



## **Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings<sup>\*</sup>**

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### **I. Introduction**

#### **a. Trafficking in human beings: the phenomenon and its context**

1. Trafficking in human beings is a major problem in Europe today. Annually, thousands of people, largely women and children, fall victim to trafficking for sexual exploitation or other purposes, whether in their own countries or abroad. All indicators point to an increase in victim numbers. Action to combat trafficking in human beings is receiving worldwide attention because trafficking threatens the human rights and the fundamental values of democratic societies.

2. Action to combat this persistent assault on humanity is one of a number of fronts on which the Council of Europe is battling on behalf of human rights and human dignity.

3. Trafficking in human beings, with the entrapment of its victims, is the modern form of the old worldwide slave trade. It treats human beings as a commodity to be bought and sold, and to be put to forced labour, usually in the sex industry but also, for example, in the agricultural sector, declared or undeclared sweatshops, for a pittance or nothing at all. Most identified victims of trafficking are women but men also are sometimes victims of trafficking in human beings. Furthermore, many of the victims are young, sometimes children. All are desperate to make a meagre living, only to have their lives ruined by exploitation and rapacity.

4. To be effective, a strategy for combating trafficking in human beings must adopt a multidisciplinary approach incorporating prevention, protection of human rights of victims and prosecution of traffickers, while at the same time seeking to harmonise relevant national laws and ensure that these laws are applied uniformly and effectively.

5. A worldwide phenomenon, trafficking in human beings can be national or transnational. Often linked to organised crime, for which it now represents one of the most lucrative activities, trafficking has to be fought in Europe just as vigorously as drug and money laundering. Indeed, according to certain estimations, trafficking in human beings is the third largest illicit money-making venture in the world after trafficking of weapons and drugs.

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(\*) The Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community entered into force on 1 December 2009. As a consequence, as from that date, any reference to the European Community shall be read as the European Union.

6. In this context the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime* (hereafter “the Palermo Protocol”) laid the foundations for international action on trafficking. The Council of Europe Convention, while taking the Palermo Protocol as a starting point and taking into account other international legal instruments, whether universal or regional, relevant to combating trafficking in human beings, seeks to strengthen the protection afforded by those instruments and to raise the standards which they lay down.

7. The Palermo Protocol contains the first agreed, internationally binding definition (taken over into the Council of Europe convention) of the term “trafficking in persons” (see, below, the comments on Article 4 of the Convention). It is important to stress at this point that trafficking in human beings is to be distinguished from smuggling of migrants. The latter is the subject of a separate protocol to the *United Nations Convention against Transnational Organized Crime (Protocol Against the Smuggling of Migrants by Land, Sea and Air, Supplementing the United Nations Convention Against Transnational Crime)*. While the aim of smuggling of migrants is the unlawful cross-border transport in order to obtain, directly or indirectly, a financial or other material benefit, the purpose of trafficking in human beings is exploitation. Furthermore, trafficking in human beings does not necessarily involve a transnational element; it can exist at national level.

8. There are other international instruments that have a contribution to make in combating trafficking in human beings and protecting its victims. Among United Nations instruments the following can be mentioned:

- the International Labour Organization (ILO) Convention concerning Forced or Compulsory Labour (No. 29) of 28 June 1930;
- the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others of 2 December 1949;
- the Convention relating to the Status of Refugees of 28 July 1951 and its Protocol relating to the Status of Refugees;
- the Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979;
- the Convention on the Rights of the Child of 20 November 1989;
- the ILO Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour of 17 June 1999;
- the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 25 May 2000.

9. Experience has shown that putting legal instruments in place at regional level valuably reinforces action at world level. In the European context, the European Union (EU) *Council Framework Decision of 19 July 2002 on combating trafficking in human beings* and the EU *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* regulate some of the questions concerning trafficking in human beings. The EU *Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings* would also be relevant in the field of trafficking in human beings.

## **b. Action of the Council of Europe**

10. Given that one of the primary concerns of the Council of Europe is the safeguarding and protection of human rights and human dignity, and that trafficking in human beings directly undermines the values on which the Council of Europe is based, it is logical that finding solutions to this problem is a top priority for the Organisation. It is all the more relevant as the Council of Europe has, among its 46 member States, countries of origin, transit and destination of trafficking victims.

11. Since the late 1980s, the Council of Europe has therefore been a natural focus for work on combating trafficking in human beings <sup>(1)</sup>. Trafficking impinges on a number of questions with which the Council of Europe is concerned, such as sexual exploitation of women and children, protection of women against violence, organised crime and migration. The Council of Europe has taken various initiatives in this field and in related fields: among other things it has produced legal instruments, devised strategies, conducted research, engaged in legal and technical cooperation and carried out monitoring.

### *The Committee of Ministers of the Council of Europe*

12. In 1991 the Council of Europe Committee of Ministers adopted *Recommendation No. R(91)11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults*, which was the first international instrument dealing comprehensively with these matters. In 1999 a committee of experts on protecting children against sexual exploitation (PC-SE) was set up, in particular to revise Recommendation No. R(91)11.

13. Through the Group of Experts on traffic in women (1992-93), which reported to the Steering Committee for Equality between Women and Men (CDEG), the Council identified the most urgent areas for action from which a consultant drew up a general action plan on trafficking in women <sup>(2)</sup>. The plan suggested areas for reflection and investigation in order to draw up recommendations to the member States on legislative, judicial and punishment aspects of trafficking, on aiding, supporting and rehabilitating its victims and on programmes of prevention and training.

14. Trafficking aroused the collective concern of Council of Europe Heads of State and Government at the October 1997 Strasbourg Summit: the final declaration explicitly treats all forms of exploitation of women as a threat to citizens' security and democracy in Europe.

15. There have been various activities since the Summit. The first type of activity was concerned both with raising awareness and action. Seminars to heighten the awareness of governments and civil society to this new form of slavery <sup>(3)</sup> were organised in order to alert the different players (police, judges, social workers, embassy staff, teachers, etc.) to their role vis-à-vis trafficking victims and the dangers facing certain individuals.

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(1) 1991 Strasbourg seminar organised by the Steering Committee for Equality between Women and Men (CDEG) on *Action against traffic in women, considered as a violation of human rights and human dignity*.

(2) Plan of action against traffic in women (doc. EG (96) 2) by Ms Michèle HIRSCH (Belgium).

(3) For example, an International seminar on action against trafficking in human beings for the purpose of sexual exploitation: the role of NGOs (Strasbourg, June 1998) and a Workshop on good and bad practices with regard to media portrayal of women, with reference to trafficking in human beings for sexual exploitation (Strasbourg, September 1998).

16. In addition, member States were encouraged to draw up national action plans against trafficking. To that end, the Council prepared the above-mentioned model action plan against trafficking in women in 1996 and since then has encouraged the preparation of both national and regional action plans, in particular in South-East Europe <sup>(1)</sup> and the South Caucasus <sup>(2)</sup>.

17. Studies and research have also been carried out to apprehend the problem of trafficking from its many different angles. In particular the Steering Committee for equality between women and men (CDEG) prepared a study on *the impact of the use of new information technologies on trafficking in human beings for the purpose of sexual exploitation*. <sup>(3)</sup>

18. Furthermore, targeted seminars and meetings of experts have taken place in several member States, both providing them with the necessary technical assistance for drawing up or revising legislation in this area and helping them to take other requisite measures for combating this scourge.

19. One more recent initiative was the LARA Project supporting the reform of criminal legislation in South-East Europe as a means of preventing and combating trafficking in human beings, launched in July 2002 and completed in November 2003. This Council of Europe Project, implemented within the framework of the Stability Pact Task Force on Trafficking in Human Beings, enabled the countries concerned to adapt and review their domestic legislation in this field. As a result of this Project, nearly all those countries adopted national global action plans against trafficking in human beings, covering prevention, prosecution of traffickers and protection of the victims.

20. The awareness-raising activities led to setting up a legal framework for combating the trafficking in human beings. Two Council of Europe legal instruments were produced which specifically dealt with trafficking in human beings for sexual exploitation, most of whose victims are women and children:

– *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation;*

– *Recommendation No. R(2001)16 of the Committee of Ministers to member States on the protection of children against sexual exploitation.*

21. These put forward a pan-European strategy taking in definitions, general measures, a methodological and action framework, prevention, victim assistance and protection, criminal measures, judicial cooperation and arrangements for international co-operation and co-ordination.

22. Finally, it should be underlined that during the 5th European Ministerial Conference on Equality between Women and Men (Skopje, 22-23 January 2003) devoted to the theme: “Democratisation, conflict prevention and peace building: the perspectives and the roles of women”, the European Equality Ministers agreed that the activities undertaken by the Council of Europe to protect and promote the human rights of women should be focused, among other things, on the objective to prevent and combat violence against women and trafficking in human beings.

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(1) Within the framework of the Stability Pact for South-Eastern Europe, the Council of Europe organised an International seminar on “Co-ordinated action against trafficking in human beings in South-Eastern Europe: towards a regional action plan”. At the invitation of the Greek authorities, the seminar took place in Athens from 29 June to 1 July 2000. It was organised in partnership with the United Nations High Commissioner for Human Rights, OSCE/ODIHR and the International Organisation for Migration (IOM), and with the support of Japan.

(2) A seminar on “Co-ordinated action against trafficking in human beings in the South Caucasus: towards a regional action plan” was held in Tbilisi on 6 and 7 November 2002.

(3) EG-S-NT (2002) 9 Fin.

23. Trafficking in human beings may be engaged in by organised criminal groups – which frequently use corruption to circumvent the law, and money laundering to conceal their profits – but it can occur in other contexts. Consequently, other Council of Europe legal instruments are also relevant to trafficking, in particular those concerned with protecting human rights, children’s rights, social rights, victims’ rights and personal data, those designed to combat corruption, money laundering and cybercrime, and the treaties on international cooperation in criminal matters. Thus, the following Council of Europe conventions could play a part in combating trafficking in human beings and protecting the victims of it:

- the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 (ETS No. 5);
- the European Convention on Extradition of 13 December 1957 (ETS No. 24) and the protocols thereto;
- the European Convention on Mutual Assistance in Criminal Matters of 20 April 1959 (ETS No. 30) and the protocols thereto;
- the European Social Charter of 18 October 1961 (ETS No. 35) and the European Social Charter (revised) of 3 May 1996 (ETS No. 163);
- the European Convention on the Compensation of Victims of Violent Crimes of 24 November 1983 (ETS No. 116);
- the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime of 8 November 1990 (ETS No. 141);
- the European Convention on the Exercise of Children’s Rights of 25 January 1996 (ETS No. 160);
- the Criminal Law Convention on Corruption of 27 January 1999 (ETS No. 173) and the Civil Law Convention on Corruption of 4 November 1999 (ETS No. 174);
- the Convention on Cybercrime of 23 November 2001 (ETS No. 185).

*The Parliamentary Assembly of the Council of Europe*

24. In *Recommendation 1545 (2002) on a campaign against trafficking in women* the Council of Europe Parliamentary Assembly recommended that the Committee of Ministers, among other things, draw up a European convention on trafficking in women that would be open to non-member States and based on the definition of trafficking set out in Committee of Ministers *Recommendation No. R(2000)11 on action against trafficking in human beings for the purpose of sexual exploitation*.

25. The Assembly returned to the question in 2003, with *Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution*. This recommended that the Committee of Ministers:

- “i. begin as soon as possible the drafting of the Council of Europe convention on trafficking in human beings, which will bring added value to other international instruments with its clear human rights and victim protection focus and the inclusion of a gender perspective;
- ii. ensure that the Council of Europe convention on trafficking in human beings includes provisions aiming at:

- a. introducing the offence of trafficking in the criminal law of Council of Europe member States;
- b. harmonising the penalties applicable to trafficking;
- c. ensuring the effective establishment of jurisdiction over traffickers or alleged traffickers, particularly by facilitating extradition and the application of the principle *aut dedere aut judicare* in all cases concerning trafficking.”

26. In *Recommendation 1611 (2003) on trafficking in organs in Europe*, the Parliamentary Assembly suggested developing, in cooperation with relevant organisations, a European strategy for combating organ trafficking and also suggested that drafting the future Council of Europe Convention on action against trafficking in human beings include a protocol to it on trafficking in organs and tissues of human origin.

27. Parliamentary Assembly Recommendation 1663 (2004) on domestic slavery: servitude, au pairs and mail-order brides recommended adopting the necessary measures to combat domestic slavery in all its forms. Furthermore, the Parliamentary Assembly considered that the Council of Europe must have zero tolerance for slavery, and that the Council of Europe as an international organisation defending human rights must fight against all forms of slavery and trafficking in human beings. The Assembly underlined that the Council of Europe and its member States must promote and protect the human rights of the victim and ensure that the perpetrators of such crimes are brought to justice so that slavery can finally be eliminated from Europe. Finally, the Parliamentary Assembly expressed its support for the drafting of the *Council of Europe Convention on action against trafficking in human beings*.

### **c. The Council of Europe Convention on action against trafficking in human beings**

28. At the same time as these different activities, and to follow up Committee of Ministers Recommendation No. R(2000)11, the Steering Committee for Equality between Women and Men (CDEG) took the initiative to give new impetus to the Council of Europe's work in this area and prepared a study on the feasibility of drawing up a Convention on action against trafficking in human beings.

29. The Council of Europe considered that it was necessary to draft a legally binding instrument which goes beyond recommendations or specific actions. The European public perception of the phenomenon of trafficking and the measures which need to be adopted to combat it efficiently have evolved, thus rendering necessary the elaboration of a legally binding instrument, geared towards the protection of victims' rights and the respect for human rights, and aiming at a proper balance between matters concerning human rights and prosecution.

30. Even though there are already other international instruments in this field, the Convention benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and may go beyond minimum standards agreed upon in other international instruments. The evolution of international law proves that regional instruments are very often necessary to complement global efforts. European instruments in the field of the protection of children's rights <sup>(1)</sup>, money laundering or trafficking in drugs <sup>(2)</sup> have proved to have a very positive impact on the implementation of global initiatives. The drafting of a Council of Europe

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(1) European Convention on the exercise of children's rights of 25 January 1996 (ETS No. 160) (in relation to the 1989 UN Convention on the rights of the child).

(2) Convention on Laundering, Search, Seizure and Confiscation of Proceeds of Crime of 1990 (ETS No.141) (in relation to the UN Convention against Illicit Traffic in Narcotic Drugs and Psychotropic substances of 1988);

Council of Europe Agreement of 1995 on illicit traffic by sea, implementing Article 17 of the United Nations Convention against illicit traffic in narcotic drugs and psychotropic substances of 1995 (ETS No. 156).

Convention does not aim at competing with other instruments adopted at a global or regional level but at improving the protection afforded by them and developing the standards contained therein, in particular in relation to the protection of the human rights of the victims of trafficking.

31. At a tripartite meeting in Geneva, on 14 February 2003, high-level representatives of the Council of Europe, the Organisation for Security and Cooperation in Europe (OSCE) and the United Nations stated their support for a Council of Europe convention on trafficking in human beings to improve the protection of victims and to develop pan-European action on what was an extremely serious form of criminal activity, they also backed the idea of promoting national legislation to combat trafficking.

32. The need for the Council of Europe to reinforce its action was underlined by the Foreign Affairs Ministers at the 112th (4-5 May 2003), 113th (5-6 November 2003) and 114th (12-13 May 2004) Sessions of the Committee of Ministers. Therefore, the Council of Europe launched the drafting of a Convention on action against trafficking in human beings. The convention would be geared towards the protection of victims' rights and the respect for human rights, and aim at a proper balance between matters concerning human rights and prosecution.

33. The proposal to prepare a Council of Europe Convention on action against trafficking in human beings was approved by the Committee of Ministers, at the 838th meeting of the Ministers' Deputies on 30 April 2003, when adopting the specific terms of reference setting up the Ad Hoc Committee on Action against Trafficking in Human Beings (CAHTEH). This multidisciplinary committee had the task of preparing a convention focusing on the protection of the human rights of the victims of trafficking and, balanced with this concern, the prosecution of traffickers.

34. In September 2003, the Council of Europe started negotiations on the Convention on action against trafficking in human beings. The CAHTEH held eight meetings, in September and December 2003; February, May, June/July, September/October and December 2004 and February 2005 to finalise the text.

35. The text of the draft Convention was approved by the CAHTEH during its meeting in December 2004 and transmitted to the Committee of Ministers for submission to the Parliamentary Assembly for opinion. In January 2005 the Parliamentary Assembly gave its opinion on the draft convention (Opinion No. 253 (2005), 26 January 2005) and the CAHTEH considered that opinion at its 8th and final meeting in February 2005.

36. The added value provided by the Council of Europe Convention lies firstly in the affirmation that trafficking in human beings is a violation of human rights and violates human dignity and integrity, and that greater protection is therefore needed for all of its victims. Secondly, the Convention's scope takes in all forms of trafficking (national, transnational, linked or not to organised crime, and for purposes of exploitation) in particular with a view to victim protection measures and international cooperation. Thirdly, the Convention sets up monitoring machinery to ensure that Parties implement its provisions effectively. Lastly, the Convention mainstreams gender equality in its provisions.

