are, in general, not detained so long as they participate in a voluntary return process, which may or may not be supported by the destination country.

A number of EU member states impose re-entry bans on third-country nationals who have made use of assisted voluntary return programmes. It is not clear whether this procedure also applies to trafficked persons returning under such programmes, but it does appear that, in some circumstances, exceptions to the ban may be made on the basis of humanitarian reasons, and a special visa may be issued instead.²⁶⁴ In some EU countries, a re-entry ban is imposed on the victim's departure if he or she decides to leave without participating in a formal support and/or return programme.²⁶⁵

When victims of trafficking co-operate with law enforcement agencies, this can increase the risks of retaliation against them by their traffickers. This makes it essential that special protection measures are provided that take into account the specific needs of female and male victims. In many countries, comprehensive protection from retaliation is only provided when the victim acts as a witness in criminal proceedings

²⁶³ Hancilova and Massey, *Legislation and the Situation Concerning Trafficking in Human Beings*, *op. cit.*, note 80, p. 63. European Union Agency for Fundamental Rights, *Child Trafficking in the European Union – Challenges, perspectives and good practices*, 2009, p. 69.

²⁶⁴ “Programmes and Strategies in the EU Member States”, European Migration Network, *op. cit.*, note 13, para. 6.2.4.

²⁶⁵ Information obtained from a representative of the La Strada Foundation on 21 November 2011.

and, in some cases, is restricted to proceedings for certain offences or certain categories of witness.

Doing no further harm

The issues of criminalization, restrictions on liberty of trafficked persons and discrimination on various grounds are not necessarily specific to the process of return of trafficked persons. Instead, these are generic issues concerning the need for the adequate treatment of trafficked persons by destination countries. Nevertheless, these issues must be duly addressed in the return process, since treating them separately can lead to further harm being caused to trafficked persons as a result of re-victimization.

Since the adoption of the OSCE Ministerial Council Decision of 2000,²⁶⁶ there have been notable developments in the attitudes of OSCE participating States towards the issue of criminalization.²⁶⁷ The OSCE commitments provide that victims of trafficking must not be subject to criminal proceedings solely as a direct result of having been trafficked.²⁶⁸ The OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings has explicitly expressed the view that “States have an obligation to keep victims immune from punishment where their crime was caused or directly linked to their having been trafficked, and States have a degree of discretion only regarding how to implement the requirement not to punish, according to their national legal systems.”²⁶⁹

While the UN Trafficking Protocol does not specifically address this issue, the body established to provide recommendations on the protocol’s implementation has suggested that a non-criminalization approach be adopted.²⁷⁰ In the same vein, the UN Global Plan of Action against Trafficking in Persons urges governments to ensure that identified victims are not penalized for having been trafficked,²⁷¹ a standard that is also referenced in the OHCHR Trafficking Principles.²⁷² The Council of Europe requires

266 OSCE Ministerial Council, Decision No. 1, *Enhancing the OSCE’s Efforts to Combat Trafficking in Human Beings*, Vienna, 28 November 2000, para. 9, <<http://www.osce.org/mc/14105?download=true>>.

267 Decision No. 8/07 of the OSCE Ministerial Council already discusses the possible provision to not impose penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so (see OSCE Ministerial Council, Decision No. 8/07, para. 10). The same approach was taken at the 2011 Ministerial Council Declaration (see OSCE Ministerial Council Declaration, “On Combating All Forms of Human Trafficking”, Vilnius, 7 December 2011, para. 10, <<http://www.osce.org/mc/86373?download=true>>).

268 OSCE Action Plan, part III, para. 1.8.

269 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking* (Vienna: OSCE, 2013), para. 14, <<http://www.osce.org/secretariat/101002?download=true>>.

270 Recommendations adopted by the meeting of the Open-ended Interim Working Group on Trafficking in Persons held in Vienna on 14 and 15 April 2009, annexed to UN General Assembly, *Trafficking in women and girls : report of the Secretary-General*, 4 August 2008, A/63/215, para. 11. See also UN Office of the High Commissioner for Human Rights (OHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, 20 May 2002, E/2002/68/Add.1 (hereafter: OHCHR Trafficking Principles), guideline 2, para. 5.

271 UN General Assembly, *United Nations Global Plan of Action to Combat Trafficking in Persons : resolution / adopted by the General Assembly*, 12 August 2010, A/RES/64/293, para. 30.

272 OHCHR Trafficking Principles, principle 7.

that States Parties provide for the possibility of not imposing penalties on victims for unlawful activities that the victim has been compelled to commit.²⁷³ The principle is also a recognized EU standard, and is included in both the EU Trafficking Directive²⁷⁴ and in the Brussels Declaration of 2002.²⁷⁵

In the EU, the application of re-entry bans is established by Directive 2008/115/EC on the return of third-country nationals. Re-entry bans can be considered a specific form of penalty, and may accompany return decisions under the directive, prohibiting entry into and stay on the territory of member states for a specified period of time. The above-mentioned directive specifically provides that victims of trafficking who have been granted residence permits pursuant to Directive 2004/81/EC on residence permits for victims of trafficking shall not be subject to a re-entry ban. Since no provision is made for victims who are returned without having been granted a residence permit, re-entry bans can discriminate against victims of trafficking who leave the destination country owing to their lack of legal residence. However, under the directive, member states may refrain from issuing, withdrawing or suspending entry bans in individual cases for humanitarian reasons.²⁷⁶

The OHCHR Trafficking Principles state clearly that the detention of trafficking victims is inappropriate, while also implying that it is illegal. The principles call on states to ensure that trafficked persons are not, under any circumstances, held in immigration detention or in other forms of custody.²⁷⁷ Special justification and protection measures apply in cases of the detention of children. The detaining authority must be able to demonstrate that the detention is in the child's best interests and that, in each and every case, there is no reasonable alternative available.²⁷⁸ The EU standards foresee that the use of detention for the purpose of removal should be limited and subject to the principle of proportionality with regard to the means used and objectives pursued. Detention is justified only to prepare the return or carry out the

273 Compulsion should be understood as comprising, at a minimum, any of the illicit means contained in the definition of trafficking contained in Article 4 of the Council of Europe Trafficking Convention, such as the use of threats, force, coercion or deception (see: Explanatory Report to the Council of Europe Trafficking Convention, para. 273).

274 EU Trafficking Directive, art. 8. However, the directive notes that this safeguard should not exclude prosecution or punishment for offences that a person has voluntarily committed or participated in.

275 The Brussels Declaration calls on states to recognize trafficking victims as victims of serious crimes and to ensure that they are not re-victimized, further stigmatized, criminalized, prosecuted or held in detention centres for offences that may have been committed by the victim as part of the trafficking process.

276 Directive 2004/81/EC, art. 11(3).

277 OHCHR Trafficking Principles, guidelines 2.6 and 6.1. The Commentary to this instrument concludes that the routine detention of victims or suspected victims of trafficking in public detention facilities or shelters violates principles of international law, including freedom of movement and prohibitions on the unlawful deprivation of liberty and arbitrary detention. International law also prohibits the discriminatory detention of victims, including the routine detention of women and girls in shelters. The Commentary notes that the detention of victims may only be permissible on a case-by-case basis, owing to, for example, criminal justice imperatives, public order requirements or victim safety needs, and provided that the requirements of necessity, legality and proportionality are met. As such, detention may be used as a last resort, but usually only in situations where there are credible and specific threats to a victim's safety (see OHCHR Commentary to the Recommended Principles and Guidelines, pp. 133-139.)

278 The Commentary confirms that, in addition to stipulating the circumstances under which a child can be detained, international law also imposes conditions on the conduct of such detention (see OHCHR Commentary to the Recommended Principles and Guidelines, pp. 136-139.)

removal process and in situations where the application of less coercive measures would be insufficient.²⁷⁹ Detention may not exceed a period of six months, and may only be extended by a maximum period of 12 months.²⁸⁰ Detention must be periodically reviewed, and will cease to be justified if and when it appears that removal is no longer a prospect.²⁸¹ Unaccompanied minors and families with children may only be detained as measures of last resort and for the shortest appropriate period of time.²⁸²

In some OSCE participating States, as well as in other countries, victims are often placed in shelter programmes and effectively detained there with little or no freedom of movement.²⁸³ The OSCE Action Plan, the UN Trafficking Protocol and the Council of Europe Trafficking Convention do not deal with the issue of victim detention. The OHCHR Trafficking Principles, however, state that the detention of victims is inappropriate, and that states should ensure that victims are not held in immigration detention or other forms of custody.²⁸⁴

The above principle concerns the right to freedom of movement and prohibition from arbitrary arrest or detention. The right to freedom of movement is recognized in the ICCPR,²⁸⁵ the UDHR²⁸⁶ and the ECHR,²⁸⁷ as well as in key OSCE documents.²⁸⁸ However, the ICCPR qualifies this right by applying it only to persons who are lawfully within a state's territory.²⁸⁹ Furthermore, it allows for restrictions on freedom of movement on grounds of national security, public order, public health or morals, or

279 EU Return Directive, para. 16. Article 15 stipulates that detention prior to removal may only be imposed if other less coercive measures cannot be applied, and if there is a risk of absconding or if the person avoids or hampers the return or removal process.

280 For example, owing to a lack of co-operation by the third-country national or delays in obtaining necessary documentation from third countries (see EU Return Directive, art. 15(5-6)).

281 EU Return Directive, arts. 15(3-4). As emphasized by the European Agency for Fundamental Rights, grounds for pre-removal detention must be exhaustively listed in national legislation and defined in a clear manner. The mere fact of being an irregular migrant should never be considered a sufficient ground for detention (see European Union: European Agency for Fundamental Rights, *Detention of Third Country Nationals in Return Procedures*, 30 November 2010, p. 9.)

282 EU Return Directive, art. 17(1). The European Commission Action Plan on Unaccompanied Minors states that unaccompanied minors should always be placed in appropriate accommodation and treated in a manner that is fully compatible with their interests. Where the detention of unaccompanied minors is justified, it is to be used only as a measure of last resort, for the shortest appropriate period of time and taking into account the best interests of the child as a primary consideration (see EU Action Plan on Unaccompanied Minors, p. 9.) The European Agency for Fundamental Rights has strongly recommended that states allow NGOs and those providing legal assistance to access detention facilities, in particular to ensure that unidentified trafficked persons held in immigration detention are identified, assisted and released during the reflection period (see European Union: European Agency for Fundamental Rights, *Detention of Third Country Nationals in Return Procedures*, 30 November 2010, p. 9).

283 On this issue, the following study draws on examples around the world, including from OSCE participating States: Anne Gallagher and Elaine Pearson, "Detention of trafficked persons in shelters: A legal and policy analysis", *Australian Agency for International Development*, 2008.

284 OHCHR Trafficking Principles, guidelines 1.5, 2.6 and 6.1, and principle 7.

285 ICCPR, art. 12.

286 UDHR, art. 13.1.

287 ECHR, 4th Additional Protocol, arts. 2-4; 7th Additional Protocol, art. 1.

288 Such as the 1990 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Co-operation in Europe (CSCE) (hereafter: 1990 Copenhagen Document), art. 19.

289 ICCPR, art. 12.1.

the rights and freedom of the others.²⁹⁰ In the context of victims who are placed in shelters, further issues arise over whether detention in a shelter is provided for by law, is consistent with other rights and is necessary to protect victims.²⁹¹

The prohibition on arbitrary arrest or detention is foreseen by ICCPR,²⁹² and is also provided for in other human rights treaties²⁹³ and OSCE documents.²⁹⁴ The right to liberty is not absolute, but the deprivation of liberty must be authorized by law and be non-arbitrary. At the same time, it cannot be manifestly disproportional, unjust or unpredictable, and states must have procedural guarantees in place to deal with situations of unlawful or arbitrary detention.²⁹⁵ As such, the detention of victims in shelters could violate that right, particularly if it is not provided for by law, is discriminatory, is imposed for a prolonged or unspecified period of time, is unjust, unpredictable, disproportionate or is not subject to judicial review.²⁹⁶

Trafficked persons may be discriminated against, directly or indirectly, on the basis of their membership of an ethnic group or, indeed, on the basis of any other status. There is, therefore, an ongoing need to monitor laws, policies and practices for their discriminatory effects.

A further issue is the impact of gender biases in the return process, which can contribute to the widespread reluctance to recognize or identify forms of trafficking other than the trafficking of women and girls for sexual exploitation. A failure to identify male victims of trafficking impedes their exercise of rights and access to entitlements, including those relating to return.²⁹⁷ Even when identified correctly, the special needs of male victims of trafficking may not be met by systems and processes that have been narrowly designed to meet the specific requirements of female victims.²⁹⁸ In particular, many assistance and protection services focus on victims of trafficking for the purposes of sexual exploitation, and have little or no assistance mechanisms suitable for male victims of trafficking for the purpose of labour exploitation, for example.

²⁹⁰ ICCPR, art. 12.3.

²⁹¹ Anne Gallagher and Elaine Pearson, "Detention of trafficked persons in shelters: A legal and policy analysis", *Australian Agency for International Development*, 2008, p. 14.

²⁹² ICCPR, art. 9.1.

²⁹³ UDHR, art. 3; ECHR, art. 5.1; Organization of American States (OAS), *American Convention on Human Rights*, "Pact of San Jose", Costa Rica, 22 November 1969, art. 7.1.

²⁹⁴ In particular, see the 1991 Moscow Document, art. 23.1.

²⁹⁵ Anne Gallagher and Elaine Pearson, "Detention of trafficked persons in shelters: A legal and policy analysis", *Australian Agency for International Development*, 2008, p. 14.

²⁹⁶ *Ibid.*, p. 15.

²⁹⁷ Craggs and Martens, *Rights, Residence, Rehabilitation*, *op. cit.*, note 132, p. 70.

²⁹⁸ Rebecca Surtees, "Trafficked Men as Unwilling Victims," *St Antony's International Review*, Vol. 4, No. 1, 2008, p. 16.

The prohibition of discrimination is firmly entrenched both in universal (for example, the ICCPR²⁹⁹) and in regional instruments of the Council of Europe³⁰⁰ and the EU,³⁰¹ as well as in the OSCE commitments.³⁰² In relation to trafficked persons in particular, the Council of Europe Trafficking Convention specifies that the implementation of the convention shall be without discrimination on any ground,³⁰³ and further provides that States Parties shall aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of measures for the protection and promotion of the rights of victims.³⁰⁴ The EU Trafficking Directive also recognizes the “gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes”,³⁰⁵ and calls for gender-specific assistance and support measures, where appropriate.