37. The Convention contains a preamble and ten chapters. Chapter I deals with its purposes and scope, the principle of non-discrimination and definitions; Chapter II deals with prevention, cooperation and other measures; Chapter III deals with measures to protect and promote the rights of victims, guaranteeing gender equality; Chapter IV deals with substantive criminal law; Chapter V deals with investigation, prosecution and procedural law; Chapter VI deals with international cooperation and cooperation with the civil society; Chapter VII sets out the monitoring mechanism; and, lastly, Chapters VIII, IX and X deal with the relationship between the Convention and other international instruments, amendments to the Convention and final clauses.

## II. Commentary on the provisions of the Convention

### Title

38. The title contains the new official name of all new Council of Europe treaties. Following a decision by the Secretary General, the official name of any new treaty would be “Council of Europe Convention [or agreement] on...”. Therefore, this new title is adopted for the Convention.

39. Furthermore, the Convention includes in its title the term “action” in order to underline that the Convention provides not only legislative measures but also other initiatives to be taken to combat trafficking in human beings. Action against trafficking in human beings should be understood to include prevention and assistance to victims as well as criminal law measures designed to combat trafficking.

### Preamble

40. The Preamble reaffirms the commitment of the signatories to human rights and fundamental freedoms. Furthermore, it underlines that the accession to the Convention is open to other signatories than the member States of the Council of Europe.

41. The Convention is based on recognition, already stated in the Preamble in paragraph 5 of *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation*, that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and integrity of the human being. The recognition of trafficking as a violation of human rights would have consequences for some legal systems which have introduced special protection measures in cases of infringement of fundamental rights.

42. The recognition of trafficking in human beings as a violation of human rights appears directly or indirectly in an important number of international legal instruments and international declarations. *Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence*, defines violence against women as including trafficking and states that violence against women both violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms. The *Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women* affirms, in the Preamble, that violence against women constitutes a violation of their human rights and fundamental freedoms. The definition of violence against women in Article 2 of this Convention includes trafficking as a form of violence against women. The European Union, in its *Council Framework Decision on Combating Trafficking in Human Beings* of 19 July 2002 states that “trafficking in human beings comprises serious violations of fundamental human rights and human dignity...”(paragraph 3). Treaty monitoring bodies of the United Nations, including the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, have also identified trafficking in human beings as a violation of human rights.<sup>(1)</sup>

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(1) See, *inter alia*, UN Docs: CCPR/CO/79/LVA, dated 06/11/2003 and A/53/38/rev.1, respectively. See also, The Permanent Council of the OSCE’s *Decision No 557: Action Plan to Combat Trafficking in Human Beings*, 24 July 2003 Budapest, *Declaration on Public Health and Trafficking in Human Beings* of 19-21 March 2003. See also, the second paragraph of the Preamble to the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution*.



43. Furthermore, the Rome Statute of the International Criminal Court in its Article 7 states that: “For the purpose of this Statute, “crime against humanity” means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: [...] (c) Enslavement; [...] which “means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.

44. The horizontal application of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter ECHR) has been the subject of debate over many years. However, the case law of the European Court of Human Rights contains clear indications in favour of the applicability of the ECHR to relations between private individuals in the sense that the Court has recognised the liability of contracting States for acts committed by individuals or group of individuals when these States failed to take appropriate measures of protection. The first judgment in this sense was case *X and Y v. The Netherlands* <sup>(1)</sup>, where the Court held that there was an obligation on the State to adopt criminal-law provisions to secure the effective protection of individuals. Culpable State failure to act on this could therefore give rise to violation of the ECHR. In the case *Young, James and Webster v. The United Kingdom* <sup>(2)</sup>, the Court stated that “Under Article 1 (art. 1) of the Convention, each Contracting State “shall secure to everyone within [its] jurisdiction the rights and freedoms defined in ... [the] Convention”; hence, if a violation of one of those rights and freedoms is the result of non-observance of that obligation in the enactment of domestic legislation, the responsibility of the State for that violation is engaged. Although the proximate cause of the events giving rise to this case was the 1975 agreement between British Rail and the railway unions, it was the domestic law in force at the relevant time that made lawful the treatment of which the applicants complained. The responsibility of the respondent State for any resultant breach of the Convention is thus engaged on this basis [...]” Since then <sup>(3)</sup> the liability of Contracting States for acts committed by individuals or a group of individuals in violation of the ECHR has been recognised.

45. Trafficking in human beings has become one of the Europe’s major scourges. This phenomenon affecting men, women and children has reached such an unprecedented level that we can refer to it as a new form of slavery. The ECHR prohibits slavery and forced labour in its Article 4: “1. No one shall be held in slavery or servitude; 2. No one shall be required to perform forced or compulsory labour [...]”. The definition of “trafficking in human beings” contained in Article 4 of the present Convention refers specifically to “slavery” (see comments on Article 4 below).

46. The main added value of the present Convention in relation to other international instruments is its Human Rights perspective and its focus on victim protection. Therefore, paragraph 5 of the Preamble states that the respect for the rights and protection of victims and the fight against trafficking in human beings must be the paramount objectives.

47. In relation to the non-discrimination principle, it should be recalled that Recommendation 1545 (2002) of the Parliamentary Assembly of the Council of Europe on a *campaign against trafficking in women*, calls for the inclusion of a non-discrimination clause in the future Convention based on the one contained in Parliamentary Assembly Opinion 216 (2000) on Draft Protocol No. 12 to the ECHR. (See comments on Article 3 below).

- (1) *Eur. Court HR, X and Y v. The Netherlands judgement of 26 March 1985*, Series A no. 91, paragraph 23.
- (2) *Eur. Court HR, Young James and Websters v. The United Kingdom judgement of 13 August 1981*, Series A, no. 44, paragraph 49.
- (3) See, *inter alia*, the following judgments: *Eur. Court HR, A v. The United Kingdom judgement of 23 September 1998*, Reports of Judgments and Decisions 1998-VI, paragraph 22; *Eur. Court HR, Z and others v. The United Kingdom judgement of 10 May 2001*, Reports of Judgments and Decisions 2001-V, paragraph 73; *Eur. Court HR, M.C. v. Bulgaria judgement of 4 December 2003*; application no. 39272/98.

48. The Preamble of the Convention also refers to the declarations of the Foreign Affairs Ministers of the member States of the Council of Europe at the 112th, 113th and 114th Sessions of the Committee of Ministers, as mentioned above.

49. The Preamble contains an enumeration of the most important international legal instruments which directly deal with trafficking in human beings in the framework of the Council of Europe, the European Union and the United Nations. In particular, it should be underlined that, as mentioned above, the Council of Europe through its Committee of Ministers, and its Parliamentary Assembly prepared an important number of instruments to examine and combat trafficking in human beings from different perspectives. The important place that this Convention attributes to the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime* is reflected in the adoption of the definition on « trafficking in human beings » agreed upon in this Protocol. As a complement to and development of this United Nations Protocol, which emphasises the crime prevention aspect of trafficking, the Council of Europe Convention clearly defines trafficking as being first and foremost an issue of violation of human rights and emphasises the victims' protection aspect of trafficking. The aim is to improve the protection afforded by it and to develop the standards contained therein.

50. During the negotiation process of this Convention, other international legal instruments relevant in this field have also been taken into account as mentioned above.

51. In conclusion it could be said that the added value of this new Council of Europe instrument in relation to the other existing international legal instruments is:

- recognition of trafficking in human beings as a violation of human rights;
- a special focus on assistance to victims and on protection of their human rights;
- a comprehensive scope of application:
  - all forms of trafficking: national/transnational linked/non-linked with organised crime;
  - all trafficked persons: the Convention applies to all persons who are victims of trafficking whether they are women, children or men;
- setting up a comprehensive legal framework for the protection of victims and witnesses with specific and binding measures to be adopted;
- setting up an efficient and independent monitoring mechanism: experience has proved that, in areas where such independent monitoring systems exist (e.g. torture and minorities), they have high credibility with the States Parties, and the cooperative nature of such mechanisms is fully understood and recognised;
- a Council of Europe Convention benefits from the more limited and uniform context of the Council of Europe, contains more precise provisions and goes beyond the minimum standards agreed upon in other international instruments.

## Chapter I – Purposes, scope, non-discrimination principle and definitions

### Article 1 – Purposes of the Convention

52. Article 1 deals with the purposes of the Convention. Paragraph 1 states these to be:

- a. to prevent and combat trafficking in human beings, guaranteeing gender equality;
- b. to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, guaranteeing gender equality, and ensure effective investigation and prosecution;
- c. to promote international cooperation on action against trafficking in human beings.

53. Paragraph 1(a) states the need for measures both to prevent and combat trafficking in human beings. At the same time it is important to bear in mind the specific needs of the victims, whether women, children or men. While applying to women, children and men, the Convention recognises that specific measures to prevent and combat trafficking in human beings also require guaranteeing gender equality and a child-rights approach to children.

54. Gender equality means an equal visibility, empowerment and participation of both sexes in all spheres of public and private life. Gender equality is the opposite of gender inequality, not of gender difference. It means accepting and valuing equally the complementarity of women and men and the diverse roles they play in society. Equality between women and men means not only non-discrimination on grounds of gender but also positive measures to achieve equality between women and men. Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment (physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation). These violations of women's human rights are still common and have dramatically increased in some areas of Europe. It should be noted that *Recommendation Rec(2002)5 of the Committee of Ministers to member States on the protection of women against violence* considers trafficking in human beings as a form of violence against women. The Declaration of the Committee of Ministers on Equality of Women and Men (16 November 1988) was a landmark. It affirms that the principle of equality of the sexes is an integral part of human rights, and that sex-related discrimination is an impediment to the exercise of fundamental freedoms.

55. Here it should be noted that gender equality is not reducible to the non-discrimination principle (as laid down in Article 3) and that the CAHTEH's terms of reference asked it to take gender equality into account. A further point is that gender equality is integral to human rights and that discrimination on sex grounds is an interference with the exercise of fundamental freedoms.

56. Paragraph 1(b) reflects the multidisciplinary necessary to combat trafficking in human beings effectively. Not only is multidisciplinary basic to the Convention, it must also be basic to any national action on trafficking in human beings.

57. Two of the main aims of this Convention, as set out in Article 1, are the protection of the rights of trafficked persons and the prosecution of those responsible for trafficking. The drafters recognised that the two are related to each other.

58. Paragraph 1(c) deals with international cooperation: only by joining forces will countries overcome trafficking; on their own, they stand very little chance of success. International cooperation as referred to by the Convention is not confined to criminal matters (a field in which the Council of Europe has already adopted a number of authoritative documents – see the comments on Chapter VI) but also takes in preventing trafficking and assisting and protecting victims, and is intended to make these things central concerns of the countries which victims are trafficked from, through and into.

59. Article 1, paragraph 2, states that, in order to ensure effective implementation of its provisions by the Parties, the Convention sets up a special monitoring mechanism, the “Group of Experts on Action against Trafficking in Human Beings” (GRETA). This is a crucial element of the Convention’s added value: the GRETA is a means of ensuring Parties’ compliance with the Convention and is a guarantee of the Convention’s long-term effectiveness (see comments on Chapter VII).

## Article 2 – Scope

60. This sets the Convention’s scope. Firstly, it lays down that the Convention applies to all forms of trafficking in human beings. The Convention thus applies whoever the victim of the trafficking, man, woman or child. ,

61. Secondly the drafters wanted the Convention to make clear that it applied to both national and transnational trafficking, whether or not related to organised crime. That is, the Convention is wider in scope than the Palermo Protocol and, as stated in Article 39, is intended to enhance the protection which the Palermo Protocol affords. Article 1, paragraph 2, of the Palermo Protocol states that the provisions of the *United Nations Convention against Transnational Organized Crime* apply *mutatis mutandis* to the protocol unless the protocol otherwise provides, and Article 3, paragraph 1, of the United Nations convention states that it applies to certain offences of a transnational nature <sup>(1)</sup> and involves an organised criminal group <sup>(2)</sup>. Under Article 2 of the Convention, therefore, Chapters II to VI apply even if trafficking is at the purely national level and does not involve any organised criminal group.

62. Lastly, in the case of transnational trafficking, the Convention applies both to victims who legally entered or are legally present in the territory of the receiving Party and those who entered or are present illegally. In some cases, trafficking victims are taken illegally into the country, but in other cases they enter a country legally as tourists, future spouses, artists, domestic staff, au pair girls or asylum seekers, depending on the law of the particular country. The Convention applies to both types of situations. Nevertheless, certain specific provisions (Articles 13 and 14) apply only to victims illegally present.

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(1) Article 3(2) of the United Nations Convention against Transnational Organized Crime states that “an offence is transnational if:

- a) It is committed in more than one State;
- b) It is committed in one State but a substantial part of its preparation, planning, direction or control takes place in another State;
- c) It is committed in one State but involves an organized criminal group that engages in criminal activities in more than one State; or
- d) It is committed in one State but has substantial effects in another State.”.

(2) Article 2(a) of the United Nations Convention against Transnational Organized Crime states: “Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”.

### Article 3 – Non-discrimination principle

63. This prohibits discrimination in Parties' implementation of the Convention and in particular in enjoyment of measures to protect and promote victims' rights, which are set out in Chapter III. The meaning of discrimination in Article 3 is identical to that given to it under Article 14 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* (hereafter the ECHR).

64. The concept of discrimination has been interpreted consistently by the European Court of Human Rights in its case-law concerning Article 14 of the ECHR. In particular this case-law has made clear that not every distinction or difference of treatment amounts to discrimination. As the Court has stated, for example in the *Abdulaziz, Cabales and Balkandali v. the United Kingdom* judgment, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, if it does not pursue a 'legitimate aim' or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' " (judgment of 28 May 1985, Series A, No.94, paragraph 72).

65. Since not every distinction or difference of treatment amounts to discrimination and because of the general character of the non-discrimination principle, it was not considered necessary or appropriate to include a restriction clause in the present convention. For example, the law of most if not all Council of Europe member States provides for certain distinctions based on nationality concerning certain rights or entitlements to benefits. The situations where such distinctions are perfectly acceptable are sufficiently safeguarded by the very meaning of the term "discrimination" as described in the above paragraph, since distinctions for which an objective and reasonable justification exists do not constitute discrimination. In addition, under the case-law of the European Court of Human Rights national authorities are allowed some discretion in assessing whether and to what extent differences in otherwise similar situations justify different treatment in law. The scope of the discretion will vary according to the circumstances, the subject-matter and its background (see, for example, the judgment of 28 November 1984 in *Rasmussen v. Denmark*, Series A, No. 87, paragraph 40).

66. The list of non-discrimination grounds in Article 3 is identical to that in Article 14 of the ECHR and the list contained in Protocol No.12 to the ECHR. This solution was considered preferable to others, such as expressly including certain additional non-discrimination grounds (e.g. state of health, physical or mental disability, sexual orientation and age). The reason for this was not unawareness that such grounds may be of particular importance in trafficking victims' predicament, but that such an inclusion is legally unnecessary because the list of non-discrimination grounds is not exhaustive and inclusion of any specific additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is worth pointing out that the European Court of Human Rights has applied Article 14 to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in *Salgueiro da Silva Mouta v. Portugal*).

67. Article 3 refers to "implementation of the provision of this Convention by Parties". These words seek to specify the extent of the prohibition on discrimination. In particular, Article 3 prohibits a victim's being discriminated against in the enjoyment of measures – as provided for in Chapter III of the Convention – to protect and promote their rights.

68. It should be noted that the Convention mainly places positive obligations on Parties. For example, Article 12 requires Parties to provide certain assistance to victims of trafficking, such as standards of living capable of ensuring their subsistence, through such measures as appropriate and secure housing, psychological and material assistance and access to emergency medical treatment. Similarly, Article 14 provides the issuing of a renewable residence permit to victims. Under Article 3 such measures must be applied without discrimination – that is without any making of unjustified distinctions.

69. Thus Article 3 of the Convention might be contravened, even if there were no contravention of other provisions of the Convention, if the measures provided for in those articles were implemented differently in respect of particular categories of person (for example, depending on sex, age or nationality) and the difference in treatment could not be reasonably justified.

#### **Article 4 – Definitions**

##### *Introduction concerning the Article 4 definitions*

70. It was understood by the drafters that, under the Convention, Parties would not be obliged to copy *verbatim* into their domestic law the concepts in Article 4, provided that domestic law covered the concepts in a manner consistent with the principles of the Convention and offered an equivalent framework for implementing it.

##### *Definition of trafficking in human beings*

71. The Article 4 definition of trafficking in human beings is not the first international legal definition of the phenomenon. For instance, *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation* gives a definition of trafficking, but one whose scope, unlike the definition in the present Convention, is restricted to trafficking in human beings for the purpose of sexual exploitation.

72. To combat trafficking more effectively and help its victims, it is of fundamental importance to use a definition of trafficking in human beings on which there is international consensus. The definition of trafficking in human beings in Article 4(a) of the Convention is identical to the one in Article 3(a) of the Palermo Protocol. Article 4(b) to (d) of the Convention is identical to Article 3(b) to (d) of the Palermo Protocol. Article 3 of that protocol forms a whole which needed to be incorporated as it stood into the present convention.

73. The definition of trafficking in human beings is essential in that it crucially affects implementation of the provisions in Chapters II to VI.

74. In the definition, trafficking in human beings consists in a combination of three basic components, each to be found in a list given in the definition:

- the action of: “recruitment, transportation, transfer, harbouring or receipt of persons”;
- by means of: “the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person”;
- for the purpose of exploitation, which includes “at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”.