Importance of re-integration

A recent IOM study found that trafficked persons who had been forcibly returned to their countries of origin without being provided return and reintegration assistance were more vulnerable to re-trafficking than those persons who had received such assistance.³⁰⁶ Further reports have confirmed the link between forcible return and

299 ICCPR, arts. 2, 3 and 26.

300 See, for example, ECHR, art. 14 and protocol 12. See also Recommendations of the Committee of Ministers of the Council of Europe, including: Rec(97)20E/30 October 1997 on hate speech; Rec(97)21E/30 October 1997 on the media and the promotion of a culture of tolerance; Rec(2001)6E/18 July 2001 on the prevention of racism, xenophobia and racial intolerance in sport; Rec(2006)10E/12 July 2006 on better access to health care for Roma and Travelers in Europe; Rec(2007)2E/31 January 2007 on media pluralism and diversity of media content; and Rec(97)19E/30 October 1997 on the portrayal of violence in the electronic media). In addition, see the following Recommendations and Resolutions of the Parliamentary Assembly: Recommendation 1831(2008) on European Muslim Communities confronted with extremism; Recommendation 1805 (2007) on blasphemy, religious insults and hate speech against persons on grounds of their religion; Recommendation 1768 (2006) on the image of asylum-seekers, migrants and refugees in the media; Recommendation 1543 (2001) on racism and xenophobia in cyberspace; Recommendation 1396 (1999) on religion and democracy; Resolution 1563 (2007) on combating anti-Semitism in Europe; Resolution 1495 (2006) on combating the resurgence of Nazi ideology; and Resolution 1478 (2006) on the integration of immigrant women in Europe.

301 See, for example, Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin, 2000 OJ L 180/22; Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, 2000 OJ L 303. See also the Proposal for a Council Directive of 2 July 2008 on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation, COM/2008/0426 final.

302 See: Final Act of the Conference on Security and Co-operation in Europe, Helsinki, 1 August 1975, Questions Relating to Security in Europe 1(a); 1989 Vienna Document, art. 13.7 and 15); 1990 Copenhagen Document, arts. 5.9 and 25.4; Concluding Document of Madrid (Second Follow-up Meeting), Madrid, 6 September 1983; Istanbul Document, Istanbul, 19 November 1999, p. 23); OSCE Ministerial Council, Decision No. 4/03, “Tolerance and Non-Discrimination”, Maastricht, 2 December 2003, <<http://www.osce.org/mc/19382?download=true>>; and OSCE Ministerial Council, Decision No. 14/04, “2004 OSCE Action Plan for the Promotion of Gender Equality”, Sofia, 7 December 2004, <<http://www.osce.org/mc/23295?download=true>>.

303 Council of Europe Trafficking Convention, art. 3

304 The Explanatory Report to the Council of Europe Trafficking Convention notes that the aim of Article 17 of the Convention is to draw attention to the common understanding that women are the main target group of trafficking in human beings, and that marginalization of and discrimination against women can be a factor in increasing their vulnerability to trafficking. Accordingly, measures for the protection of victims of trafficking should recognize the different needs of men and women and, in particular, the double marginalization suffered by many women trafficking victims (see Explanatory Report to the Council of Europe Trafficking Convention, para. 210).

305 EU Trafficking Directive, preamble, para. 3.

306 Jobe, *The Causes and Consequences of Re-Trafficking*, *op. cit.*, note 39, p. 13.

vulnerability to re-trafficking.³⁰⁷ In other cases, unidentified victims deported from a destination country to their country of origin reported being contacted by agents of the traffickers soon after arrival, sometimes while still in police custody.³⁰⁸ The provision of reintegration assistance to trafficking victims returned to their countries of origin greatly depends on the existence of reintegration mechanisms in those countries. Some countries of origin contribute to the reintegration of the returned trafficking victims by providing them with limited financial assistance or specialized reintegration programmes that are run or monitored by NGOs or the IOM.

In the EU, one particular issue to have arisen concerns trafficked persons who are nationals of EU member states and who are trafficked to and identified as such in another EU member state. Information provided by practitioners³⁰⁹ and confirmed by research into the issue indicates that these cases may be going undetected.³¹⁰ The right of EU citizens to remain in other EU member states means that they are not subject to immigration regulations and that they can work legally in other EU member states. As such, when they are identified as victims trafficking, their legal status does not depend on their co-operation with the authorities. As a result, they might be denied access to the services or assistance typically made available to third-country nationals whose status is dependent on their willingness to co-operate.³¹¹ Even in cases where EU citizens assist the law enforcement authorities, their status as EU citizens might still exclude them from status-specific assistance.³¹² This situation, in turn, can prevent either the victim's integration into the destination country or re-integration into the country of origin, thereby compromising the person's security and making the person vulnerable to re-trafficking.

The OSCE has urged participating States to work together with NGOs and inter-governmental organizations to reduce the risks of re-trafficking for repatriated victims. States are called on to conduct risk assessments and to address factors that can increase a victim's vulnerability to re-trafficking. These factors include poverty, discrimination, a lack of access to education and economic opportunities, sexual abuse and domestic violence.³¹³

307 See Alan Davis, *Sex trafficking victim wins substantial damages from the Home Office*, The Guardian, 11 April 2011. In another case reported by the Italian NGO Gruppo Abele, a victim of sexual exploitation from Albania was deported without having been identified as such. The victim did not return to her family due to fear of being stigmatized and rejected for having worked in prostitution, and was subsequently re-trafficked. According to Gruppo Abele, it is the traffickers themselves who often spread the word about their victims' activities in order to make return difficult or even impossible, thereby facilitating future exploitation.

308 ODIHR Anti-Trafficking Programme, "Paper on the Return of Victims of Trafficking from Italy", 2009, p. 11.

309 Information provided by representative of the Austrian NGO LEFO at the ODIHR Expert Meeting in Warsaw, Poland, 11-12 February 2014.

310 *Evaluation of the Effectiveness of Measures for the Integration of Trafficked Persons* (Paris: IOM, 2013), p. 46

311 *Ibid.*

312 *Ibid.* In addition, in contrast to third-country nationals, an EU citizen would also not be able to access international protection measures, since EU citizenship prevents EU citizens from applying for asylum within the EU.

313 OSCE Ministerial Council Decision No. 14/06 (2006), para. 4.

In this regard, the UNTOC obliges States Parties to protect victims from retaliation or intimidation, while the UN Trafficking Protocol calls for establishing policies and programmes that serve to protect victims from re-victimization, among other functions.³¹⁴ The Council of Europe Trafficking Convention requires that states take into consideration the safety and protection needs of victims, and establish return programmes aimed at preventing re-victimization. The convention also requires states to provide victims with effective and appropriate protection from potential retaliation or intimidation, in particular (but not only) during and after the investigation and prosecution of perpetrators.³¹⁵ Where a risk of harm in another state is identified, states also have an obligation under the convention to notify and provide information on the risk to the relevant state without delay.³¹⁶ The Council of Europe Committee of Ministers has also issued recommendations on the assistance to be accorded victims of crime, which state that “victims should be protected as far as possible from secondary victimisation”.³¹⁷

The prevention of secondary victimization is an obligation clearly embodied in the EU Trafficking Directive.³¹⁸ In the directive’s preamble, it affirms the importance of conducting individual risk assessments to ensure that “victims [are] protected from retaliation, from intimidation, and from the risk of being re-trafficked.”³¹⁹ As such, EU member states must ensure that trafficking victims receive appropriate protection on the basis of an individual risk assessment, including access to witness-protection programmes and similar measures.³²⁰

A number of problems have been identified concerning reintegration-support programmes currently available to victims of trafficking. In particular, access to such

³¹⁴ UN Trafficking Protocol, art. 9.1(b).

³¹⁵ Council of Europe Trafficking Convention, art. 28. While the protection afforded under Article 28 is specifically intended for the period of investigation and prosecution, the period in which protection measures must be provided depends on the threat posed in a particular case (see Explanatory Report to the Council of Europe Trafficking Convention, para. 288). The report recommends implementing measures that take the victim’s safety fully into account, including, for example, by ensuring that the victim’s place of residence is kept secret and secure against traffickers (see Explanatory Report to the Council of Europe Trafficking Convention, para. 164).

³¹⁶ Council of Europe Trafficking Convention, art. 33(1).

³¹⁷ Council of Europe Committee of Ministers, *Recommendation Rec(2006)8 of the Committee of Ministers to member states on assistance to crime victims*, 14 June 2006, para. 3.3. Under these recommendations, states should ensure the protection of the victim’s physical and psychological integrity (art. 10.1). States are also required to take specific protection measures for victims at risk of intimidation, reprisals or repeat victimization (art. 10.2).

³¹⁸ EU Trafficking Directive, recitals 14 and 19, art. 12(4).

³¹⁹ EU Trafficking Directive, recital 19. The EU Group of Experts has noted that, in order to prevent trafficked persons from being re-victimized or re-trafficked and to protect their safety, it is essential to establish appropriate, preferably voluntary, return procedures and social assistance programmes offering long-term assistance to enable trafficked persons regain control over their lives. Such programmes should start in the country of destination and should continue after the trafficked person has returned (see Report of the EU Group of Experts, “Explanatory Paper 13: Return and social inclusion”, p. 197).

³²⁰ EU Trafficking Directive, art. 12(3). The EU Directive on the rights of victims of crime establishes the importance of protection from secondary and repeat victimization, and acknowledges the particular risks facing victims of trafficking. In addition, it reaffirms the need for specific protection measures for victims, including during criminal proceedings, lists the information support and assistance victims should receive concerning the risks of re-victimization and spells out their right to protection. The directive states that child victims shall always be presumed to have specific protection needs due to their vulnerability to secondary and repeat victimization and intimidation.

programmes is commonly cited as a major obstacle. Even when reintegration services are available, they may not be accessible to victims located outside larger towns or capital cities. In addition, many reintegration programmes are residence-based, requiring that victims stay in shelters that are often removed from their families and communities. Both of these factors discourage victims from participating in reintegration programmes.³²¹

Reintegration programmes may also not be appropriate for dealing with victims from diverse backgrounds and with different needs, including both male and female victims and victims from ethnic or religious minorities. A lack of longer-term reintegration programmes has also been noted as an obstacle to effective reintegration. Other problems include a lack of trained and dedicated staff and resources for conducting reintegration programmes.

An additional barrier to the successful implementation of reintegration programmes is a lack of co-operation between victim support agencies, as communication and information-sharing failures between and within government agencies, NGOs and international organizations hamper their effective co-operation and collaboration.³²² Moreover, reintegration assistance programmes are often developed and implemented in an *ad-hoc* way and without the benefit of agreed standards, protocols and models. This contributes to a lack of consistency and quality in the provision of services.³²³

Moreover, effective reintegration can be compromised by the stigmatization of returnees as “victims of trafficking”. Research has confirmed the importance of respecting victims’ right to privacy and ensuring that they retain control over information about them throughout the reintegration process.³²⁴ The problems of discrimination and stigmatization affect not only their ability to reintegrate socially, but can also compromise their economic integration, causing them to struggle to obtain employment or establish their own businesses.³²⁵ In some cases, the receipt of reintegration assistance may increase the risk of stigmatization and discrimination, as it can draw attention to the victim’s trafficking experience, and may generate feelings of resentment among victims regarding the provision of assistance.³²⁶ For this reason, some states

321 Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 46; Rebecca Surtees, “Re/integration of trafficked persons: how can our work be more effective”, Issues paper 1, King Baudouin Foundation and the Nexus Institute, 2008, page 20; Interviews with the NGO APRAMP (Asociación para la Prevención, Reinserción y Atención de la Mujer Prostituida) and the IOM.

322 Victim service organizations also report a lack of understanding among state agency employees about their mandate for the reintegration of victims, and a lack of willingness to take responsibility for victims of trafficking. Some officials responsible for providing victim support services do not have the necessary skills for implementing this particular mandate (see Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 29).

323 *Ibid*, p. 46.

324 See Self-Empowerment Program for Migrant Women (SEPOM), ‘Trafficked’ Identities as a Barrier to Community Reintegration: Five Stories of Women Rebuilding Lives and Resisting Categorisation, GAATW Feminist Participatory Action Research Series (Bangkok: GAATW, 2010).

325 Surtees, “Re/integration of trafficked persons”, *op. cit.*, note 322, p. 19.

326 Interview with the NGO APRAMP (Asociación para la Prevención, Reinserción y Atención de la Mujer Prostituida), the NGO Vagalume and the IOM, December 2008.

try to make reintegration programmes less conspicuous, by providing assistance to larger sections of communities, such as unemployed people, allowing assistance to be delivered to trafficked persons without identifying them as such.³²⁷

The OSCE Action Plan urges states to consider providing social and economic assistance to victims in the context of efforts to ensure their successful rehabilitation and social reintegration.³²⁸ In particular, OSCE states are encouraged to put in place special measures to protect the safety and well-being of children throughout the return process. Returning states are asked to support measures to monitor the victim's situation implemented by the authorities in receiving countries upon return.³²⁹ The importance of reintegrating child victims is highlighted, and participating States are called on to strengthen structures to promote the social inclusion and reintegration of victims, both in countries of origin and destination.³³⁰

The UN Trafficking Protocol urges states to consider implementing measures to provide for, *inter alia*, the social recovery of victims of trafficking, "including, in appropriate cases, in cooperation with non-organizations, other relevant organizations and other elements of civil society".³³¹

Similarly, the Council of Europe Trafficking Convention requires states to establish multi-agency re-integration programmes aimed at avoiding re-victimization. In the EU, the Brussels Declaration confirms that the full range of victim re-integration measures should be made available to trafficked persons irrespective of whether they are being returned to their home countries or are granted longer-term residency status in the country of destination.³³²

The EU Trafficking Directive also mentions reintegration in connection to finding durable solutions for unaccompanied child victims of trafficking.³³³ Where trafficked persons have been granted refugee or subsidiary status, the EU law provides that member states make provisions for the integration of beneficiaries of international protection, either through the creation of integration programmes or by granting them access to already existing programmes.³³⁴

In addition to the legally-binding provisions developed for EU member states, the EU Group of Experts has emphasized the importance of victims' empowerment to achieving successful reintegration. The group describes the concept of empowerment

327 Surtees, "Re/integration of trafficked persons", *op. cit.*, note 322, p. 20.

328 OSCE Action Plan, part V, para. 7(3). The 2013 Addendum to the OSCE Action Plan also highlights the issue of reintegration (part IV, paras. 2 and 2.5).

329 2005 Addendum to the OSCE Action Plan, para. 10.

330 2005 Addendum to the OSCE Action Plan, para. 11.

331 UN Trafficking Protocol, art. 6.3.

332 Brussels Declaration, p. 17.

333 EU Trafficking Directive, recital 23.

334 EU Qualification Directive, art. 34.

as “a process through which an individual can develop her/his ability to stand independently, make her/his own decisions and show control over her/his life. It implies the involvement and active participation of trafficked persons, as opposed to treating them as passive victims.”³³⁵ In this vein, the group recommends that individually tailored assistance plans be developed with the victim and revised throughout the implementation process to ensure the plan’s ongoing relevance to the victim’s needs.³³⁶

The ultimate aim of the re-integration process following a trafficked person’s return should be her/his full access to fundamental rights and to the opportunities and resources necessary to participate in economic and social life, including being able to secure a standard of living that is considered acceptable in the society in which they live.³³⁷

In contrast to cases involving children, there is no standard requiring states to try to find durable solutions for adult victims of trafficking. While the return of an adult victim of trafficking should, ideally, also represent a durable solution, more often than not it merely involves the removal of a person with no legal grounds to remain on the territory of the destination country. This often means that, once returned, adult victims end up being re-trafficked.