75. Trafficking in human beings is a combination of these constituents and not the constituents taken in isolation. For instance, “harbouring” of persons (action) involving the “threat or use of force” (means) for “forced labour” (purpose) is conduct that is to be treated as trafficking in human beings. Similarly, recruitment of persons (action) by deceit (means) for exploitation of prostitution (purpose).

76. For there to be trafficking in human beings ingredients from each of the three categories (action, means, purpose) must be present together. There is, however, an exception regarding children: under Article 4(c) recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is to be regarded as trafficking in human beings even if it does not involve any of the means listed in Article 4(a). Under Article 4(d) the word “child” means any person under 18 years of age.

77. Thus trafficking means much more than mere organised movement of persons for profit. The critical additional factors that distinguish trafficking from migrant smuggling are use of one of the means listed (force, deception, abuse of a situation of vulnerability and so on) throughout or at some stage in the process, and use of that means for the purpose of exploitation.

78. The actions the Convention is concerned with are “recruitment, transportation, transfer, harbouring or receipt of persons”. The definition endeavours to encompass the whole sequence of actions that leads to exploitation of the victim.

79. The drafters looked at use of new information technologies in trafficking in human beings. They decided that the Convention’s definition of trafficking in human beings covered trafficking involving use of new information technologies. For instance, the definition’s reference to recruitment covers recruitment by whatever means (oral, through the press or via the Internet). It was therefore felt to be unnecessary to include a further provision making the international-cooperation arrangements in the *Convention on Cybercrime* (ETS No.185) applicable to trafficking in human beings.

80. As regards “transportation”, it should be noted that, under the Convention, transport need not be across a border to be a constituent of trafficking in human beings. Similarly Article 2, on the Convention’s scope, states that the Convention applies equally to transnational and national trafficking. Nor does the Convention require, in cases of transnational trafficking, that the victim has entered illegally or be illegally present on national territory. Trafficking in human beings can be involved even where a border is crossed legally and presence on national territory is lawful.

81. The means are the threat or use of force or other forms of coercion, abduction, fraud, deception, abuse of power or of a position of vulnerability, and giving or receiving payments or benefits to achieve the consent of a person having control over another person.

82. Fraud and deception are frequently used by traffickers, as when victims are led to believe that an attractive job awaits them rather than the intended exploitation.

83. By abuse of a position of vulnerability is meant abuse of any situation in which the person involved has no real and acceptable alternative to submitting to the abuse. The vulnerability may be of any kind, whether physical, psychological, emotional, family-related, social or economic. The situation might, for example, involve insecurity or illegality of the victim’s administrative status, economic dependence or fragile health. In short, the situation can be any state of hardship in which a human being is impelled to accept being exploited. Persons abusing such a situation flagrantly infringe human rights and violate human dignity and integrity, which no one can validly renounce.

84. A wide range of means, therefore has to be contemplated: abduction of women for sexual exploitation, enticement of children for use in paedophile or prostitution rings, violence by pimps to keep prostitutes under their thumb, taking advantage of an adolescent’s or adult’s vulnerability, whether or not resulting from sexual assault, or abusing the economic insecurity or poverty of an adult hoping to better their own and their family’s lot. However, these various cases reflect differences of degree rather than any difference in the nature of the phenomenon, which in each case can be classed as trafficking and is based on use of such methods.

85. The purpose must be exploitation of the individual. The Convention provides: “Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs”. National legislation may therefore target other forms of exploitation but must at least cover the types of exploitation mentioned as constituents of trafficking in human beings.

86. The forms of exploitation specified in the definition cover sexual exploitation, labour exploitation and removal of organs, for criminal activity is increasingly diversifying in order to supply people for exploitation in any sector where demand emerges.

87. Under the definition, it is not necessary that someone has been exploited for there to be trafficking in human beings. It is enough that they have been subjected to one of the actions referred to in the definition and by one of the means specified “for the purpose of” exploitation. Trafficking in human beings is consequently present before the victim’s actual exploitation.

88. As regards “the exploitation of the prostitution of others or other forms of sexual exploitation”, it should be noted that the Convention deals with these only in the context of trafficking in human beings. The terms “exploitation of the prostitution of others” and “other forms of sexual exploitation” are not defined in the Convention, which is therefore without prejudice to how States Parties deal with prostitution in domestic law.

89. Nor does the Convention define “forced labour”. Nonetheless, there are several relevant international instruments, such as the *Universal Declaration of Human Rights* (Article 4), the *International Covenant on Civil and Political Rights* (Article 8), the 1930 ILO *Convention concerning Forced or Compulsory Labour* (Convention No. 29), and the 1957 ILO *Convention concerning the Abolition of Forced Labour* (Convention No. 105).

90. Article 4 of the ECHR prohibits forced labour without defining it. The authors of the ECHR took as their model the ILO Convention concerning Forced or Compulsory Labour (No.29) of 29 June 1930, which describes as forced or compulsory “all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”. In the case *Van der Müsselle v. Belgium* (judgment of 23 November 1983, Series A, No.70, paragraph 37) the Court held that “relative weight” was to be attached to the prior-consent criterion and it opted for an approach which took into account all the circumstances of the case. In particular it observed that, in certain circumstances, a service “could not be treated as having been voluntarily accepted beforehand”. It therefore held that consent of the person concerned was not sufficient to rule out forced labour. Thus, the validity of consent has to be evaluated in the light of all the circumstances of the case.

91. Article 4(b) of the present Convention follows ECHR case-law in that it states that a human-trafficking victim’s consent to a form of exploitation listed in Article 4(a) is irrelevant if any of the means referred to in sub-paragraph a. has been used.

92. With regard to the concept of “forced services”, the Court likewise found, in *Van der Müsselle v. Belgium*, that the words “forced labour”, as used in Article 4 ECHR, were to be given a broad meaning and encompassed the concept of forced services (judgment of 23 November 1983, Series A, No.70, paragraph 33). From the standpoint of the ECHR, therefore, there is no distinction to be made between the two concepts.

93. Slavery is not defined in the Convention but many international instruments and the domestic law of many countries define or deal with slavery and practices similar to slavery (for example, the *Geneva Convention on Slavery* of 25 September 1926, as amended by the New York Protocol of 7 December 1953; the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery* of 7 September 1956; the ILO *Worst Forms of Child Labour Convention* (Convention No.182)).



94. The definition of trafficking in human beings does not refer to illegal adoption as such. Nevertheless, where an illegal adoption amounts to a practice similar to slavery as defined in Article 1(d) of the *Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices similar to Slavery*, it will also fall within the Convention's scope.

95. The ECHR bodies have defined "servitude". The European Commission of Human Rights regarded it as having to live and work on another person's property and perform certain services for them, whether paid or unpaid, together with being unable to alter one's condition (Application No.7906/77, D.R.17, p. 59; see also the Commission's report in the *Van Droogenbroeck* case of 9 July 1980, Series B, Vol. 44, p. 30, paragraphs 78 to 80). Servitude is thus to be regarded as a particular form of slavery, differing from it less in character than in degree. Although it constitutes a state or condition, and is a "particularly serious form of denial of freedom" (*Van Droogenbroeck* case, judgment of 24 June 1982, Series A, No.50, p.32, paragraph 58), it does not have the ownership features characteristic of slavery.

96. Exploitation also includes "removal of organs". The principle that it is not permissible for the human body or its parts as such to give rise to financial gain is established Council of Europe legal *acquis*. It was laid down in Committee of Ministers Resolution (78) 29 and was confirmed, in particular, by the final declaration of the 3<sup>rd</sup> Conference of European Health Ministers (Paris, 1987) before being definitively established in Article 21 of the *Convention on Human Rights and Biomedicine* (ETS No. 164). The principle was then reaffirmed in the additional protocol to that convention *concerning transplantation of organs and tissues of human origin* (ETS No. 186), which was opened for signature in January 2002. Article 22 of the protocol explicitly prohibits traffic in organs and tissues. It should also be recalled that the Parliamentary Assembly of the Council of Europe adopted a report on "Trafficking in organs in Europe" (Doc. 9822, 3 June 2003, Social, Health and Family Affairs Committee, Rapporteur: Mrs Ruth-Gaby Vermot-Mangold, Switzerland, SOC) and *Recommendation 1611 (2003) on trafficking in organs in Europe*.

97. Article 4(b) states: "The consent of a victim of 'trafficking in human beings' to the intended exploitation set forth in sub-paragraph (a) of this article shall be irrelevant where any of the means set forth in sub-paragraph (a) have been used". The question of consent is not simple and it is not easy to determine where free will ends and constraint begins. In trafficking, some people do not know what is in store for them while others are perfectly aware that, for example, they will be engaging in prostitution. However, while someone may wish employment, and possibly be willing to engage in prostitution, that does not mean that they consent to be subjected to abuse of all kinds. For that reason Article 4(b) provides that there is trafficking in human beings whether or not the victim consents to be exploited.

98. Under sub-paragraphs b. and c. of Article 4 taken together, recruitment, transportation, transfer, harbouring and receipt of a child for the purpose of exploitation are regarded as trafficking in human beings. It is immaterial whether the means referred to in sub-paragraph a. have been used. It is also immaterial whether or not the child consents to be exploited.

#### *Definition of "victim"*

99. There are many references in the Convention to the victim, and the drafters felt it was essential to define the concept. In particular the measures provided for in Chapter III are intended to apply to persons who are victims within the meaning of the Convention.

100. The Convention defines "victim" as "any natural person who is subjected to trafficking in human beings as defined in this Article". As explained above, a victim is anyone subjected to a combination of elements (action, means, purpose) specified in Article 4(a) of the Convention. Under Article 4(c), however, when that person is a child, he or she is to be regarded as a victim even if none of the means specified in Article 4(a) has been used.

## Chapter II – Prevention, cooperation and other measures

101. Chapter II contains various provisions that come under the heading of prevention in the wide sense of the term. Some provisions are particularly concerned with prevention measures in the strict sense (Articles 5 and 6) while others deal with specific measures relating to controls, security and cooperation (Articles 7, 8 and 9) for preventing and combating trafficking in human beings.

### Article 5 – Prevention of trafficking in human beings

102. Trafficking in human beings takes many forms, cuts across various fields and has implications for various branches of society. To be effective, and given the nature of the phenomenon, preventive action against trafficking must be co-ordinated. The first paragraph of Article 5 is therefore concerned to promote a multidisciplinary co-ordination approach by requiring that Parties take measures to establish or strengthen co-ordination nationally between the various bodies responsible for preventing and combating trafficking in human beings. The paragraph makes it a requirement to co-ordinate all the sectors whose action is essential in preventing and combating trafficking, such as the agencies with social, police, migration, customs, judicial or administrative responsibilities, non-governmental organisations, other organisations with relevant responsibilities and other elements of civil society.

103. Article 5, paragraph 2, gives a specimen list of prevention policies and programmes which Parties must establish or support, in particular for persons vulnerable to trafficking and for relevant professionals. The drafters felt that it was important that the beneficiaries of such policies and programmes include “*professionals concerned*”, namely anyone coming into contact with victims of trafficking in the course of their work (police, social workers, doctors, etc.). Such measures vary in character and may have short-, medium-, or long-term effects. For example, *research* on combating trafficking is essential for devising effective prevention methods. *Information, awareness-raising and education campaigns* are important short-term prevention measures, particularly in the countries of origin. *Social and economic initiatives* tackle the underlying and structural causes of trafficking and require long-term investment. It is widely recognised that improvement of economic and social conditions in countries of origin and measures to deal with extreme poverty would be the most effective way of preventing trafficking. Among social and economic initiatives, improved training and more employment opportunities for people liable to be traffickers’ prime targets would undoubtedly help prevent trafficking in human beings.

104. Under Article 5, paragraph 3, Parties are to promote a human-rights-based approach. Here, the drafters took the view that it was essential that the policies and programmes referred to in paragraph 2 be based on gender mainstreaming and a child-rights approach to children. One of the main strategies for bringing about proper equality between women and men is gender mainstreaming, as described in Committee of Ministers *Recommendation No. R(98)14 to member States on gender mainstreaming*. Gender mainstreaming is a concept which features prominently in international documents, particularly those of the United Nations World Conferences on Women, and in European documents since its 1996 adoption by the European Commission (Commission Communication of 21 February 1996, “Incorporating equal opportunities for women and men into all Community policies and activities”, COM (96) 67 final). The concept was then consolidated in the Community Framework Strategy on Gender Equality (2001-2005). The Council of Europe group of specialists on the subject defined the approach as “*the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy making*”. Each Party is required to apply these approaches at all stages of its prevention policies and programmes – that is, in developing, implementing and evaluating them.

105. Paragraph 4 places an obligation on Parties to take appropriate measures as necessary to enable people to emigrate and immigrate lawfully. It is essential that would-be immigrants have accurate information about legal opportunities for migration, employment conditions and their rights and duties. The provision is aimed at counteracting traffickers' misinformation so that people recognise traffickers' offers for what they are and know better than to take them up. It is for each Party to decide, according to its internal functioning, which the "relevant offices" are. The drafters mainly but not exclusively had in mind visa and immigration services.

106. Paragraph 5 requires that Parties take specific preventive measures with regard to children. The provision refers in particular to creating a "*protective environment*" for children so as to make them less vulnerable to trafficking and enable them to grow up without harm and to lead decent lives. The concept of a *protective environment*, as promoted by UNICEF, has eight key components:

- protecting children's rights from adverse attitudes, traditions, customs, behaviour and practices;
- government commitment to and protection and realisation of children's rights;
- open discussion of, and engagement with, child protection issues;
- drawing up and enforcing protective legislation;
- the capacity of those dealing and in contact with children, families and communities to protect children;
- children's life skills, knowledge and participation;
- putting in place a system for monitoring and reporting abuse cases;
- programmes and services to enable child victims of trafficking to recover and reintegrate.

107. Lastly, paragraph 6 recognises the important role of non-governmental organisations, other relevant organisations and other elements of civil society in preventing trafficking in human beings and protecting and assisting victims. For that reason Parties, while responsible for meeting the obligations laid down in Article 5, must, as appropriate, involve such bodies in the implementation of preventive measures.

#### **Article 6 – Measures to discourage the demand**

108. This article places a positive obligation on Parties to adopt and reinforce measures for discouraging demand whether as regards sexual exploitation or in respect of forced labour or services, slavery and practices similar to slavery, servitude and organ removal. By devoting a separate, free-standing article to this, the drafters sought to underline the importance of tackling demand in order to prevent and combat the trafficking itself.

109. The aim of measures is to achieve effective dissuasion. The measures involved may be legislative, administrative, educational, social, cultural or of other kinds.

110. The article includes a list of such minimum measures. An essential one is research on best practices, methods and strategies for discouraging client demand effectively. The media and civil society have been key agencies in identifying demand as one of the main causes of trafficking, and the measures accordingly seek to create maximum awareness and recognition of their role and responsibility in that field. Information campaigns targeting relevant groups could also be conducted, with involvement, where appropriate, of political

decision-makers and public authorities. Lastly, educational measures play an important part in discouraging demand. For example, educational programmes for school children could not only advantageously tell them about the trafficking phenomenon but also alert them to gender issues, questions of dignity and integrity of human beings, and the consequences of gender-based discrimination.

#### **Article 7 – Border measures**

111. Article 7, modelled on Article 11 of the Palermo Protocol, covers a range of measures for prevention and border detection of transnational trafficking in human beings. The drafters agreed that better management of controls and cooperation at borders would make action to combat trafficking in human beings more effective.

112. Under the first paragraph, Parties have to strengthen border controls as far as possible to ensure that people are authorised to enter or leave a Party's territory. Such measures must be without prejudice to international commitments in relation to people's freedom of movement, this requirement being particularly relevant within the European Community, where member States have developed a set of rules on control and surveillance of external borders (EC law on police and customs cooperation).

113. Under paragraph 2, Parties must adopt legislative or other appropriate measures to prevent means of transport operated by commercial carriers from being used to commit offences established in Chapter IV.

114. The type of measure is left to Parties' discretion. For example, paragraph 3 requires commercial carriers to check that passengers are in possession of the travel documents necessary for entering the receiving State. When passengers are not, there also have to be appropriate penalties (paragraph 4). It should be noted, however, that the obligation on commercial carriers, including any transport company or owner or operator of any means of transport, consists in checking solely for possession of documents and not on documents' validity or authenticity. The nature of the penalties to be applied in cases of contravening the paragraph 3 obligation is not specified, leaving it to Parties to decide appropriate measures according to their domestic law.

115. Paragraph 5 is concerned with punishing persons implicated in Chapter IV offences. Each Party is required to adopt the legislative or other measures necessary so that such persons can be refused entry to their territory or their visas can be revoked.

116. Lastly, in paragraph 6, the drafters sought to promote cooperation between border control services. Introducing new types of operational action (such as cross-border observation and pursuit, and introducing official machinery for direct exchange of information between services) has a definite place in cross-border cooperation on devising preventive law-and-order and security measures or strategies. New modes of action and intervention methods give cross-border services an important role in combating trafficking. Paragraph 6 accordingly requires Parties to consider strengthening cooperation between border-control services by, among other things, establishing and maintaining direct channels of communication.

#### **Article 8 – Security and control of documents**

117. Under Article 8, modelled on Article 12 of the Palermo Protocol, every Party must adopt the necessary measures to ensure quality of travel and identity documents and protect the integrity and security of such documents. By "travel or identity documents" the drafters mean any type of document required to enter or leave a country's territory in accordance with domestic law or any document commonly used to establish a person's identity in a country under that country's law.