When seeking durable solutions, states can draw on good practices in the sphere of internally displaced persons.³³⁸ Of particular relevance are the criteria used to determine when a durable solution has been achieved, namely: safety and security; an adequate standard of living; access to livelihoods; restoration of housing/land/property; access to documentation; family reunification; participation in public affairs; and access to effective remedies and justice.³³⁹ An additional criterion that encompasses all of the above is the principle of non-discrimination – that persons are not discriminated against either as a result of their displacement or on any other grounds.³⁴⁰

335 The Group of Experts further notes that the active participation of the victim in the planning and implementation of her or his reintegration is critical to ensuring that the programme is both victim-centred and viable (see Report of the EU Group of Experts, “Explanatory Paper 13: Return and social inclusion”, p. 197).

336 ICMPD TRM Guidelines, p. 69. Such a plan may include accommodation, social and psychological counselling, legal counselling and assistance, medical assistance, social and health services, language training, educational activities, vocational training, employment counselling, job placement assistance, income-generating programmes, family/community-reintegration measures, family mediation, recreational activities, financial assistance and case monitoring and evaluation.

337 ICMPD TRM Guidelines, p. 68.

338 See, for example, “Promotion and protection of all human rights, civil, political, economic, social and cultural rights, including the right to development”, *Report of the Representative of the Secretary-General on the human rights of internally displaced persons, Walter Kalin. Addendum: Framework on Durable Solutions for Internally Displaced Persons*, 29 December 2009, A/HRC/13/21/Add.4.

339 *Ibid.*, para. 53.

340 *Ibid.*, para. 54. See also paras. 56, 62 and 71-72 on measuring key criteria for ensuring a durable solution.

Principle 6:

Access to effective remedies

Victims of trafficking face significant challenges in accessing justice. Many are not identified correctly, meaning that their right to remedies cannot be acknowledged or respected. Similarly, the routine detention and deportation of trafficked persons obstruct the right to a remedy, as does the failure to provide them with legal assistance, information and support. Other factors that impede access to remedies include: inadequate legal frameworks; low prosecution rates for trafficking-related exploitation (particularly where offender identification and conviction is a prerequisite for certain remedies); a lack of protection provisions for victims and victim-witnesses; the absence of effective international legal co-operation; and low success rates in tracing and seizing the profits of trafficking-related crimes.³⁴¹

There are many obstacles that impede victims' abilities to claim compensation, both in destination countries and on their return.³⁴² While many states provide some form of compensation to trafficked persons, few in the OSCE area make specific provisions for victims to be informed of the availability of compensation and to be provided with a right to remain in order to attempt to claim compensation. In some destination countries, the availability of compensation under national compensation schemes is limited to particular types of crimes, which may not cover the type of exploitation experienced in a particular trafficking case. In other countries, compensation is limited to cases where the victim has suffered some form of visible physical injury.³⁴³ Moreover, the national compensation scheme may only be available to that country's nationals, to EU citizens and/or to third-country nationals legally entitled to reside in the destination country.³⁴⁴

341 In addition, see Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, Joy Ngozi Ezeilo, 13 April 2011, A/HRC/17/35.

342 Hancilova and Massey, *Legislation and the Situation Concerning Trafficking in Human Beings*, op. cit., note 80; "Programmes and Strategies in the EU Member States", European Migration Network, op. cit., note 13, p. 83.

343 See, for example, Council of Europe: Group of Experts on Action against Trafficking in Human Beings, *Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Slovak Republic*, 16 December 2013, GRETA(2011)9, para. 119.

344 See Council of Europe: Group of Experts on Action against Trafficking in Human Beings, *Report Concerning the Implementation of the Council of Europe Convention against Trafficking in Human Beings by Austria*, 15 September 2011, GRETA(2011)10, para. 120.

Limitations on the right to remain in the destination country for victims of trafficking represent a major practical obstacle to accessing remedies.³⁴⁵ In some countries, victims of trafficking have access to a visa regime that enables them to stay for the duration of a civil claim. In other countries, victims are informed of their right to compensation and have access to free legal aid, but no specific provisions are in place to ensure that compensation claims are finalized prior to return and that the period of time required for claiming compensation is longer than the period of temporary residence provided to trafficked persons.

In particular, cases have been recorded in the OSCE region where victims had initiated claims for compensation but were returned prior to the finalization of the claim. In such cases, the removal of claimants has made it difficult for lawyers to communicate with their clients and to obtain the necessary evidence of physical and/or psychological damage. In cases where the victim is returned before a claim for compensation can be made, lawyers may not be able to represent the victim due to legal obligations that they physically see the client and confirm her or his identity.³⁴⁶ Such problems are particularly likely to arise in cases where the victim decides to make a claim for compensation but where a parallel criminal case has not been processed or concluded.³⁴⁷ In such situations, the civil case is likely to be complex and lengthy, and the victim may be without legal entitlement to remain for the duration of that proceeding.

The right to effective remedies is a fundamental right recognized in the ICCPR, the ECHR and OSCE commitments.³⁴⁸ As such, the UNTOC and the UN Trafficking Protocol require states to establish procedures to provide access to compensation for trafficked persons. The UN Trafficking Protocol obliges States Parties to ensure that their domestic legal systems contain measures that offer victims the possibility of obtaining compensation for damage suffered.³⁴⁹ The Council of Europe Trafficking Convention requires that victims be provided with appropriate information, including procedures they can use to obtain compensation and access to legal assistance.³⁵⁰ The convention also reaffirms that victims have a right to monetary compensation from convicted

345 OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw: ODIHR: 2008), p. 36.

346 OSCE/ODIHR, *Compensation for Trafficked and Exploited Persons in the OSCE Region* (Warsaw: ODIHR, 2008), p. 113.

347 *Ibid.*, p. 26.

348 ICCPR, art. 2; ECHR, art. 13; EU Charter of Fundamental Rights, art. 47; 1989 Vienna Document, art. 13.9; 1990 Copenhagen Document, p. 11; 1991 Moscow Document; CSCE, *Charter of Paris For A New Europe*, Paris, 1990, p. 4; OSCE Ministerial Council, Decision No. 12/05, "Upholding Human Rights and the Rule of Law in Criminal Justice Systems", Ljubljana, 6 December 2005, <<http://www.osce.org/mc/17347?download=true>>; and OSCE Ministerial Council, Decision No. 7/08, "Further Strengthening the Rule of Law in the OSCE Area", Helsinki, 5 December 2008, <<http://www.osce.org/mc/35494?download=true>>.

349 UN Trafficking Protocol, art. 6(6). In addition, the UN Special Rapporteur on Trafficking in Persons has noted that victims of human rights violations must be provided with adequate reparations for the harms suffered, including guarantees of non-repetition, and that victims should be entitled to remain in the country where the remedy is sought for the duration of any criminal, civil or administrative proceedings (Human Rights Council, Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, 13 April 2011, A/HRC/17/35, para. 51).

350 Council of Europe Trafficking Convention, art. 15.

traffickers in respect of both material injury and suffering, and requires States Parties to take steps to guarantee compensation of victims. Similarly, while the EU Trafficking Directive does mention respect for fundamental rights, including the right to an effective remedy, it falls short of referencing other types of remedies besides compensation.³⁵¹ Importantly, while the focus in the OSCE area in terms of remedies has mainly been on the right to claim compensation,³⁵² the 2013 Addendum to the OSCE Action Plan broadens the concept of remedies to include procedural remedies, such as the provision of reflection delay and residence permits, as well as ensuring the safe return and reintegration of victims.³⁵³

Moreover, trafficked persons should be afforded the right to adequate and appropriate remedies as victims of human rights violations, which goes beyond the right to apply for and obtain compensation.³⁵⁴

Under the Draft Basic Principles on the right to an effective remedy for trafficked persons, developed under the auspices of the UN Special Rapporteur on trafficking in persons, the right to an effective remedy encompasses a substantive right to reparations, as well as procedural rights necessary to access these reparations.³⁵⁵ Reparations may include restitution, compensation, recovery, satisfaction and guarantees of non-repetition.³⁵⁶ In order to successfully obtain these reparations, trafficked persons should be provided with access to a competent and independent authority;

351 EU Trafficking Directive, recital 33. In relation to victims of crime more generally, Council Framework Decision 2001/220/JHA on the standing of victims in criminal proceedings requires member states to ensure that, in the course of criminal proceedings, victims of criminal acts are entitled to obtain a decision within a reasonable period of time concerning compensation by the offender, except where national law provides for compensation to be awarded in another manner (see Council Framework Decision 2001/220/JHA, art. 9(1)). Directive 2012/29/EU of 25 October 2012, establishing minimum standards on the rights, support and protection of victims of crime, will replace the Framework Decision on 16 November 2015, and obliges member states to:

- “ensure that, in the course of criminal proceedings, victims are entitled to obtain a decision on compensation by the offender, within a reasonable time, except where national law provides for such a decision to be made in other legal proceedings”; and
- “promote measures to encourage offenders to provide adequate compensation to victims” (Directive 2012/29/EU, art. 16).

352 As reflected in Ministerial Council Decisions No.14/06 (para. 5), No. 8/07 (para. 7) and No. 5/08 (para. 19). The OSCE Action Plan encourages participating States to consider establishing a compensation fund for victims of trafficking and using the confiscated assets of trafficking and related offences to help finance such a fund (see OSCE Action Plan, part III, para. 1.5).

353 2013 Addendum to the OSCE Action Plan, part IV, para. 2.

354 See UN Global Plan of Action to Combat Trafficking in Persons, para. 3. See also presentations made at the *Global Consultation on the right to an effective remedy for trafficked persons*, held on 7 November 2013, convened by the UN Special Rapporteur on Trafficking in Persons. The UN Basic Principles and Guidelines on the Right to a Remedy and Reparation confirm the general obligation on states to ensure equal and effective access to justice and the availability of remedies. They also confirm that the right to a remedy for gross human rights violations, a term that could apply to the most serious cases of trafficking, includes the right of access to justice, the right to reparation for harm suffered and the right of access to information concerning violations and reparation mechanisms. Access to justice includes measures to ensure that victims can actually exercise their rights to a remedy, as well as the protection of victims’ privacy and safety in the course of any legal proceedings (see UN General Assembly Resolution on Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, A/RES/60/147).

355 Human Rights Council, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, 13 April 2011, A/HRC/17/35, annex I, para. 1.3.

356 *Ibid.*, para. 1.4.

information concerning their rights (including the reparations available and the existence of and modalities for accessing reparation mechanisms); legal, medical, psychological, social, administrative and other types of assistance necessary to seek remedies; and should be granted a reflection and recovery period, followed by residence status while they seek remedies.³⁵⁷

In the context of return, the procedural element – the provision of a reflection period, accompanied by adequate assistance as required – is the first crucial step towards allowing trafficked persons being returned to effectively access remedies. It must also be noted that the existence of adequate identification and referral mechanisms that allow for the identification of trafficked persons is a prerequisite to providing a reflection period.³⁵⁸ Without the provision of a reflection period and complete information concerning the victim's rights, including as regards access to remedies, it is probable that the victim's ability to access those remedies will be ineffective, if not impossible. For that reason, the granting of a reflection period has been discussed in the context of due process issues (see Principle 2) concerning the return of trafficked persons. It is also a precondition that trafficked persons are able to make an informed decision as to the reparations to be sought before being returned after the end of the reflection period or at later date. If such information is not provided prior to return, then victims may face limited options to gain particular reparations and, thus, will not be provided effective access to remedies.

The return of a trafficked person to the country of origin can also be considered a remedy if it leads to restitution and provides guarantees of non-repetition.³⁵⁹ It is, therefore, imperative that the return be safe (see Principle 1). In practice, this means that trafficked persons cannot simply be turned away at the border, but that a proper identification process must first be completed, possibly followed by a reflection period and, most importantly, by a pre-return risk assessment (see *Principle 2 – Due Process* for more information).³⁶⁰ Importantly, the Draft Basic Principles also foresee that restitution would need to be in the best interests of the trafficked person.³⁶¹ Return can only be considered an effective remedy when it is safe and, ideally, a step towards achieving a durable solution for the individual being returned.

Two additional aspects relating to remedies are relevant here. The first concerns the possibility to claim compensation – even following return – including for civil damages

357 *Ibid.*, para. 1.5.

358 On challenges relating to the identification of victims during the provision of international protection and forced return, see European Migration Network (EMN), *Identification of victims of trafficking in human beings in international protection and forced return procedures – Summary Report*, March 2014.

359 Draft basic principles on the right to an effective remedy for trafficked persons, para. 7.

360 See UNHCR et al., *Prevent, Combat, Protect: Human Trafficking*, pp. 59-60.

361 Draft basic principles on the right to an effective remedy for trafficked persons, paras 7(a),(b). The best interest principle is mandatory only when identifying a durable solution for child victims. However, together with the recommendation that states effectively address the root causes of trafficking in order to ensure that trafficked persons are not returned to conditions that place them at risk of being re-trafficked, the best interests principle is an important addition (see *ibid.*, para. 7(c)).

for trafficking-related offences, awards obtained through criminal courts from persons convicted of trafficking-related offences and compensation from the state for injuries and damages.³⁶²

The second concerns the status of trafficked persons, which can often determine whether they are able to access remedies, in particular whether they are provided financial compensation. When trafficked persons do not co-operate with the authorities, it is not uncommon that an investigation into their case will not be initiated. In legal regimes where the victim's status is strictly tied to the existence of criminal investigations and proceedings, this means that trafficked persons will not be afforded the status of victims of trafficking, subsequently limiting their ability or making it impossible for them to access remedies. Proceeding from the principle that access to assistance must under no circumstances be made conditional on the trafficked persons' co-operation with authorities,³⁶³ access to remedies may not, therefore, be restricted or denied in cases where no criminal investigation takes place.

On a similar note, trafficked persons often do not receive compensation in cases where the prosecution has not been successful, or where the convicted perpetrators have insufficient funds to adequately compensate the victim. This situation runs contrary to the Draft Basic Principles, which clearly state that trafficked persons have the right to obtain compensation, regardless of whether their perpetrators have been convicted.³⁶⁴

³⁶² *Ibid.*, para. 9.

³⁶³ *Ibid.*, para. 8(b).

³⁶⁴ *Ibid.*, para. 9.