118. It should be noted that the drafters had in mind not only cases where documents have been unlawfully falsified, altered, reproduced or issued but also those where lawfully created or issued documents have been tampered with, altered or misappropriated.

119. Such measures may include, for example, introducing minimum standards to improve security of passports and other travel documents, including stricter technical specifications and additional security requirements such as more sophisticated preventive features that make counterfeiting, falsification, forgery and fraud more difficult. They also include administrative and control measures to prevent illegal issue and possession, guard against improper use and facilitate detection where such documents have been falsified or illegally altered, reproduced, issued or used.

### **Article 9 – Legitimacy and validity of documents**

120. Travel and identity documents are essential tools in trafficking, particularly transnational trafficking. Cooperation between Parties in checking the legitimacy and validity of travel and identity documents is thus an important preventive measure.

121. Under Article 9, modelled on Article 13 of the Palermo Protocol, Parties are required to check the legitimacy and validity of travel or identity documents which have been issued, or supposedly have been issued, by their authorities when they are requested to do so by another Party and when it is suspected that the documents are being used for trafficking in human beings. The checking is carried out according to the rules of domestic law of the Party requested.

122. The requested Party must verify the “legitimacy and validity” of travel or identity documents issued or purporting to have been issued in its name. By this is meant that the requested Party must check both the formal and material legality of the documents. Documents used for trafficking in human beings may be outright forgeries, and therefore not issued by the requested Party. They may also have been issued by the requested Party but later altered to produce a counterfeit. In such cases the documents are formally illegal. However, documents which neither are counterfeits nor have been altered may likewise be used for trafficking in human beings. For example, documents may have been drawn up on the basis of inaccurate or false information, or they may be perfectly valid but being used by persons other than their rightful holders. In such cases the documents are materially illegal. Article 9 places a duty on Parties to cooperate in detecting all such situations.

123. It should be noted in particular that Parties have a duty to proceed expeditiously and that the Party requested must provide a reply to the requesting Party within a reasonable time, which will of course vary according to the complexity of the checks which the request involves. Nevertheless, it is essential that the reply be received in time for the requesting Party to take any measures necessary.

### **Chapter III – Measures to protect and promote the rights of victims, guaranteeing gender equality**

124. Chapter III contains provisions to protect and assist victims of trafficking in human beings. Some of the provisions in this chapter apply to all victims (Articles 10, 11, 12, 15 and 16). Others apply specifically to victims unlawfully present in the receiving Party’s territory (Articles 13 and 14) or victims in a legal situation but with a short-term residence permit. In addition, some provisions also apply to persons not yet formally identified as victims but whom there are reasonable grounds for believing to be victims (Article 10, paragraph 2, Article 12, paragraphs 1 and 2, and Article 13).

125. This chapter is an essential part of the Convention. It is centred on protecting the rights of trafficking victims, taking the same stance as set out in the United Nations *Recommended Principles and Guidelines on Human Rights and Trafficking in Human Beings* : “The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims” <sup>(1)</sup> 15.

126. Chapter III has eight articles. Article 10 deals with identification of victims of trafficking as being essential if they are to be given the benefit of the rights laid down in the Convention. Article 11 deals with protection of their private life. Article 12 specifies the assistance measures to which trafficking victims are entitled. Articles 13 and 14 lay down a recovery and reflection period to which victims illegally present in a Party’s territory are entitled and provide for issue of a residence permit. Article 15 deals with compensation of trafficking victims for harm suffered and Article 16 with repatriation or return. Article 17 deals with gender equality.

### **Article 10 – Identification of the victims**

127. To protect and assist trafficking victims it is of paramount importance to identify them correctly. Article 10 seeks to allow such identification so that victims can be given the benefit of the measures provided for in Chapter III. Identification of victims is crucial, is often tricky and necessitates detailed enquiries. Failure to identify a trafficking victim correctly will probably mean that victim’s continuing to be denied his or her fundamental rights and the prosecution to be denied the necessary witness in criminal proceedings to gain a conviction of the perpetrator for trafficking in human beings. Through the identification process, competent authorities seek and evaluate different circumstances, according to which they can consider a person to be a victim of trafficking.

128. Paragraph 1 places obligations on Parties so as to make it possible to identify victims and, in appropriate cases, issue residence permits in the manner laid down in Article 14 of the Convention. Paragraph 1 addresses the fact that national authorities are often insufficiently aware of the problem of trafficking in human beings. Victims frequently have their passports or identity documents taken away from them or destroyed by the traffickers. In such cases they risk being treated primarily as illegal immigrants, prostitutes or illegal workers and being punished or returned to their countries without being given any help. To avoid that, Article 10, paragraph 1, requires that Parties provide their competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings and in identifying and helping victims, including children, and that they ensure that those authorities cooperate with one other as well as with relevant support organisations.

129. By “competent authority” is meant the public authorities which may have contact with trafficking victims, such as the police, the labour inspectorate, customs, the immigration authorities and embassies or consulates. It is essential that these have people capable of identifying victims and channelling them towards the organisations and services who can assist them.

130. The Convention does not require that the competent authorities have specialists in human-trafficking matters but it does require that they have trained, qualified people so that victims can be identified. The Convention likewise requires that the authorities collaborate with one another and with organisations that have a support-providing role. The support organisations could be non-governmental organisations (NGOs) tasked with providing aid and support to victims.

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(1) Principles, paragraph 1.

131. Even though the identification process is not completed, as soon as competent authorities consider that there are reasonable grounds to believe that the person is a victim, they will not remove the person from the territory of the receiving State. Identifying a trafficking victim is a process which takes time. It may require an exchange of information with other countries or Parties or with victim-support organisations, and this may well lengthen the identification process. Many victims, however, are illegally present in the country where they are being exploited. Paragraph 2 seeks to avoid their being immediately removed from the country before they can be identified as victims. Chapter III of the Convention secures various rights to people who are victims of trafficking in human beings. Those rights would be purely theoretical and illusory if such people were removed from the country before identification as victims was possible.

132. The Convention does not require absolute certainty – by definition impossible before the identification process has been completed – for not removing the person concerned from the Party's territory. Under the Convention, if there are "reasonable" grounds for believing someone to be a victim, then that is sufficient reason not to remove them until completion of the identification process establishes conclusively whether or not they are victims of trafficking.

133. The words "removed from its territory" refer both to removal to the country of origin and removal to a third country.

134. The identification process provided for in Article 10 is independent of any criminal proceedings against those responsible for the trafficking. A criminal conviction is therefore unnecessary for either starting or completing the identification process.

135. Even though the identification process may be speedier than criminal proceedings (if any), victims will still need assistance even before they have been identified as such. For that reason the Convention provides that if the authorities "have reasonable grounds to believe" that someone has been a victim of trafficking, then they should have the benefit, during the identification process, of the assistance measures provided for in Article 10, paragraphs 1 and 2.

136. The point of paragraph 3 is that, while children need special protection measures, it is sometimes difficult to determine whether someone is over or under 18. Paragraph 3 consequently requires Parties to presume that a victim is a child if there are reasons for believing that to be so and if there is uncertainty about their age. Until their age is verified, they must be given special protection measures, in accordance with their rights as defined, in particular, in the *United Nations Convention on the Rights of the Child*.

137. Paragraph 4 provides for measures which must be taken by the Parties when they deal with cases of child victims of trafficking who are unaccompanied children. Hence, Parties must provide for the representation of the child by a legal guardian, organisation or authority which is responsible to act in the best interests of that child (a); take the necessary steps to establish his/her identity and nationality (b); and make every effort to locate his/her family when this is in the best interests of the child (c). The family of the child should be found only when this is in the best interests of the child given that sometimes that is his/her family who is at the source of his/her trafficking.

#### **Article 11 – Protection of private life**

138. Article 11 protects trafficking victims' private life. Protection is essential for victims' physical safety, given the danger from their traffickers, but also (on account of the feelings of shame and the stigmatisation risk that attach to the trafficking, both for the victim and the family) to preserve their chances of social reintegration in the country of origin or the receiving country.

139. The first sentence of paragraph 1 states the objective of the article as a whole: to protect victims' private life and identity. The remainder of Article 11 lays down specific measures for achieving that objective. It should be noted that this question is also dealt with in Article 30 of the Convention, which is concerned with protection of victims' private life and identity in the specific context of judicial proceedings.

140. Paragraph 1 also refers to the question of personal data regarding victims of trafficking. Because of the possible dangers to a victim if data concerning them were to circulate without any safeguards or checks, the Convention requires that such data be processed and stored in the manner prescribed in the *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (ETS No.108).

141. Convention No.108 provides, in particular, that personal data are to be stored only for specified lawful purposes and are not to be used in any way incompatible with those purposes. It also provides that such data are not to be stored in any form allowing identification of the data subject or for any longer than is necessary for the purposes for which the data are recorded and stored. Convention No.108 likewise makes it compulsory to take appropriate security measures preventing unauthorised access to and alteration or disclosure of data. It should be noted that under Article 11, paragraph 1, Parties must comply, as regards personal data of trafficking victims, with the requirements laid down in Convention No.108 regardless of whether they have ratified it.

142. Paragraph 2 provides for special protection measures regarding children as it would be particularly harmful for their identity to be disclosed in the media or by other means. This provision likewise applies to "details enabling [...] identification" in that, without actually mentioning a child victim's name, the media may sometimes reveal details – such as where they are staying or, possibly, working – that might allow them to be identified.

143. The Parties are free to decide what measures to take to prevent the identity, or details allowing identification, of child trafficking victims from being made publicly known. For that purpose the law of some countries lays down criminal penalties for making publicly known any information that might reveal the identity of victims of some offences.

144. Paragraph 2 nonetheless allows information to be released about child victims' identity where exceptional circumstances justify doing so in order to trace relatives or otherwise secure the well-being and protection of the child.

145. Finally, paragraph 3 exhorts Parties to adopt measures encouraging the media to protect victims' private life and identity. To avoid undue interference with media freedom of expression, it states that such measures must accord with Article 10 ECHR and must be for the specific purpose of protecting victims' private life and identity. "Self-regulation" is regulation by the private sector, "co-regulation" is regulation in the context of a partnership between the private sector and public authorities, and "regulation" applies to standards laid down by the public authorities independently.

## **Article 12 – Assistance to victims**

146. Victims who break free of their traffickers' control generally find themselves in a position of great insecurity and vulnerability. Article 12, paragraph 1, sets out the assistance measures which Parties must provide for trafficking victims. It must be pointed out that Article 12 applies to all victims, whether victims of national or transnational trafficking. It applies to victims that have not been granted residence permit, under the conditions established in Articles 10, paragraph 2, and 13, paragraph 2.

147. The persons who must receive assistance measures are all those who have been identified as victims after completion of the Article 10 identification process. Such persons are entitled to all the assistance measures set out in Article 12. During the actual identification process, in the case of someone whom the authorities have "reasonable grounds to believe"



to be a victim, that person is entitled solely to the measures in Article 12, paragraphs 1 and 2, and not to all the Article 12 measures. During the recovery and reflection period (Article 13) such a person is likewise entitled to the measures in Article 12, paragraphs 1 and 2.

148. Paragraph 1 provides that the measures concerned have to be taken by “each Party”. This does not mean that all Parties to the Convention must provide assistance measures to each and every victim but that the Party in whose territory the victim is located must ensure that the assistance measures specified in sub-paragraphs a. to f. are provided to him or her. When the victim leaves that Party’s territory the measures referred to in Article 12 no longer apply as Parties are responsible only for persons within their jurisdiction.

149. Under paragraph 5 the assistance can be provided in cooperation with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance. It is nevertheless the Parties that remain responsible for meeting the obligations in the Convention. Consequently, it is they who have to take the steps necessary to ensure that victims receive the assistance they are entitled to, in particular by making sure that reception, protection and assistance services are funded adequately and in time.

150. The aim of the assistance provided for in sub-paragraphs a. to f. is to “assist victims in their physical, psychological and social recovery”. The authorities must therefore make arrangements for those assistance measures while bearing in mind the specific nature of that aim.

151. Although there was no legal necessity to do so, as it is always open to Parties to adopt measures more favourable than those provided for in any part of the Convention, the drafters wished to make it clear that the assistance measures referred to are minimum ones. Parties are thus free to grant additional assistance measures.

152. Under paragraph a. victims are to be secured “standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance”. The obligation on Parties is to provide victims with standards of living capable of ensuring their subsistence, but the drafters considered it necessary to refer, as an example, to appropriate and secure accommodation and to psychological and material assistance as being particularly relevant to assisting victims of trafficking.

153. It should be noted that even though Article 31 of the *revised European Social Charter* (ETS No. 163) recognises everyone’s right to housing, the special features of the situation in which victims find themselves often calls for particular measures to assist them in their psychological and social recovery. Paragraph a. accordingly specifies that accommodation must be “appropriate and secure” as victims need adapted and protected accommodation in which they can feel safe from the traffickers.

154. The type of appropriate accommodation depends on the victim’s personal circumstances (for instance, they may be living in the streets or already have accommodation, and in the latter case it will be necessary to make sure that the accommodation is appropriate and does not present any security problems). Where trafficking in human beings is concerned, special protected shelters are especially suitable and have already been introduced in various countries. Such refuges, staffed by people qualified to deal with questions of assistance to trafficking victims, provide round-the-clock victim reception services and are able to respond to emergencies. The purpose of such shelters is to provide victims with surroundings in which they feel secure and to provide them with help and stability. As a guarantee of victims’ security it is very important to take precautions such as keeping their address secret and having strict rules on visits from outsiders, since, to begin with, there is the danger that traffickers will try to regain control of the victim. The protection and help which the refuges provide is aimed at enabling victims to take charge of their own lives again.

155. In the case of children, the accommodation has to be appropriate in terms of their specific needs. Child victims of trafficking are sometimes placed in detention institutions. In some cases this happens because of a shortage of places in specialist child-welfare institutions. Placement of a child in a detention institution should never be regarded as appropriate accommodation.

156. Psychological assistance is needed to help the victim overcome the trauma they have been through and get back to reintegration into society. The Convention provides for material assistance because many victims, once out of the traffickers' hands, are totally without material resources. The material assistance provided for in sub-paragraph a. is intended to give them the means of subsistence. Material assistance is distinguished from financial aid in that it may take the form of aid in kind (for example, food and clothing) and is not necessarily in the form of money.

157. Sub-paragraph b. provides for emergency medical treatment to be available to victims. Article 13 of the *revised European Social Charter* (ETS No.163) also recognises the right of any person who is without adequate resources to social and medical assistance. Medical assistance is often necessary for victims of trafficking who have been exploited or have suffered violence. The assistance may also allow evidence to be kept of the violence so that, if they wish, the victims can take legal action. Full medical assistance is only for victims lawfully resident in the Party's territory under Article 12, paragraph 3.

158. Under sub-paragraph c. language aid is to be provided to victims when appropriate, for many victims do not speak, or barely speak, the language of the country they have been brought to for exploitation. Ignorance of the language adds to their isolation and is one of the factors preventing them from claiming their rights. In such cases language aid is needed to help them with formalities. This is an essential measure for guaranteeing access to rights, which is a prerequisite for access to justice. The provision is not limited to the right to an interpreter in judicial proceedings.

159. Sub-paragraphs d. and e. deal more specifically with assistance to victims in the form of supply of information: two common features of victims' situation are helplessness and submissiveness to the traffickers due to fear and lack of information about how to escape their situation.

160. Sub-paragraph d. provides that victims are to be given counselling and information, in particular as regards their legal rights and the services available to them, in a language that they understand. The information deals with matters such as availability of protection and assistance arrangements, the various options open to the victim, the risks they run, the requirements for legalising their presence in the Party's territory, the various possible forms of legal redress, how the criminal-law system operates (including the consequences of an investigation or trial, the length of a trial, witnesses' duties, the possibilities of obtaining compensation from persons found guilty of offences or from other persons or entities, and the chances of a judgment being properly enforced). The information and counselling should enable victims to evaluate their situation and make an informed choice from the various possibilities open to them.

161. Such advice and information, even though it has to do "in particular [with] their legal rights", is to be distinguished from free legal aid by an appointed lawyer in compensation proceedings, which is dealt with specifically in Article 15, paragraph 2.

162. Sub-paragraph e. deals with general assistance to victims to ensure that their interests are taken into account in criminal proceedings. Article 15, paragraph 2, deals more specifically with the right to a defence counsel.

163. Sub-paragraph f. recognises the right to access to education for children.

164. Under Article 12, paragraph 2, each Party must take due account of victims' safety and protection needs. Victims' needs can vary widely depending on their personal circumstances. They may arise from matters such as age or gender, or from circumstances such as the type of exploitation the victim has undergone, the country of origin, the types and degree of violence suffered, isolation from his or her family and culture, knowledge of the local language, and his or her material and financial resources. It is therefore essential to provide measures that take victims' safety fully into account. For example, the address of any accommodation needs to be kept secret and the accommodation must be protected from any attempts by traffickers to recapture the victims.

165. Under paragraph 3 each Party is required to provide the necessary medical or other assistance to victims lawfully resident in its territory who do not have adequate resources and need the assistance. Lawfully resident victims are, in particular, nationals and persons with the residence permit referred to in Article 14. In addition Article 13 of the *revised European Social Charter* (ETS No.163) – under which any person who is without resources and who is unable to secure such resources either by his or her own efforts or from other sources is to be granted adequate assistance, and, in case of sickness, the care necessitated by his or her condition – applies to nationals and to persons lawfully present on national territory. This medical assistance is not just a question of availability of emergency medical care, as provided for in paragraph 1(b). For example, the medical assistance might be assistance to a victim during pregnancy or with HIV/AIDS.

166. Paragraph 4 provides that each Party is to adopt the rules under which victims lawfully resident in the Party's territory are allowed access to the labour market, to vocational training and to education. In the drafters' view these measures are desirable for helping victims reintegrate socially and more particularly take greater charge of their lives. However, the Convention does not establish an actual right of access to the labour market, vocational training and education. It is for the Parties to decide the conditions governing access. As in paragraph 3, the words "lawfully resident" refer, for instance, to victims who have a residence permit referred to in Article 14 or who have the Party's nationality. The authorisation referred to need not involve issuing an administrative document to the person concerned that allows them to work.

167. As already stated, NGOs often have a crucial role in victim assistance. For that reason paragraph 5 specifies that each Party is to take measures, where appropriate and under the conditions provided for by national law, to cooperate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in victim assistance.

168. The drafters wish to make it clear that under Article 12, paragraph 6, of the Convention, assistance is not conditional upon a victim's agreement to cooperate with competent authorities in investigations and criminal proceedings.

169. Some Parties may decide – as allowed by Article 14 – to grant residence permits only to victims who cooperate with the authorities. Nevertheless, paragraph 6 of Article 12 provides that each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

170. It should also be noted that, in the law of many countries, it is compulsory to give evidence if requested to do so. Paragraph 6 is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. Thus no one may rely on paragraph 6 in refusing to act as a witness when they are legally required to do so.

171. Paragraph 7 indicates that the services provided to victims should be carried out on an informed and consensual basis. It is indeed essential that victims agree to the services provided to them. Thus, for instance, victims must be able to agree to the detection of illness such as HIV/AIDS for them to be licit. In addition, the services provided must take into account the specific needs of persons in a vulnerable position and the rights of children concerning accommodation, education and health.

### **Article 13 – Recovery and reflection period**

172. Article 13 is intended to apply to victims of trafficking in human beings who are illegally present in a Party's territory or who are legally resident with a short-term residence permit. Such victims, when identified, are, as other victims of trafficking, extremely vulnerable after all the trauma they have experienced. In addition, they are likely to be removed from the territory.

173. Article 13, paragraph 1, accordingly introduces a recovery and reflection period for illegally present victims during which they are not to be removed from the Party's territory. The Convention contains a provision requiring Parties to provide in their internal law for this period to last at least 30 days. This minimum period constitutes an important guarantee for victims and serves a number of purposes. One of the purposes of this period is to allow victims to recover and escape the influence of traffickers. Victims recovery implies, for example, healing of the wounds and recovery from the physical assault which they have suffered. That also implies that they have recovered a minimum of psychological stability. Paragraph 3 of Article 13 allows Parties not to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly. This provision aims to guarantee that victims' status will not be illegitimately used.

174. The other purpose of this period is to allow victims to come to a decision "on co-operating with the competent authorities". By this is meant that victims must decide whether they will cooperate with the law-enforcement authorities in a prosecution of the traffickers. From that standpoint, the period is likely to make the victim a better witness: statements from victims wishing to give evidence to the authorities may well be unreliable if they are still in a state of shock from their ordeal. "Informed decision" means that the victim must be in a reasonably calm frame of mind and know about the protection and assistance measures available and the possible judicial proceedings against the traffickers. Such a decision requires that the victim no longer be under the traffickers' influence.

175. The reflection and recovery period provided for in Article 13, paragraph 1, should not be confused with the issue of the residence permit under Article 14, paragraph 1. Its purpose being to enable victims to recover and escape the influence of traffickers and/or to take an informed decision on co-operating with the competent authorities, the period, in itself, is not conditional on their co-operating with the investigative or prosecution authorities.

176. The decision to cooperate or to not cooperate with the competent authorities does not exclude the obligation to testify when it is required by a judge. Someone who is legally required to do so therefore cannot use Article 13, paragraph 1, as a basis for refusing to testify. For that reason, Article 13, paragraph 1, specifies that it is "without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned".

177. The Convention specifies that the length of the recovery and reflection period must be at least 30 days. The length of this recovery and reflection period has to be of at least 30 days and has to be compatible with the purpose of Article 13. At present countries which have a period of that kind in their domestic law have lengths of one month, 45 days, two months, three months or unspecified. A three-month period was referred to in the declaration of the 3rd Regional Ministerial Forum of the Stability Pact for South-Eastern Europe (Tirana, 11 December 2002). The Group of Experts on trafficking in human beings which the European Commission set up by decision of 25 March 2003 recommended, in an opinion of 16 April 2004, a period of at least 3 months.

178. The words “it shall not be possible to enforce any expulsion order against him or her” mean that the victim must not be removed from the Party’s territory during the recovery and reflection period. Although free to choose what method to employ, Parties are required to create a legal framework allowing the victim to remain on their territory for the duration of the period. To meet this end, in accordance with national legislation, each Party shall provide victims, without delay, with the relevant documents authorising them to remain on its territory during the recovery and reflection period.

179. To help victims to recover and stay free of the traffickers for that period, it is essential to provide appropriate assistance and protection. Article 13, paragraph 2, consequently provides that victims are entitled to the measures contained in Article 12, paragraphs 1 and 2.

#### **Article 14 – Residence permit**

180. Article 14, paragraph 1, provides that victims of trafficking in human beings shall be issued with renewable residence permits. Provision for a residence permit meets both victims’ needs and the requirements of combating the traffic.

181. Immediate return of the victims to their countries is unsatisfactory both for the victims and for the law-enforcement authorities endeavouring to combat the traffic. For the victims this means having to start again from scratch – a failure that, in most cases, they will keep quiet about, with the result that nothing will be done to prevent other victims from falling into the same trap. A further factor is fear of reprisals by the traffickers, either against the victims themselves or against family or friends in the country of origin. For the law-enforcement authorities, if the victims continue to live clandestinely in the country or are removed immediately they cannot give information for effectively combating the traffic. The greater victims’ confidence that their rights and interests are protected, the better the information they will give. Availability of residence permits is a measure calculated to encourage them to cooperate.

182. The two requirements laid down in Article 14, paragraph 1, for issue of a residence permit are that either the victim’s stay be “necessary owing to their personal situation” or that it be necessary “for the purpose of their cooperation with the competent authorities in investigation or criminal proceedings”. The aim of these requirements is to allow Parties to choose between granting a residence permit in exchange for cooperation with the law-enforcement authorities and granting a residence permit on account of the victim’s needs, or indeed to adopt both simultaneously.

183. Thus, for the victim to be granted a residence permit, and depending on the approach the Party adopts, either the victim’s personal circumstances must be such that it would be unreasonable to compel them to leave the national territory, or there has to be an investigation or prosecution with the victim co-operating with the authorities. Parties likewise have the possibility of issuing residence permits in both situations.

184. The personal situation requirement takes in a range of situations, depending on whether it is the victim’s safety, state of health, family situation or some other factor which has to be taken into account.

185. The requirement of the cooperation with the competent authorities has been introduced in order to take into account that victims are deterred from contacting the national authorities by fear of being immediately sent back to their country of origin as illegal entrants to the country of exploitation.

186. In the case of children, the child's best interests take precedence over the above two requirements: the Convention provides that residence permits for child victims are to be "issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions" (Article 14, paragraph 2). The words "when legally necessary" have been introduced in order to take into account the fact that certain States do not require for children a residence permit.

187. The Convention leaves the length of the residence permit to the Parties' discretion, though the Parties must set a length compatible with the provision's purpose. By way of example, the *EU 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* sets a minimum period of 6 months.

188. Even though the Convention does not specify any length of residence permit it does provide that the permit has to be renewable. Paragraph 3 provides that the non-renewal or the withdrawal of a residence permit are subject to the conditions provided for in the internal law of the Party.

189. The object of Article 14, paragraph 4, is to ensure that a Party granting, under paragraph 1, a residence permit takes that into account when the victim requests another kind of residence permit. Where a victim applies for another kind of residence permit, paragraph 2 encourages Parties to have regard to the applicant's having been a victim of trafficking in human beings. However, it does not place any obligation on the Parties to grant another kind of residence permit to persons who have received a residence permit under paragraph 1.

190. Paragraph 5 is a particular application of the principle provided for in Article 40, paragraph 4, of the Convention.

#### **Article 15 – Compensation and legal redress**

191. The purpose of this article is to ensure that victims of trafficking in human beings are compensated for damage suffered. It comprises four paragraphs. The first is concerned with information to victims. The second deals with victims' right to legal assistance. The third establishes victims' right to compensation and the fourth is concerned with guarantees of compensation.

192. People cannot claim their rights if they do not know about them. Paragraph 1 therefore requires Parties to ensure that, as from their first contact with the competent authorities, victims have access to information on relevant court and administrative proceedings in a language which they can understand. It is of paramount importance that they be told about any procedures they can use to obtain compensation for damage suffered. It is also essential that victims who are illegally present in the country be informed of their rights as regards the possibility of obtaining a residence permit under Article 14 of the Convention, as it would be very difficult for them to obtain compensation if they were unable to remain in the country where the proceedings take place.

193. Reference is made to "court and administrative proceedings" so as to take into account the diversity of national systems. For example, compensation of victims can be a matter for the courts (whether civil or criminal) or sometimes for administrative authorities with special responsibility for compensating victims of offences. In the case of illegally present victims eligible for a residence permit under Article 14, information about the procedure for obtaining the permit is likewise essential. Traditionally, granting residence permits is an administrative matter but there may also be judicial review by means of an appeal to the courts. It is important that victims be informed of all relevant procedures.

194. Victims must be informed of relevant procedure as from their first contact with the competent authorities. By “competent authorities” is meant the wide range of public authorities with which victims may have their first contact with officialdom, such as the police, the prosecutor’s office, the labour inspectorate, or the customs or immigration services. It does not have to be these services which supply the relevant information to victims. However, as soon as a victim is in touch with such services, he or she needs to be directed to persons, services or organisations able to supply the necessary information.

195. Under paragraph 2 each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law. As court and administrative procedure is often very complex, legal assistance is necessary for victims to be able to claim their rights.

196. This provision does not give the victim an automatic right to free legal aid. It is for each Party to decide the requirements for obtaining such aid. Parties must have regard not only to Article 15, paragraph 2, but also to Article 6 of the ECHR. Even though Article 6, paragraph 3.c, of the ECHR provides for free assistance from an officially appointed lawyer only in criminal proceedings, European Court of Human Rights case-law (*Airey v. Ireland* judgment of 9 October 1979) also recognises, in certain circumstances, the right to free legal assistance in a civil matter on the basis of Article 6, paragraph 1, of the ECHR, interpreted as establishing the right to a court for determination of civil rights and obligations (see *Golder v. the United Kingdom*, judgment of 21 February 1975). The Court’s view is that effective access to a court may necessitate free legal assistance. Its position is that it must be ascertained whether appearance before a court without the assistance of a lawyer would be effective in the sense that the person concerned would be able to present his or her case properly and satisfactorily. Here the Court has taken into account the complexity of procedures and the emotional character of a situation – which might be scarcely compatible with the degree of objectivity required by advocacy in court – in deciding whether someone was in a position to present his or her own case effectively. If not, he or she must be given free legal assistance. Thus, even in the absence of legislation granting free legal assistance in civil matters, it is for the courts to assess whether, in the interest of justice, an applicant who is without financial means should be granted legal assistance if unable to afford a lawyer.

197. Paragraph 3 establishes a right of victims to compensation. The compensation is pecuniary and covers both material injury (such as the cost of medical treatment) and non-material damage (the suffering experienced). For the purposes of this paragraph, victims’ right to compensation consists in a claim against the perpetrators of the trafficking – it is the traffickers who bear the burden of compensating the victims. If, in proceedings against traffickers, the criminal courts are not empowered to determine civil liability towards the victims, it must be possible for the victims to submit their claims to civil courts with jurisdiction in the matter and powers to award damages with interest.

198. However, even though it is the trafficker who is liable to compensate the victim, by order of a civil court or – in some countries – a criminal court, or under a judicial or extrajudicial transaction between the victim and the trafficker, in practice there is rarely full compensation whether because the trafficker has not been found, has disappeared or has declared himself bankrupt. Paragraph 4 therefore requires that Parties take steps to guarantee compensation of victims. The means of guaranteeing compensation are left to the Parties, which are responsible for establishing the legal basis of compensation, the administrative framework and the operational arrangements for compensation schemes. In this connection, paragraph 4 suggests setting up a compensation fund or introducing measures or programmes for social assistance to and social integration of victims that could be funded by assets of criminal origin.

199. In deciding the compensation arrangements, Parties may use as a model the principles contained in the *European Convention on the Compensation of Victims of Violent Crimes* (ETS No. 116), which is concerned with European-level harmonisation of the guiding principles on compensating victims of violent crime and with giving them binding force. European Union member States must also have regard to the *Council Directive of 29 April 2004 on compensation of crime victims*.

#### **Article 16 – Repatriation and return of victims**

200. Article 16 is partly inspired by Article 8 of the Palermo Protocol. It regards at the same time voluntary return as well as non-voluntary return of victims of trafficking in human beings, though the drafters have specified that this return shall preferably be voluntary.

201. Paragraph 1 of Article 16 places an obligation on the Party which a victim is a national of or in which the person had the right of permanent residence to facilitate and accept the return of the victim without undue or unreasonable delay. In this context it should be recalled Article 13, paragraph 2, of the *Universal declaration of human rights* which provides for the right to return in its country, as well as article 3, paragraph 2, of Protocol No. 4 to the *Convention for the Protection of Human Rights and Fundamental Freedoms* which provides that “no one shall be deprived of the right to enter the territory of the State of which he is a national”. Article 12, paragraph 4, of the *International Covenant on Civil and Political Rights* also provides that “no one shall be arbitrarily deprived of the right to enter his own country”, which includes the right to return for persons who, without being nationals of that country, had established their residence.

202. The return of a victim of trafficking is not always without any risk. Therefore, the drafters wished to precise in the text of the convention that the return of a victim “shall be with due regard for the rights, safety and dignity of that person”. This applies to the Party which facilitates and accepts the return of the victim as well as, according to paragraph 2, to the Party which returns a victim to another State. Such rights include, in particular, the right not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of his/her identity. The return of a victim shall also take into account the status of any legal proceedings related to the fact that the person is a victim, in order not to affect the rights that the victim could exercise in the course of the proceedings as well as the proceedings themselves.

203. The drafters considered that in this respect it was important to have in mind the jurisprudence of the European Court of Human Rights regarding article 3. Hence, in the case *Soering v United Kingdom* (7 July 1989, Series A No. 161), in the context of extradition, the Court found that “such a decision may give rise to an issue under Article 3 and hence engage the responsibility of that State under the convention, where substantial grounds have been shown for believing that the person concerned, if extradited, faces a real risk of being subjected to torture or to inhuman or degrading treatment or punishment”. In the case *Cruz Varaz and Others v. Sweden* (20 March 1991, Series A, No. 201) the Court has decided that this principles apply also to deportation. In the case *D.v United Kingdom* (2 May 1997, Reports of Judgments and Decisions, 1997-III), it stated that the responsibility of States Parties is also engaged when the alleged ill treatments did not follow directly or indirectly from public authorities of the destination country.

204. Paragraphs 3 and 4 of this article deal with specific measures of international cooperation among the receiving Party and the Party of which the person is a national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party. Hence, upon the request of the latter, the requested Party has an obligation of diligence to facilitate the return of the victim, by conducting checks in order to identify if the victim is one of its nationals or if the victim had the right of permanent residence on its territory, as well as, if these checks are positive, and if the victim no longer has the necessary documents, to deliver the travel documents or other authorisation as may be necessary to enable the victim to travel to and re-enter its territory.



205. Paragraph 5 obliges each Party to establish repatriation programmes by the adoption of legislative or other measures, aiming at avoiding re-victimisation. This provision is addressed to each Party, which is responsible for putting in place the measures provided for. At the same time, each Party should make its best efforts to favour the social reintegration of the victims. Regarding children, these programmes have to take into account their right to education and to establish measures in order to secure adequate care or receipt by the family or appropriate care structure.

206. Paragraph 6 provides that each Party shall adopt such legislative or other measures as may be necessary in order to make available to victims information on the services and organisations which could assist them upon their return. The list of these services is formulated in an exemplifying manner as they may vary according to each Party.

207. Paragraph 7 of Article 16 includes in the context of repatriation and return the principle embodied in Article 3 of the United Nations *Convention on the Rights of the Child*. When the authorities take a decision regarding the repatriation of a child victim, the best interests of the child must be the primary consideration. According to this provision, the authorities must undertake an assessment of the risks which could be generated by the return of the child to a State as well as on its security, before implementing any repatriation measure.

### **Article 17 – Gender equality**

208. Trafficking in human beings, when it is carried out for the purposes of sexual exploitation, mainly concerns women, although women can be trafficked for other purposes. In this respect it should be recalled that to put an end to what was commonly known as "white slaving", two international conferences were held in Paris in 1902 and 1910. This work culminated in the signing of the *International Convention for the Suppression of the White Slave Traffic* (Paris, 4 May 1910), later supplemented by the *International Convention for the Suppression of the Traffic in Women and Children* (30 September 1921) and the *International Convention for the Suppression of the Traffic in Women of Full Age* (Geneva, 11 October 1933). *The Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others* (New York, 2 December 1949) cancelled and replaced, in parts, the provisions of the earlier international instruments.