Principle 7:

Co-operation and monitoring

Co-operation, whether domestic or international, is an integral element of all the principles included in this document. It is particularly important in ensuring the safe return and access to effective remedies of trafficked persons, as well as in seeking durable solutions that do not expose victims to further harm. However, practice has shown that co-operation between those involved in the return of trafficked persons is often ad hoc and, thus, heavily dependent on organizational or personal contacts.³⁶⁵ In particular, the absence of agreed standards, protocols and models for both domestic and international co-operation is a significant weakness. A lack of communication about the available services prevents authorities in destination countries from fulfilling their obligations to ensure the safe return and access to adequate remedies of trafficked persons, as well as to endeavour to identify durable solutions.³⁶⁶

In the context of return, co-operation between state authorities in origin and destination countries appears to be largely limited to consular assistance in identifying and providing travel documents to trafficked persons. Such co-operation is typically strengthened through the implementation of formal assisted voluntary return programmes.³⁶⁷ The assisted voluntary return of migrants is frequently undertaken by implementing partners – usually the IOM, another international organization or an NGO.³⁶⁸ A lack of correct and adequate documentation and weak or non-existent co-operation between countries of origin and destination in resolving documentation problems represent major barriers for trafficked persons in exercising their right to leave and return. Failures in bilateral co-operation often lead to a situation in which documentation permitting return is delayed or not issued at all. It has been reported that, on occasion, some countries of origin have refused to admit their own citizens owing to uncertainty concerning the person's identity.³⁶⁹

365 Cuzuioc-Weiss and Lacroix, *Study on Post-Trafficking*, p. 122.

366 Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 44.

367 “Programmes and Strategies in the EU Member States”, European Migration Network, *op. cit.*, note 13, p. 78.

368 *Ibid.*, p. 7. In some countries, agreements or memoranda of understanding are signed between the government and the IOM that outline the respective roles and responsibilities of government agencies and the IOM in the implementation of the return policy (*ibid.* p. 53). In addition, the IOM is also responsible for arranging reception and reintegration assistance upon arrival in the country of origin, and for making specific arrangements, such as transit and reception assistance or escorts, to ensure a safe and dignified return (Information from IOM representative, 8 December 2011). One study has indicated that, where return has been conducted by the IOM, other non-governmental agencies and international organizations are frequently involved in providing specific aspects of assistance (Jobe, *The Causes and Consequences of Re-Trafficking*, *op. cit.*, note 39, p. 50).

369 “Programmes and Strategies in the EU Member States”, European Migration Network, *op. cit.*, note 13, p. 58.

Another issue that has been identified is that of limited co-operation between state authorities and NGOs within the country of origin.³⁷⁰ In a number of countries, national referral mechanisms have been established to formalize co-operation among government agencies and non-governmental organizations.³⁷¹ However, it should be noted that the referral models in different countries vary widely, as do the scope and extent of their implementation.³⁷² In most countries with national referral mechanisms, civil society plays a key role in the national co-ordination of anti-trafficking responses, including return.³⁷³ In some countries, formal co-operation agreements have been concluded between NGOs and state authorities. These co-operation agreements sometimes specify the roles and responsibilities of police and counselling centres for trafficked persons, including on referral, information sharing and the conduct of pre-return risk assessments.³⁷⁴

Problems with co-operation can prevent victims from accessing the full range of assistance and services available, and can limit them to the assistance provided by particular agencies and their partners.³⁷⁵ Such problems may also compromise victim safety, in particular if a lack of co-operation affects pre-return risk assessments or the provision of protection. For example, in some countries it has been reported that difficulties in co-operation between law enforcement and those providing counselling to returning victims have led to inadequate risk assessments.³⁷⁶

In addition to national referral mechanisms, some states have also formalized co-operation between state agencies and civil society, through legislation or by-laws, or through policy documents or protocols. The existence of national anti-trafficking programmes specifying the roles of key actors has contributed to increased co-ordination in trafficking responses.³⁷⁷

Concerns have been raised about the existence, quality and duration of monitoring carried out following victims' return and during their period of reintegration. Few countries of destination, or indeed of origin, maintain contact with victims after return.³⁷⁸ Even countries of origin that specifically provide for reintegration assistance report a lack of effective post-return monitoring in most cases.

370 UNODC, *Human Trafficking in the Baltic Sea Region*, *op. cit.*, note 37, p. 39.

371 OSCE/ODIHR, *National Referral Mechanisms – Joining Efforts to Protect the Rights of Trafficked Persons: A Practical Handbook* (Warsaw: ODIHR, 2004).

372 Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 47.

373 OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, *Efforts to Combat Trafficking in Human Beings in the OSCE Area: Co-ordination and Reporting Mechanisms* (Vienna: OSCE, 2008), p. 11.

374 See, for example *Kooperationskonzept für die Zusammenarbeit von Fachberatungsstellen und Polizei für den Schutz von Opferzeugen/innen von Menschenhandel zum Zweck der sexuellen Ausbeutung*, Bundesministerium für Familie, Senioren, Frauen und Jugend, 2007 (in German only).

375 Surtees, *Listening to Victims*, *op. cit.*, note 77, p. 44.

376 UNODC, *Human Trafficking in the Baltic Sea Region*, *op. cit.*, note 37, p. 43.

377 Hancilova and Massey, *Legislation and the Situation Concerning Trafficking in Human Beings*, *op. cit.*, note 80, p. 93.

378 European Migration Network (EMN), *Programmes and Strategies*, p. 79.

International legal standards regulate co-operation between states, as well as between the relevant state and non-state counterparts within a state. However, the practice of monitoring remains vaguely regulated. While the UNTOC and the UN Trafficking Protocol both focus mainly on inter-state co-operation among law enforcement agencies,³⁷⁹ the UN Trafficking Protocol also recommends co-operating with NGOs and civil society in providing assistance to victims.³⁸⁰

The Council of Europe imposes a range of obligations on countries of origin and destination to co-operate and collaborate with one another at each stage of the return process. As recognized by the Council of Europe Trafficking Convention, co-operation is particularly important when attempting to confirm the identities of and provide identity documents and travel authorizations to trafficked persons.³⁸¹ It requires countries of origin to confirm a victim's nationality or residency status, and to issue the necessary travel documents or other authorization to allow the victim to travel and re-enter the country of origin.³⁸² It further requires States Parties to adopt legislative or other measures to establish return programmes that involve the relevant national or international institutions and non-governmental organizations,³⁸³ and encourages states to establish strategic partnerships with NGOs and civil society towards achieving the aims of the convention.³⁸⁴

The OSCE affirms the critical importance of effective co-operation among relevant actors in countries of origin, transit and destination in the return and reintegration of victims of trafficking. It recommends that states establish national referral mechanisms to facilitate co-ordination and strategic partnership between states, civil society and other actors working to protect and promote the human rights of trafficked persons.³⁸⁵ The OSCE draws particular attention to the need for enhanced co-operation between police and NGOs in identifying, informing and protecting victims, as well as for co-operation with and between embassies and consulates for the speedy verification of personal data.³⁸⁶ In this regard, national referral mechanisms should serve to strengthen co-operative arrangements at the national, regional and international level among law enforcement personnel, labour inspectorates, social protection units, medical institutions, immigration and border service officials, civil society organizations, victim support services and the business community.³⁸⁷ In addition, participating States should, through national referral mechanisms or other relevant

379 UNTOC, art. 27; UN Trafficking Protocol, arts. 9(4), 11(6). Article 9(5) of the UN Trafficking Protocol also discusses bi- and multi-lateral co-operation to reduce demand.

380 UN Trafficking Protocol, art. 6(3), also repeated in arts. 9(3) and 10(2).

381 Council of Europe Trafficking Convention, art. 16(4).

382 Council of Europe Trafficking Convention, art. 16.

383 Council of Europe Trafficking Convention, art. 16(5). See also articles 32-34 of the Convention.

384 Council of Europe Trafficking Convention, art. 35.

385 OSCE Ministerial Council, "Declaration On Trafficking in Human Beings", Porto, 7 December 2002 (MC(10). JOUR/2), < <http://www.osce.org/odihr/23862?download=true>>; OSCE Action Plan, part V, Para. 3(1). For more information on national referral mechanisms, see OSCE/ODIHR, National Referral Mechanisms.