209. The development of communications and the economic imbalances in the world have made trafficking in women, mainly for sexual exploitation purposes, more international than ever. There was first the "white slave traffic <sup>(1)</sup>", then trafficking from South to North and now there is trafficking in human beings from the more disadvantaged regions to the more prosperous regions, whatever their geographical location (but in particular to western Europe).

210. The aim of Article 17 is not to avoid any discrimination on the grounds of sex in the enjoyment of measures to protect and promote the rights of victims, which is already contained in Article 3 of the Convention. The main aim of Article 17 is to draw the attention to the fact that women, according to existing data, are the main target group of trafficking in human beings and to the fact that women, who are susceptible to being victims, are often marginalised even before becoming victims of trafficking and find themselves victims of poverty and unemployment more often than men. Therefore, measures to protect and promote the rights of women victims of trafficking must take into account this double marginalisation, as women and as victims. In short, these measures must take into account the social reality to which they apply, mainly that society is composed of women and men and that their needs are not always the same.

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(1) Agreement on the Suppression of the Traffic in Women and Children of 18 May 1904.

211. As mentioned above in relation to Article 1, equality between women and men means not only non-discrimination on grounds of sex but also positive measures to achieve equality between women and men. Equality must be promoted by supporting specific policies for women, who are more likely to be exposed to practices which qualify as torture or inhuman or degrading treatment (physical violence, rape, genital and sexual mutilation, trafficking for the purpose of sexual exploitation). As the Vienna Programme of Action, adopted by the World Conference on Human Rights (Vienna, 14-25 June 1993), and the Declaration on the Elimination of Violence against Women adopted by the General Assembly (December 1993) stated “member States were alarmed that opportunities for women to achieve legal, social, political and economic equality in society are limited, *inter alia*, by continuing and endemic violence against women (...)”.

212. For a long time gender equality in Europe was defined as giving women and men *de jure* equal rights. Nowadays, it is recognised that equality *de jure* does not automatically lead to equality *de facto*. It is true that the legal status of women has improved over the last 30 years in Europe, but effective equality is still far from being reality. Imbalances between women and men continue to influence all walks of life and it is becoming increasingly clear that new approaches, new strategies and new methods are needed to achieve gender equality. Gender mainstreaming is one of these strategies.

213. The Council of Europe *Steering Committee for Equality between Women and Men (CDEG)*, in its 1998 report on “Gender mainstreaming: Conceptual framework, methodology, and presentation of good practices” agreed on the following definition:

*Gender mainstreaming is the (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.*

214. Following the adoption of this report by the CDEG, the Committee of Ministers adopted *Recommendation No. R (98) 14 to member States on gender mainstreaming* inviting them to draw inspiration from the CDEG’s report and implement the strategy at national level. The Committee of Ministers also adopted a “Message to Steering Committees of the Council of Europe on gender mainstreaming”, encouraging them to use this strategy in their programmes of activities.

215. Following these recommendations of the Committee of Ministers, Article 17 indicates that when developing, implementing and assessing measures contained in Chapter III, Parties to the Convention shall apply this strategy of gender mainstreaming which, as mentioned before, is a strategy to reach the goal of gender equality.

#### **Chapter IV – Substantive criminal law**

216. Chapter IV comprises nine articles. Articles 18, 19 and 20 are concerned with making certain acts criminal offences. This kind of harmonisation facilitates action against crime at national and international level, for several reasons. Firstly, harmonisation of countries’ domestic law is a way of avoiding a criminal preference for committing offences in a Party which previously had less strict rules. Secondly, it becomes possible to promote exchange of useful common data and experience. Shared definitions can also assist research and promote comparability of data at national and regional level, thus making it easier to gain an overall picture of crime. Lastly, international cooperation (in particular extradition and mutual legal assistance) is facilitated, for example as regards the rules on dual criminal liability.

217. The offences referred to in these articles represent a minimum consensus which does not preclude adding to them in domestic law.

218. The drafters likewise considered whether to introduce a provision on an offence of laundering the proceeds of trafficking in human beings. Trafficking in human beings is an extremely lucrative criminal activity and they recognised the importance of the question. Article 6 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) requires Parties to make laundering a criminal offence. However, Article 6, paragraph 4, of that Convention allows Parties to restrict the offence to laundering the proceeds of certain underlying offences. As, at the time of drawing up the present convention, a Council of Europe committee of experts was drawing up a protocol to Convention No. 141 requiring that trafficking in human beings be treated as an offence underlying laundering, the drafters decided not to include such a provision in the Convention. They took the view that laundering was better dealt with in a cross-sector legal instrument – one dealing with cooperation in several areas of crime – such as Convention No.141 rather than a specific instrument like the present Convention.

219. It should be noted that, in the case of European Union member States, Article 1 of the *Council Framework Decision on money laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime* provides that member States are to take the necessary steps not to make or uphold reservations in respect of Article 6 of the 1990 convention as far as serious offences are concerned <sup>(1)</sup>.

220. This chapter likewise contains further provisions on criminalisation of acts dealt with in Articles 18 to 20. The provisions deal with attempt and aiding or abetting (Article 21), corporate liability (Article 22), sanctions and measures (Article 23), aggravating circumstances (Article 24) and previous convictions (Article 25).

221. Article 26 deals with criminal non-liability of victims of trafficking.

### **Article 18 – Criminalisation of trafficking in human beings**

222. Article 18 seeks to have trafficking in human beings treated as a criminal offence. The obligation laid down in Article 18 is identical to that in Article 5 of the Palermo Protocol and is very similar to the one in Article 1 of the *Council Framework Decision of 19 July 2002 on combating trafficking in human beings*.

223. Under Article 18, Parties are required to criminalise trafficking in human beings as defined in Article 4, whether by means of a single criminal offence or by combining several offences covering, as a minimum, all conduct capable of falling within the definition. It is thus necessary to use the definition in Article 4 in order to determine the ingredients of the offence or offences which Article 18 of the Convention requires Parties to establish.

224. As explained above, trafficking in human beings is a combination of ingredients that has to be made a criminal offence, and not the ingredients taken in isolation. Thus, for example, the Convention does not create any obligation to criminalise the following when taken individually: *abduction, deception, threats, forced labour, slavery or exploitation of the prostitution of others*.

225. In accordance with the definition, the offence laid down in Article 18 is constituted at an early stage: a person does not have to have been exploited for there to be trafficking in human beings. It is sufficient that they have been subjected to one of the acts in the definition by one of the means in the definition for the purpose of exploitation. There is thus trafficking of human beings before any actual exploitation of the individual.

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(1) Such offences in any event include offences which are punishable by deprivation of liberty or a detention order for a maximum of more than one year or, as regards States which have a minimum threshold for offences in their legal system, offences punishable by deprivation of liberty or a detention order for a minimum of more than six months.

226. Under Article 4(b), where there is the threat or use of force or other forms of coercion or where there is abduction, fraud, deception, abuse of power or of a position of vulnerability, or giving or receiving of payments or benefits to achieve the consent of a person having control over another person, the consent of the victim does not alter the offenders' criminal liability.

227. Under Article 4(c) and (d), none of these means is necessary to the offence if a person aged under 18 is involved as a victim. Consequently, to prove trafficking in human beings the prosecuting authorities need establish only that there has been an act such as recruitment or transportation of a child for the purpose of exploitation.

228. The offence has to be committed intentionally for there to be criminal liability. The interpretation of the word "intentionally" is left to domestic law. It is nonetheless necessary to bear in mind that Article 4(a) provides for a specific element of intention in that the types of conduct listed in it are engaged in "for the purpose of exploitation". For the purposes of the Convention, therefore, there is trafficking in human beings only when that specific intention is present.

### **Article 19 – Criminalisation of the use of services of a victim**

229. Under this provision, Parties must consider making it a criminal offence to knowingly use the services of a victim of trafficking.

230. Several considerations prompted the drafters to include this provision in the Convention. The main one was the desire to discourage the demand for exploitable people that drives trafficking in human beings.

231. The provision targets the client whether of a victim of trafficking for sexual exploitation or of a victim of forced labour or services, slavery or practices similar to slavery, servitude or organ removal.

232. It could, for example, be made a criminal offence, under this provision, for the owner of a business to knowingly use trafficked workers made available by the trafficker. In such a case the business owner could not be treated as criminally liable under Article 18 – not having him/herself recruited the victims of the trafficking (the culprit is the trafficker) and not having him/herself used any of the means referred to in the definition of trafficking – but would be guilty of a criminal offence under Article 19. The client of a prostitute who knew full well that the prostitute had been trafficked could likewise be treated as having committed a criminal offence under Article 19, as could someone who knowingly used a trafficker's services to obtain an organ.

233. An important point is that Article 19 targets use of the services which are the subject of the exploitation dealt with in Article 4(a). Article 19 is intended not to prevent victims of trafficking from carrying on an occupation or hinder their social rehabilitation but to punish those, who by buying the services exploited, play a part in exploiting the victim. Similarly, the provision is not concerned with using the services of a prostitute as such. That comes under Article 19 only if the prostitute is exploited in connection with trafficking of human beings – that is, when the components of the Article 4 definition are present together. As explained above, the Convention is concerned with exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in human beings. It defines neither "exploitation of the prostitution of others" nor "other forms of sexual exploitation". It therefore does not affect the way in which Parties deal with prostitution in their domestic law.

234. To be liable for punishment under Article 19, a person using the services of a trafficking victim must do so "in the knowledge that the person is a victim of trafficking in human beings". In other words the user must be aware that the person is a trafficking victim and cannot be penalised if unaware of it. Proving knowledge may be a difficult matter for the prosecution authorities. A similar difficulty arises with various other types of criminal law provision requiring evidence of some non-material ingredient of an offence. However, the difficulty of

finding evidence is not necessarily a conclusive argument for not treating a given type of conduct as a criminal offence.

235. The evidence problem is sometimes overcome – without injury to the principle of presumption of innocence – by inferring the perpetrator's intention from the factual circumstances. That approach has been expressly recommended in other international conventions. For instance, Article 6, paragraph 2.c, of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) states that “knowledge, intent or purpose required as an element of an offence set forth in that paragraph may be inferred from objective, factual circumstances”. Similarly, Article 6, paragraph 2.f, on criminalising the laundering of the proceeds of crime, of the *United Nations Convention against Transnational Organized Crime* states: “Knowledge, intent or purpose required as an element of an offence set forth in paragraph 1 of this article may be inferred from objective, factual circumstances”.

236. Aware of the value of a measure such as the one provided for in Article 19, while also acknowledging the problems of collecting evidence, it was considered that this provision should encourage Parties to adopt the measure, without making it a binding provision.

### **Article 20 – Criminalisation of acts relating to travel or identity documents**

237. The purpose of Article 20 is to treat certain acts in relation to travel or identity documents as criminal offences when committed to allow trafficking of human beings. Such documents are important tools of transnational trafficking. False documents are often used to traffic victims through countries and into the countries where they will be exploited. Consequently, identifying the channels through which false documents pass may bring to light criminal networks engaged in trafficking in human beings.

238. Article 20(a) and (b) is modelled on Article 6, paragraph 1, of the *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime*. The two sub-paragraphs deal with making a fraudulent travel or identity document and procuring or providing such a document. However – unlike Article 6, paragraph 1.b.ii, of the UN protocol, the Convention is not concerned with possession of a fraudulent document.

239. The travel or identity documents with which Article 20 deals are official documents such as identity cards or passports. Article 3(c) of the *Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime* defines “fraudulent travel or identity document” as: “... any travel or identity document:

- (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorised to make or issue the travel or identity document on behalf of a State; or
- (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or
- (iii) That is being used by a person other than the rightful holder”.

240. Clearly, victims of trafficking in human beings may be given false documents by their traffickers. Like the Protocol against the Smuggling of Migrants by Land, Air and Sea (Article 5) the Convention does not make persons liable to prosecution for having been subjected to the types of conduct it deals with.

241. Article 20(c) takes into account that traffickers very often take trafficking victims' travel and identity papers from them as a way of exerting pressure on them. The drafters felt that this could usefully be made a criminal offence in that it was relatively simple to prove and could thus be an effective law-enforcement tool against traffickers.

242. Sub-paragraph c. – unlike sub-paragraphs a. and b. – does not refer to fraudulent documents. The reason for this is that the law of some countries gives no particular protection to fraudulent travel and identity documents, so that taking or destroying them is not an offence. Some CAHTEH members took the view, however, that, in terms of pressure on and intimidation of the victim, the effect was exactly the same whether the documents taken from them were authentic or fraudulent. The drafters accordingly decided to delete the reference to fraudulence of documents so as to leave Parties free to decide whether to make it a criminal offence to retain, remove, conceal, damage or destroy a fraudulent travel or identity document.

### **Article 21 – Attempt and aiding or abetting**

243. The purpose of this article is to establish additional offences relating to attempted commission of certain offences defined in the Convention and aiding or abetting commission of some.

244. Paragraph 1 requires Parties to establish as criminal offences aiding or abetting the commission of any of the offences under Articles 18 and 20 of the Convention. Liability arises for aiding or abetting where the person who commits a crime established in the Convention is aided by another person who also intends the crime to be committed. Treating the offence established by Article 19 (using a victim's services) as a form of aiding and abetting was ruled out as conceptually impossible.

245. With regard to paragraph 2, on attempt, it was likewise felt that treating the Article 19 offence as attempt gave rise to conceptual difficulties. Attempted commission of some of the acts dealt with in Article 20 was likewise considered to be too tenuous to be made an offence. Moreover, some legal systems limit the offences for which attempt is punishable. Consequently, Parties are required to make attempt an offence only in connection with the offences established in Articles 18 and 20(a).

246. As with all the offences established under the Convention, attempt and aiding or abetting must be intentional.

### **Article 22 – Corporate liability**

247. Article 22 is consistent with the current legal trend towards recognising corporate liability. The intention is to make commercial companies, associations and similar legal entities ("legal persons") liable for criminal actions performed on their behalf by anyone in a leading position in them. Article 22 also contemplates liability where someone in a leading position fails to supervise or check on an employee or agent of the entity, thus enabling them to commit any of the offences established in the Convention.

248. Under paragraph 1, four conditions need to be met for liability to attach. First, one of the offences described in the Convention must have been committed. Second, the offence must have been committed for the entity's benefit. Third, a person in a leading position must have committed the offence (including aiding and abetting). The term "person who has a leading position" refers to someone who is organisationally senior, such as a director. Fourth, the person in a leading position must have acted on the basis of one of his or her powers (whether to represent the entity or take decisions or perform supervision), demonstrating that that person acted under his or her authority to incur liability of the entity. In short, paragraph 1 requires Parties to be able to impose liability on legal entities solely for offences committed by such persons in leading positions.

249. In addition, paragraph 2 requires Parties to be able to impose liability on a legal entity (“legal person”) where the crime is committed not by the leading person described in paragraph 1 but by another person acting on the entity’s authority, i.e. one of its employees or agents acting within their powers. The conditions that must be fulfilled before liability can attach are: 1) the offence was committed by an employee or agent of the legal entity; 2) the offence was committed for the entity’s benefit; and 3) commission of the offence was made possible by the leading person’s failure to supervise the employee or agent. In this context failure to supervise should be interpreted to include not taking appropriate and reasonable steps to prevent employees or agents from engaging in criminal activities on the entity’s behalf. Such appropriate and reasonable steps could be determined by various factors, such as the type of business, its size, and the rules and good practices in force.

250. Liability under this article may be criminal, civil or administrative. It is open to each Party to provide, according to its legal principles, for any or all of these forms of liability as long as the requirements of Article 23, paragraph 2, are met, namely that the sanction on measure be “effective, proportionate and dissuasive” and include monetary sanctions.

251. Paragraph 4 makes it clear that corporate liability does not exclude individual liability. In a particular case there may be liability at several levels simultaneously – for example, liability of one of the legal entity’s organs, liability of the legal entity as a whole and individual liability in connection with one or the other.

#### **Article 23 – Sanctions and measures**

252. This article is closely linked to Articles 18 to 21, which define the various offences that should be made punishable under criminal law. In accordance with the obligations imposed by those articles, Article 23 requires Parties to match their action to the seriousness of the offences and lay down criminal penalties which are “effective, proportionate and dissuasive”. In the case of an individual (“natural person”) committing the offence established in accordance with Article 18, Parties must provide for prison sentences that can give rise to extradition. It should be noted that, under Article 2 of the *European Convention on Extradition* (ETS No. 24), extradition is to be granted in respect of offences punishable under the laws of the requesting and requested Parties by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty.

253. Legal entities whose liability is to be established under Article 22 are also to be liable to sanctions that are “effective, proportionate and dissuasive”, which may be criminal, administrative or civil in character. Paragraph 2 requires Parties to provide for the possibility of imposing monetary sanctions on legal persons.

254. Paragraph 3 places a general obligation on Parties to adopt appropriate legal instruments enabling them to confiscate or otherwise deprive offenders (e.g. by so-called “civil” confiscation) of the instrumentalities and proceeds of criminal offences established under Article 18 and Article 20(a) of the Convention. Paragraph 3 has to be read in the light of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141). That Convention is based on the idea that confiscating the proceeds of crime is an effective anti-crime weapon. As trafficking in human beings is nearly always engaged in for financial profit, measures depriving offenders of assets linked to or resulting from the offence are clearly needed in this field as well. As it is difficult to conceive of the types of act referred to in Articles 19 and 20(b) and (c) generating substantial proceeds or necessitating particular instrumentalities, paragraph 3 refers only to Articles 18 and 20(a).

255. Article 1 of the Laundering Convention defines “confiscation”, “instrumentalities”, “proceeds” and “property” as used in that article. By “confiscation” is meant a penalty or measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences, resulting in final deprivation of property. “Instrumentalities” covers the whole range of things which may be used, or intended for use, in any manner, wholly or in part, to commit the criminal offences defined in Article 18 and Article 20(a). “Proceeds” means any economic

advantage or financial saving from a criminal offence. It may consist of any “property” (see the interpretation of that term below). The wording of the paragraph takes into account that there may be differences of national law as regards the type of property which can be confiscated after an offence. It can be possible to confiscate items which are (direct) proceeds of the offence or other property of the offender which, though not directly acquired through the offence, is equivalent in value to its direct proceeds (“substitute assets”). “Property” must therefore be interpreted, in this context, as any property, corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to or interest in such property. It should be noted that Parties are not bound to provide for criminal-law confiscation of substitute assets since the words “or otherwise deprive” allow “civil” confiscation.

256. Paragraph 4 of Article 23 provides for closure of any establishment used to carry out trafficking in human beings. This measure is likewise provided for in paragraph 45 of *Recommendation No. R(2000)11 of the Committee of Ministers to member States on action against trafficking in human beings for the purpose of sexual exploitation* and, in the context of sexual exploitation of children, in paragraph 42 of *Recommendation Rec(2001)16 of the Committee of Ministers to member States on the protection of children against sexual exploitation*. Paragraph 4 also allows the perpetrator to be banned, temporarily or permanently, from carrying on the activity in the course of which the offence was committed.

257. The Convention provides for such measures so that action can be taken against establishments which might be used as cover for trafficking in human beings, such as matrimonial agencies, placement agencies, travel agencies, hotels or escort services. The measures are also intended to reduce the risk of further victims by closing premises on which trafficking victims are known to have been recruited or exploited (such as bars, hotels, restaurants or textile workshops) and banning people from carrying on activities which they used to engage in trafficking.

258. This provision does not require Parties to provide for closure of establishments as a criminal penalty. Parties may, for example, use administrative closure measures. “Establishment” means any place in which any aspect of trafficking in human beings occurs. The provision applies to whoever has title to the establishment, be they a legal person or a natural person.

259. To avoid penalising persons not involved in trafficking in human beings (for example, the owner of an establishment where trafficking in human beings has been carried on without his or her knowledge), the provision specifies that closures of establishments are “without prejudice to the rights of *bona fide* third parties”.

#### **Article 24 – Aggravating circumstances**

260. Article 24 requires Parties to ensure that certain circumstances (mentioned in subparagraphs a, b, c and d) are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention.

261. The first of the aggravating circumstances is where the trafficking endangered the victim’s life deliberately or by gross negligence. This aggravating circumstance is likewise laid down in Article 3, paragraph 2, of the *European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings*. The circumstance arises, for example, where the conditions in which trafficking victims are transported are so bad as to endanger their lives.

262. The second aggravating circumstance is where the offence was committed against a child – that is, for the purposes of the Convention, against a person aged under 18.

263. The third aggravating circumstance is where the trafficking was committed by a public official in the performance of his or her duties.



264. The fourth aggravating circumstance is where the offence involved a criminal organisation. The Convention does not define “criminal organisation”. In applying this provision, however, Parties may take their line from other international instruments which define the concept. For example, Article 2(a) of the *United Nations Convention against Transnational Organized Crime* defines “organised criminal group” as “a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit”. *Recommendation Rec(2001)11 of the Committee of Ministers to member States concerning guiding principles on the fight against organised crime* and the *Joint Action of 21 December 1998 adopted by the Council of the European Union on the basis of Article K.3 of the Treaty on European Union, on making it a criminal offence to participate in a criminal organisation in the Member States of the European Union* give very similar definitions of “organised criminal group” and “criminal organisation”.

### **Article 25 – Previous convictions**

265. Trafficking in human beings is often carried on transnationally by criminal organisations whose members may have been tried and convicted in more than one country. At domestic level, many legal systems provide for a harsher penalty where someone has previous convictions. In general, only conviction by a national court counts as a previous conviction resulting in a harsher penalty. Traditionally, previous convictions by foreign courts were discounted on the grounds that criminal law is a national matter and that there can be differences of national law, and because of a degree of suspicion of decisions by foreign courts.

266. Such arguments have less force today in that internationalisation of criminal-law standards – as a response to internationalisation of crime – is tending to harmonise different countries’ law. In addition, in the space of a few decades, countries have adopted instruments such as the ECHR whose implementation has helped build a solid foundation of common guarantees that inspire greater confidence in the justice systems of all the participating States.

267. The principle of international recidivism is established in a number of international legal instruments. Under Article 36, paragraph 2.iii, of the *New York Convention of 30 March 1961 on Narcotic Drugs*, for example, foreign convictions have to be taken into account for the purpose of establishing recidivism, subject to each Party’s constitutional provisions, legal system and national law. Under Article 1 of the *Council Framework Decision of 6 December 2001 amending Framework Decision 2000/383/JHA on increasing protection by criminal penalties and other sanctions against counterfeiting in connection with the introduction of the euro*, European Union member States must recognise as establishing habitual criminality final decisions handed down in another member State for counterfeiting of currency.

268. The fact remains that at international level there is no standard concept of recidivism and the law of some countries does not have the concept at all. The fact that foreign convictions are not always brought to the courts’ notice for sentencing purposes is an additional practical difficulty.

269. To meet these difficulties, Article 25 provides for the possibility to take into account final sentences passed by another Party in assessing a sentence. To comply with the provision Parties may provide in their domestic law that previous convictions by foreign courts – like convictions by the domestic courts – are to result in a harsher penalty. They may also provide that, under their general powers to assess the individual’s circumstances in setting the sentence, courts should take convictions into account.

270. This provision does not place any positive obligation on courts or prosecution services to take steps to find out whether persons being prosecuted have received final sentences from another Party's courts. It should nevertheless be noted that, under Article 13 of the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30), a Party's judicial authorities may request from another Party extracts from and information relating to judicial records, if needed in a criminal matter.

271. In order to stay within the framework of this Convention, the drafters of Article 25 had in mind only previous convictions based on the national implementation of Articles 18 and 20.a. In cases of reciprocal criminalisation of offences covered under Article 19 and the remaining sub-paragraphs of 20, previous convictions based on these provisions can be taken into account.

#### **Article 26 – Non-punishment provision**

272. Article 26 constitutes an obligation on Parties to adopt and/or implement legislative measures providing for the possibility of not imposing penalties on victims, on the grounds indicated in the same article.

273. In particular, the requirement that victims have been compelled to be involved in unlawful activities shall be understood as comprising, at a minimum, victims that have been subject to any of the illicit means referred to in Article 4, when such involvement results from compulsion.

274. Each Party can comply with the obligation established in Article 26, by providing for a substantive criminal or procedural criminal law provision, or any other measure, allowing for the possibility of not punishing victims when the above-mentioned legal requirements are met, in accordance with the basic principles of every national legal system.

#### **Chapter V – Investigation, prosecution and procedural law**

275. This chapter contains provisions for adapting Parties' criminal procedure for two purposes: to protect victims of trafficking and assist prosecution of the traffickers.

276. The drafters considered whether to introduce into this chapter an article to facilitate collection of evidence by special investigative methods and on confiscating the proceeds of crime. As this matter is already dealt with in Article 4 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) it was thought better not to have a similar provision in the Convention. The view was taken that any revision of the provisions of Convention No. 141 dealing with the matter might result in inconsistencies with the present convention. It was therefore deemed preferable for the present specialised convention not to incorporate a provision from a convention like Convention No. 141, intended to apply to a large number of offences and not to a particular area of crime.

#### **Article 27 – *Ex parte* and *ex officio* applications**

277. Article 27, paragraph 1, is intended to enable the authorities to prosecute offences under the Convention without the necessity of a complaint from the victim. The aim is to avoid traffickers' subjecting victims to pressure and threats in attempts to deter them from complaining to the authorities. Some States require that crimes, which were committed outside of their territories, must be the object of a claim by the victim or of a denunciation by a foreign authority in order to institute proceedings. The words "at least when the offence has been committed in whole or in part on its territory" enable these States not to modify their legislation on this matter.

278. Article 27, paragraph 2, is modelled on Article 11, paragraph 2, of the *European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings*. Its purpose is to make it easier for a victim to complain by allowing him or her to lodge the complaint with the competent authorities of his or her State of residence. If the competent authority with which the complaint has been lodged decides that it does not itself have jurisdiction in the matter, then it must forward the complaint without delay to the competent authority of the Party in whose territory the offence was committed. The obligation in Article 27, paragraph 2, is an obligation merely to forward the complaint to that competent authority and does not place any obligation on the State of residence to institute an investigation or proceedings.

279. Under paragraph 3, each Party shall ensure to non-governmental organisations and other associations which aim at fighting trafficking in human beings or protecting human rights the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence of trafficking in human beings.

#### **Article 28 – Protection of victims, witnesses and collaborators with the judicial authorities**

280. In addition to victims, other persons may also be witness or intelligence sources in the fight against trafficking. But there are real risks to them in giving statements, acting as witnesses and/or exchanging intelligence.

281. Under Article 28, Parties must take the necessary measures to provide effective and appropriate protection to victims, collaborators with the judicial authorities, witnesses and members of such persons' families. The protection of family members is only "when necessary" in that the families themselves are sometimes involved in the trafficking. Similarly, the protection to collaborators with the judicial authorities is only "as appropriate".

282. The question of protection for witnesses and persons collaborating with the judicial authorities was comprehensively dealt with by the Council of Europe in *Recommendation No. R(97)13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence*, adopted on 10 September 1997. The recommendation establishes a set of principles as guidance for national law on witness intimidation, whether the code of criminal procedure or out-of-court protection measures. The recommendation offers member States a list of measures which could help protect the interests both of witnesses and of the criminal justice system effectively, while guaranteeing the defence appropriate opportunities to exercise its rights in criminal proceedings. Some of these measures are referred to in Article 28, paragraph 2.

283. The drafters of the Convention, basing themselves in particular on Recommendation No. R(97)13, interpreted the term "those who report the criminal offences established in accordance with Article 18 of this Convention or otherwise cooperate with the investigating or prosecuting authorities" as referring to persons who faced criminal charges or had been convicted of offences established in accordance with Article 18 of this Convention and who agreed to cooperate with criminal-justice authorities, in particular by giving information about trafficking offences in which they had taken part so that the offences could be investigated and prosecutions brought.

284. The word "witnesses" refers to persons who possess information relevant to criminal proceedings concerning human-trafficking offences under Article 18 of the Convention and it includes whistle blowers and informers.

285. Intimidation of witnesses, whether direct or indirect, may take different forms, but its purpose is nearly always to get rid of evidence against defendants so that they have to be acquitted.

286. The protection measures referred to in Article 28, paragraph 2, are examples. The expression “effective and appropriate protection”, as used in Article 28, paragraph 1, refers to the need to adapt the level of protection to the threats to victims, collaborators with the judicial authorities, witnesses, informers and, when necessary, members of such persons’ families. The measures required depend on the assessment of the risks such persons run. In some cases, for example, it will be sufficient to install preventive technical equipment, agree an alert procedure, record incoming and outgoing telephone calls or provide a confidential telephone number, a protected car registration number or a mobile phone for emergency calls. Other cases will require bodyguards or, in extreme circumstances, further-reaching witness-protection measures such as a change of identity, employment and place of residence. In addition, paragraph 3 provides that a child victim shall be afforded special protection measures taking into account the best interests of the child.

287. If protection measures are to be effective, it will very often also be necessary to ensure that the traffickers remain ignorant of these measures. Parties will then have to make sure that any information about the protection measures is safe from unauthorised access.

288. Regarding the period during which the protection measures have to be provided, the Convention aims in a non-exhaustive manner at the period of investigation and of the proceedings or the period following them. The period in which protection measures have to be provided depends on the threats upon the persons.

289. Protection measures should be granted only when the beneficiary persons have consented. Even though, in principle (in relation to the respect of the persons as well as for the effectiveness of the envisaged measures), the persons’ consent to the measures aimed at protecting them must be given, in some situations (for example some emergency situations in which the persons are in shock) protective measures must be taken even without the consent of the person to be protected.

290. Victims, witnesses, collaborators of justice and members of the families of these persons are not the only persons who could be subject to intimidation by traffickers. Often, the latter intimidate members of NGOs and other groups supporting victims of trafficking. For this reason, paragraph 4 provides that Parties must ensure appropriate protection to them, in particular physical protection, when necessary, i.e. in case of serious intimidation.

291. Because trafficking in human beings is often international and some countries are small, paragraph 5 encourages Parties to enter into agreements or arrangements with other countries so as to implement Article 28. They should make it possible to improve the protection afforded under Article 28. Thus, for example, an endangered person may need to be given a new place of residence. In a very small country, or if there is a risk of the person being easily found again by those threatening him or her, the only solution, to guarantee effective protection, is sometimes to arrange a new place of residence for them in another country. In addition, in some cases victims hesitate to bring legal proceedings in the receiving country because of the threat of reprisals by the traffickers against family members who remain in the country of origin. Effective protection of victims’ families necessitates close cooperation between the country of origin and the receiving country, and this cooperation could also be brought about by bilateral or multilateral agreements as referred to in Article 28, paragraph 5, between the countries concerned. In this connection, reference should be made to Recommendation No. R(97)13 of the Committee of Ministers to member States of the Council of Europe concerning the intimidation of witnesses and the rights of the defence.

#### **Article 29 – Specialised authorities and co-ordinating bodies**

292. Under paragraph 1, Parties have to adopt the necessary measures to promote specialisation of persons or units in anti-human-trafficking action and victim protection. Each country must have anti-trafficking specialists. There must also be sufficient numbers of them and they need appropriate resources. The staff of specialised authorities and coordinating bodies should, as far as possible, be composed of women and men. The specialisation

requirement does not mean, however, that there has to be specialisation at all levels of implementing the legislation. In particular, it does not mean that each prosecution service or police station has to have a specialist unit or an expert in trafficking in human beings. Equally, the provision implies that, where necessary to counter trafficking effectively and protect victims, there must be units with responsibility for implementing the measures, and staff with adequate training.

293. Specialisation can take various forms: countries can opt to have a number of specialist police officers, judges, prosecutors and administrative officers or to have agencies or units with special responsibility for various aspects of combating trafficking. Such agencies or units can be either special services set up to take charge of anti-trafficking action or they can be specialist units within existing bodies. Such units need to have the capability and the legal and material resources to at least receive and centralise all the information necessary for preventing trafficking and unmasking it. In addition, and independently of the role of other national bodies dealing with international cooperation, such specialist authorities could also act as partners to foreign anti-trafficking units.

294. Such persons or units must have the necessary independence to be able to perform effectively. It should be noted that the independence of authorities specialising in anti-trafficking action should not be absolute: the police, the administrative authorities and the prosecution services should as far as possible integrate and co-ordinate their action. The degree of independence that specialist services need is the degree necessary for them to perform their functions satisfactorily.

295. Trafficking in human beings is often a transnational criminal activity perpetrated by organised networks which, typically, are mobile and adapt rapidly to change (for example, changes in a country's law) by redeploying. For example, some trafficking organisations have been found to have a rotation system for the women they exploit, moving them from place to place so as to avert surveillance. To be effective, action against such organisations must be co-ordinated. Article 29, paragraph 2, stresses the need to co-ordinate policy and action of public agencies responsible for combating trafficking in human beings. Such co-ordination may be performed by specially established co-ordination bodies.

296. To combat trafficking effectively and protect its victims, it is essential that public authorities have proper training. Paragraph 3 specifies that such training must cover methods of preventing trafficking, prosecuting the traffickers and protecting the victims. To make agencies aware of the special features of trafficking victims' predicament, it is provided that training must also deal with human rights. Training should also emphasise victims' needs, victim reception and appropriate treatment of victims by the criminal justice system.

297. This training must be provided for relevant officials engaged in prevention of and action to combat trafficking in human beings. "Relevant officials" covers persons and services liable to have contact with trafficking victims, such as law-enforcement officials, immigration and social services, embassy or consulate staff, staff of border checkpoints and soldiers or police on international peacekeeping missions. The Convention seeks to take in the people likeliest to be faced with victims of trafficking in human beings, for it is extremely important that staff of the services concerned be trained in recognising signs of a trafficking offence and collecting and circulating information relevant to anti-trafficking action, and also that they be fully aware of their potential importance for identifying and helping victims.

298. Paragraph 4 provides that Parties shall consider appointing national rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements. The institution of a national rapporteur has been established in the Netherlands, where it is an independent institution, with its own personnel, whose mission is to ensure the monitoring of anti-trafficking activities. It has the power to investigate and make recommendations to persons and institutions concerned and makes an annual report to the parliament containing its findings and recommendations.

### Article 30 – Court proceedings

299. Court proceedings in human-trafficking cases – as often with any serious form of crime – may have unfortunate consequences for the victims: a victim giving evidence against traffickers or claiming compensation for injury suffered is liable to come under pressure or be subjected to threats from criminal elements. Media coverage of cases is liable to worsen the problem by seriously invading victims' privacy, making it even more difficult for them to reintegrate socially.