386 OSCE Action Plan, part V, para. 5.2.

387 OSCE Ministerial Council Decision No. 14/06, para. 2.

structures, enable NGOs, trade unions and social welfare services to initiate referrals for the assistance of victims of all forms of trafficking and to co-operate with the relevant authorities.³⁸⁸

The OSCE recommends that states enhance co-operation among the responsible officials and, in particular, among embassy and consulate personnel to facilitate the speedy verification of personal data and the avoidance of undue or unreasonable delay.³⁸⁹ In addition, participating States should strengthen international co-operation among national referral mechanisms or other relevant national structures, and should continue to work towards an enhanced comprehensive and co-ordinated approach to preventing and combating trafficking, and to protecting and assisting victims in cross-border cases.³⁹⁰

The co-operation of state bodies with NGOs, as well as with international organizations, in assisting trafficking victims is also foreseen by the a programme developed by the Commonwealth of Independent States (CIS) to strengthen co-operation in combating trafficking in human beings.³⁹¹

Similarly, the EU Trafficking Directive requires the co-operation of support organizations with civil society organizations in establishing national rapporteurs or equivalent mechanisms.³⁹² The EU Plan on Best Practices also recommends the consolidation of co-operation between public authorities and civil society organizations, for example

388 2013 Addendum to the OSCE Action Plan, part IV, para. 1.2. It also recommends increasing multi-disciplinary partnerships in the framework of national referral mechanisms, with the aim of facilitating dialogue and co-operation between public authorities, NGOs, trade unions and other relevant institutions engaged in anti-discrimination programmes and the protection of the rights of women, children, members of ethnic, national and religious minorities and migrants, as well as to contribute to the identification of trafficked persons and advance the protection of their rights (see *ibid.*, part V, para. 2).

389 OSCE Action Plan, part V, para. 5.2.

390 Importantly, the OSCE is also attempting to strengthen international co-operation between relevant agencies in countries of origin, transit and destination in the OSCE's Asian and Mediterranean Partners for Co-operation, in particular by establishing joint investigation teams (see 2013 Addendum to the OSCE Action Plan, part V 3, para. 5). OSCE Asian Partners for Co-operation include Japan, South Korea, Thailand and Afghanistan, while as of March 2014, OSCE Mediterranean Partners for Co-operation are Algeria, Egypt, Israel, Jordan, Morocco and Tunisia.

391 See *CIS Programme on Cooperation of CIS Members in combating trafficking in Human Beings 2014-2018*, 25 October 2013, para. 4.4.

392 EU Trafficking Directive, arts. 11(4) and 19. Recital 6 of the Directive also suggests working closely with civil society organizations to monitor and evaluate the impact of anti-trafficking measures. The Brussels Declaration likewise recommends developing exchanges between NGOs, social workers and others concerned with victim assistance from countries of origin, transit and destination (see Brussels Declaration, p. 14).

by setting up agreed rules to promote mutual understanding and trust.³⁹³ The EU Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings highlights the importance of networking and exchanges across EU borders among organizations involved in the provision of assistance to victims.³⁹⁴ In cases where the victim to be returned is an unaccompanied minor, the Council Resolution 97/C 221/03 on unaccompanied minors who are nationals of third countries states that the authorities should co-operate with international organizations, such as UNICEF, as well as relevant NGOs, in order to ascertain the availability of reception and care facilities in the country of origin.

Some countries have developed bilateral agreements specifically concerning the return of unaccompanied minors. However, these agreements have been found to be ineffective if not followed up with proper assistance and integration measures in the countries of origin.

There are no straightforward international legal standards in the field of combating trafficking concerning the monitoring of individual cases of trafficked persons undergoing re-integration.³⁹⁵

The situation involving child victims provides an exception to this rule. Drawing on the right of the child to receive a periodic review of the treatment and circumstances of her/his placement, as provided for in the UNCRC,³⁹⁶ the UNICEF Trafficking Guidelines foresee monitoring of the situation of an individual child following her or his family reunification and/or placement in an appropriate care center.³⁹⁷ In case of a child's reunification with the family, follow-up visits to the family should be made by the competent authority for an extended period, until the child reaches the age of majority, to make sure he/she is properly treated and re-integrated and that there are no risks of re-trafficking.³⁹⁸

393 European Union, *EU Plan on Best Practices, Standards and Procedures for Combating and Preventing Trafficking in Human Beings* (2005/C 311/01), 9 December 2005, 2005/C 311/01, para. 5(i). The EU Group of Experts recommends strengthening co-operation between states and with and between NGOs towards developing safe return programmes that ensure victims' access to immediate and long-term assistance (see Report of the EU Group of Experts, rec. 110). In addition, the ICMPD recommends the development of "transnational referral mechanisms" as part of a state's national referral mechanism. In the context of return, these mechanisms would outline the roles and activities of governmental and non-governmental agencies in conducting return and, in particular, would specify the information that agencies are required to provide to one another (see ICMPD TRM Guidelines, pp. 24-25). The EU Group of Experts also recommends that co-operation agreements be made between countries of origin and destination that include the appointment of contact persons at embassies and consulates to deal with trafficked persons and their particular needs (see Report of the EU Group of Experts, p. 198).

394 Council of the European Union, *Action-Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings*, GS/ACA/ld 1, 11450/5/09 REV 5, p. 23.

395 The *CIS Programme on Cooperation of CIS Members in combating trafficking in Human Beings 2014-2018* foresees the regular exchange of experiences among competent state bodies of CIS member states.

396 UNCRC, art. 25.

397 UNICEF Trafficking Guidelines, para. 9.4.

398 *Ibid.*

In the OSCE region, monitoring is most likely to take place where the return is conducted through the IOM. The IOM Handbook on Direct Assistance for Victims of Trafficking recommends that monitoring reports be produced once a month during the first three months of reintegration, followed by at least two additional three-monthly reports.³⁹⁹ Where the IOM has monitored the reintegration of victims following return, the monitoring period has ranged from one month to three years, with the majority of cases being monitored for less than a year.⁴⁰⁰ Guidance on the issue can also be found in the Standard Operating Procedures for Transnational Referral Mechanisms, developed by the ICMPD, which recommend that case monitoring and evaluation processes be included in the long-term assistance, and that social inclusion be provided to trafficked persons.⁴⁰¹

A further level of monitoring, concerning policy and programmatic oversight, should also be mentioned. The Council of Europe foresees that states “shall consider” appointing national rapporteurs or other mechanisms for monitoring the anti-trafficking activities of state institutions and the implementation of national legislation.⁴⁰² While this level of monitoring does not refer to monitoring developments in an individual case of returned trafficked persons, the effective implementation of such monitoring serves also to benefit that particular group of trafficked persons.

A similar recommendation has also been set out in the OSCE Action Plan.⁴⁰³ In addition, the OHCHR Trafficking Principles recommend establishing mechanisms to monitor the human rights impact of anti-trafficking laws, policies, programmes and interventions, and encourage NGOs working with trafficked persons to participate in the monitoring and evaluation of the human rights impact of anti-trafficking measures.⁴⁰⁴

399 The International Organization for Migration (IOM), *Handbook on Direct Assistance for Victims of Trafficking* (Geneva: IOM, 2007), pp. 103-104.

400 Jobe, *The Causes and Consequences of Re-Trafficking*, *op. cit.*, note 39, pp. 49-50.

401 ICMPD TRM Guidelines, pp. 69, 76 and 115.

402 Council of Europe Trafficking Convention, art. 29(4).

403 OSCE Action Plan, part VI, para. 1.

404 OHCHR Trafficking Principles, guidelines 1.7 and 3. See also OHCHR Commentary to the Recommended Principles and Guidelines, pp. 93.