300. Article 30 therefore requires Parties to adapt their judicial procedure so as to protect victims' privacy and ensure their safety. The measures to be introduced under this provision are different from those provided for in Article 28. The measures provided for in Article 28 have to do with extrajudicial protection whereas the measures referred to in Article 30 are concerned with the procedural measures to be introduced.

301. In criminal procedure there are values – defence rights on the one hand, victim and witness privacy and safety on the other – which converge and sometimes clash. In addition, procedure varies greatly from country to country: a method of victim and witness protection employed in one system may be incompatible with the basic principles of another.

302. The drafters accordingly took the view that the only possible solution was for the Convention to contain a provision on court proceedings which was compulsory as to the objectives (safeguarding victims' private life and, if necessary, identity and guaranteeing victim safety and protection from intimidation) but which left it to the Parties to decide how to attain the objectives.

303. The words "in accordance with the conditions defined by its internal law" underline that Parties are at liberty to employ whatever means they consider best to achieve the Convention's objectives (protecting victims' private life and, where appropriate, their identity, and ensuring victims' safety and protection from intimidation). In the case of child victims, the Convention states that Parties must take special care of their needs and ensure their rights to special protection measures as a child will usually be more vulnerable than an adult and likelier to be intimidated.

304. The law in some countries provides for audiovisual recording of hearings of children and safeguarding such hearings by such means as: limiting the people allowed to attend the hearing and view the recording; allowing the child to request a break in recording at any time and making a full, word-for-word transcription of the hearing on request. Such recordings and written records may then be used in court instead of having the child appear in person.

305. Some legal systems likewise allow children to appear before the court by videoconference. The child is heard in a separate room, possibly in the presence of an expert and technicians. To limit as far as possible the psychological impact on the child of being in the same room as the accused or being with them by videoconference, the sight lines of both can be restricted so that the child cannot see the accused and/or *vice versa*. If, for instance, the child were to appear at the hearing, he or she could give evidence from behind a screen.

306. Article 30 states that measures must comply with Article 6 ECHR: care must be taken that measures maintain a balance between defence rights and the interests of victims and witnesses. In its *Doorson v. the Netherlands* judgment of 26 March 1996 (Reports of Judgments and Decisions, 1996-II, paragraph 70), the Court held:

"It is true that Article 6 does not explicitly require the interests of witnesses in general, and those of victims called upon to testify in particular, to be taken into consideration. However, their life, liberty or security of person may be at stake, as may interests coming generally within the ambit of Article 8 of the Convention. Such interests of witnesses and victims are in principle protected by other, substantive provisions of the Convention, which imply that Contracting States should organise their criminal

proceedings in such a way that those interests are not unjustifiably imperilled. Against this background, principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify.”

307. The question of witness protection was dealt with in *Recommendation No. R (97) 13 of the Committee of Ministers to member States concerning intimidation of witnesses and the rights of the defence*. European Court of Human Rights case-law should also be used as a guide to the various methods that can be used to protect victims’ private life and ensure their safety. The following means can be used, in accordance with the ECHR and the Court’s case-law, to achieve the objectives of Article 30:

#### *Non-public hearings*

308. The Court’s case-law is that public deliberations are a fundamental principle of Article 6, paragraph 1 (see *Axen v. Germany*, 8 December 1983, Series A No. 72, paragraph 25). However the ECHR does not make that an absolute principle: Article 6, paragraph 1, itself states that “the press and public may be excluded from all or part of the trial in the interests of morals ... where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice”.

#### *Audiovisual technology*

309. Use of audio and video technology for taking evidence and conducting hearings may, as far as possible, avoid repetition of hearings and of some face-to-face contact, thus making court proceedings less traumatic. In recent years, a number of countries have developed the use of technology in court proceedings, if necessary adapting the procedural rules on taking evidence and hearing victims. This is particularly the case with victims of sexual assault. However, this step has not yet been taken in all Council of Europe member States, in addition to which victims of trafficking are far from having the benefit of such protection measures, even in countries whose court system recognises the validity of these methods.

310. In addition to the possible use of audio and video technology for avoiding traumatic or repeat testimony, it should be pointed out that victims can be influenced by the mental pressure of being brought face to face with the accused in the courtroom. To give them proper protection it is sometimes advisable to avoid their being present in court at the same time as the accused and to allow them to testify in another room. Whether it is the accused or the victim who is moved from the courtroom, video links or other video technology can be used to enable the parties to follow the proceedings. Such measures are necessary to spare them any unnecessary stress or disturbance when they give their evidence; the trial therefore has to be organised in such a way as to avoid, as far as possible, any unwelcome influence that might hinder establishing the truth or deter victims and witnesses from making statements.

311. Such methods are advocated in paragraph 6 of *Recommendation No. R(97)13 of the Committee of Ministers to member States on intimidation of witnesses and the rights of the defence*, Article A.8 of the *European Union Council Resolution of 23 November 1995 on the protection of witnesses in the fight against international organized crime*, and Article 24 of the *United Nations Convention against Transnational Organized Crime*.

#### *Recordings of testimony*

312. Under European Court of Human Rights case-law admissibility of evidence is primarily a matter for regulation by national law (see judgments in *Schenk v. Switzerland*, 12 July 1988, Series A, No. 140, and *Doorson v. the Netherlands*, 26 March 1996, Reports 1996-II, among others) and as a general rule it is for the national courts to assess the evidence before them (see *Barberà, Messegue and Jabardo v. Spain*, judgment of 6 December 1988, Series A,

No. 146). The Court's task under the ECHR is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair (see *inter alia* the aforementioned Doorson judgment).

313. The Court has ruled that the use as evidence of statements obtained at the stage of the police enquiry and the judicial investigation is not in itself inconsistent with paragraphs 3(d) and 1 of Article 6 provided that the rights of the defence have been respected. As a rule these rights require that the defendant has had an adequate and proper opportunity to challenge and question a witness against him either when the witness was making the statements or at a later stage in the proceedings. The lack of any confrontation deprives the defendant of a fair trial if the testimony obtained before the trial was the sole basis for convicting him, because of the inadmissible restriction on proper exercise of defence rights (*Saïdi v. France*, judgment of 20 September 1993, Series A, No.261-C, paragraph 44, for instance). In addition, Article 6 does not confer an absolute right on the defendant to call witnesses. It is normally for the national courts to decide whether it is necessary or advisable to call a witness (*Bricmont v. Belgium*, judgment of 7 July 1989, Series A, No.158).

314. In criminal cases concerning sexual violence, the Court allows certain measures to be taken in order to protect the victim, provided that such measures are reconcilable with proper exercise of defence rights. To safeguard these the judicial authorities may be required to take measures to compensate for the hindrances to the defence (*Doorson v. the Netherlands, op cit.*, and *P.S. v. Germany*, 20 December 2001).

315. In *S.N. v. Sweden* (judgment of 2 July 2002, Reports 2002-V), the Court held that the applicant could not be said to have been denied his rights under Article 6, paragraph 3.d, on the ground that he had been unable to examine or have examined the witnesses during the trial and appeal proceedings. "Having regard to the special features of criminal proceedings concerning sexual offences ... this provision cannot be interpreted as requiring in all cases that questions be put directly by the accused or his or her defence counsel, through cross-examination or by other means".

316. The Court added: "The Court notes that the videotape of the first police interview was shown during the trial and appeal hearings and that the record of the second interview was read out before the District Court and the audiotape of that interview was played back before the Court of Appeal. In the circumstances of the case, these measures must be considered sufficient to have enabled the applicant to challenge M.'s statements and his credibility in the course of the criminal proceedings."

317. However, the Court made a point of reiterating, in that judgment, that evidence obtained from a witness under conditions in which the rights of the defence could not be secured to the extent normally required by the ECHR should be treated with extreme care.

#### *Anonymous testimony*

318. Anonymous testimony is an especially tricky issue in that protection for threatened persons must go hand in hand with protecting the rights of the defence. For instance, the United Nations *Recommended Principles on Human Rights and Trafficking in human beings* state, in Guideline 6, that "There should be no public disclosure of the identity of trafficking victims and their privacy should be respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial."

319. As regards the preliminary investigation stages, the European Commission of Human Rights held: "In the course of their duties police officers may well have occasion to take confidential information from persons with a legitimate interest in remaining anonymous; if such anonymity were to be refused and if these people were to be required to appear in court, much information needed if crimes are to be punished would never be brought to the knowledge of the prosecuting authorities" (Application No.8718/78, decision of 4 May 1979,



Decisions and Reports 16, p.200). The European Court of Human Rights has likewise stated several times that the ECHR does not preclude reliance, at the investigation stage of criminal proceedings, on sources such as anonymous informants but that subsequent use of anonymous statements as sufficient evidence to found a conviction is a different matter and can raise problems with regard to the Convention (see *Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A, No.166, paragraph 44, and *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 69). Witness anonymity is therefore permissible at the investigation stage for reasons of expediency in so far as the information obtained in this way is to be used not as evidence but to enable evidence to be found.

320. As regards the trial stage, the above principle governing admissibility of evidence likewise applies. While all the evidence must normally be produced in the presence of the accused at a public hearing with a view to adversarial argument, there are exceptions to that principle, which, however, must not infringe the rights of the defence. As a general rule paragraphs 3(d) and 1 of Article 6 require that the defendant be given an adequate and proper opportunity to challenge and question a witness against him, either when he makes his statements or at a later stage (see *Ludi v. Switzerland*, judgment of 15 June 1992, Series A, No.238, paragraph 47). The Court takes the view that the use of anonymous statements to found a conviction is not in all circumstances incompatible with the ECHR (see, for example, *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 69, and *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 52).

321. For use of anonymous testimony to be permissible it has to be justified by the circumstances of the case (*Kok v. the Netherlands*, 4 July 2000, Reports 2000-VI, p.655). In *Doorson v. the Netherlands* the Court held: "... principles of fair trial also require that in appropriate cases the interests of the defence are balanced against those of witnesses or victims called upon to testify." Threats to life, liberty or security potentially justify anonymity. It is for the national courts to examine the seriousness and well-foundedness of the reasons for witness anonymity in the particular case (see *Visser v. the Netherlands*, judgment of 14 February 2002, paragraph 47). In the *Doorson* judgment (paragraph 71) the Court nonetheless accepted use of anonymous testimony even in the absence of any specific threats made by the defendant. It held: "... the decision to maintain [the witnesses'] anonymity cannot be regarded as unreasonable per se. Regard must be had to the fact, as established by the domestic courts and not contested by the applicant [Mr Doorson], that drug dealers frequently resorted to threats or actual violence against persons who gave evidence against them".

322. Also, to safeguard the rights of the defence, the procedures followed by the judicial authorities must adequately counterbalance the handicaps under which the defence labours as a result of witness anonymity. As observed by the Court: "If the defence is unaware of the identity of the person it seeks to question, it may be deprived of the very particulars enabling it to demonstrate that he or she is prejudiced, hostile or unreliable. Testimony or other declarations inculcating an accused may well be designedly untruthful or simply erroneous and the defence will scarcely be able to bring this to light if it lacks the information permitting it to test the author's reliability or cast doubt on his credibility" (*Kostovski v. the Netherlands*, judgment of 20 November 1989, Series A, No.166, paragraphs 42 and 43). In its decision on the admissibility of Application No.43149/98 (*Kok v. the Netherlands*, 4 July 2000, Reports 2000-VI, p.657) the Court said that, to determine whether the arrangements for hearing an anonymous witness gave guarantees that adequately counterbalanced the difficulties caused to the defence, it was necessary to take into account to what extent the anonymous testimony had been crucial to the applicant's conviction. If the testimony was not crucial to conviction, then the defence is considerably less handicapped.

323. In *Doorson v. the Netherlands* the Court held that it was compatible with defence rights for an anonymous witness to have been questioned by an investigating judge who knew the witness's identity in the presence of the defendant's counsel (though not of the defendant), as the counsel had been able to ask the witness whatever questions he considered to be in the

interests of the defence except questions which might have resulted in disclosure of the witness's identity (judgment of 26 March 1996, Reports 1996-II, paragraph 73). However, the same interrogation approach, except that the defence counsel was not in the investigating judge's chamber and that communication was via a sound link, was held to be unsatisfactory in the circumstances of another case because it prevented the defence from observing the witness's demeanour. The Court held: "It has not been explained to the Court's satisfaction why it was necessary to resort to such extreme limitations on the right of the accused to have the evidence against them given in their presence, or why less far-reaching measures were not considered (*Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 60). In this connection, the Court referred to the possibilities of using make-up or disguise or preventing eye-contact. However, it has since declared inadmissible a further application against the Netherlands in a case in which an anonymous witness had been heard in precisely the same way as in the Van Mechelen case, and so it can no longer be stated that Article 6, as interpreted by the Court, necessarily requires – regardless, in particular, of the decisiveness of the anonymous testimony for the conviction decision – that the defence be enabled to observe, face to face, the reactions of anonymous witnesses to its direct questions (*Kok v. the Netherlands*, decision of 4 July 2000, Reports 2000-VI).

324. A further requirement is that the trial and appeal courts have sufficient information to be able to form an opinion as to an anonymous witness' credibility. Such information must indicate how reliable and credible the witness is and why he or she wishes to remain anonymous (see *Van Mechelen and Others v. the Netherlands*, judgment of 23 April 1997, Reports 1997-III, paragraph 62, and *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 73).

325. Lastly, even when counterbalancing procedures are found to compensate sufficiently the handicaps under which the defence labours, a conviction should not be based either solely or to a decisive extent on anonymous statements (see *Doorson v. the Netherlands*, judgment of 26 March 1996, Reports 1996-II, paragraph 76).

326. The position, therefore, under the Court's case-law, is that the Court's task is not to give a ruling as to whether statements of witnesses were properly admitted as evidence, but rather to ascertain whether the proceedings as a whole, including the way in which evidence was taken, were fair. In addition, while evidence must, as a rule, be produced before the accused in a public hearing with a view to adversarial debate, there are some exceptions provided that measures are taken to counterbalance the handicaps to the defence.

### **Article 31 – Jurisdiction**

327. This article lays down various requirements whereby Parties must establish jurisdiction over the offences with which the Convention is concerned.

328. Paragraph 1(a) is based on the territoriality principle. Each Party is required to punish the offences established under the Convention when they are committed on its territory. For example, a Party in whose territory someone is recruited by one of the means and for one of the exploitation purposes referred to in Article 4(a) has jurisdiction to try the human-trafficking offence laid down in Article 18. The same applies to Parties through or in whose territory that person is transported.

329. Paragraph 1(b) and (c) are based on a variant of the territoriality principle. These subparagraphs require each Party to establish jurisdiction over offences committed on ships flying its flag or aircraft registered under its laws. This obligation is already in force in the law of many countries, ships and aircraft being frequently considered to be an extension of a country's territory. This type of jurisdiction is extremely useful when the ship or aircraft is not located in the country's territory at the time of commission of the crime, as a result of which paragraph 1(a) would not be available as a basis for asserting jurisdiction. In the case of a crime committed on a ship or aircraft outside the territory of the flag or registry Party, it might

be that without this rule there would not be any country able to exercise jurisdiction. In addition, if a crime is committed on board a ship or aircraft which is merely passing through the waters or airspace of another State, there may be significant practical impediments to the latter State's exercising its jurisdiction and it is therefore useful for the registry State to also have jurisdiction.

330. Paragraph 1(d) is based on the nationality principle. The nationality theory is most frequently applied by countries with a civil-law tradition. Under it, nationals of a country are obliged to comply with its law even when they are outside its territory. Under sub-paragraph d., if one of its nationals commits an offence abroad, a Party is obliged to be able to prosecute if the conduct involved is also an offence under the law of the country where it took place or the conduct took place outside any country's territorial jurisdiction. Paragraph 1(d) also applies to stateless persons whose usual place of residence is in the Party's territory.

331. Paragraph 1(e) is based on the principle of passive personality. It is linked to the nationality of the victim and identifies particular interests of national victims to the general interests of the State. Hence, according to sub-paragraph (e), if a national is a victim of an offence abroad, the Party has to have the possibility to start the related proceedings.

332. Paragraph 2 allows Parties to enter reservations to the jurisdiction grounds laid down in paragraph 1 (d) and (e). However, no reservation is permitted with regard to establishment of jurisdiction under sub-paragraphs a., b. or c. or with regard to the obligation to establish jurisdiction in cases falling under the principle of *aut dedere aut judicare* (extradite or prosecute) under paragraph 3, i.e. where a Party has refused to extradite an alleged offender on the basis of his or her nationality and the offender is present in its territory. Jurisdiction established on the basis of paragraph 3 is necessary to ensure that Parties that refuse to extradite a national have the legal ability to undertake investigations and proceedings domestically instead, if asked to do so by the Party that requested extradition under the terms of the relevant international instruments.

333. In the case of trafficking in human beings, it will sometimes happen that more than one Party has jurisdiction over some or all of the participants in an offence. For example, a victim may be recruited in one country, then transported and harboured for exploitation in another. In order to avoid duplication of effort, unnecessary inconvenience to witnesses and competition between law-enforcement officers of the countries concerned, or to otherwise facilitate the efficiency or fairness of proceedings, the affected Parties are required to consult in order to determine the proper venue for prosecution. In some cases it will be most effective for them to choose a single venue for prosecution; in others it may be best for one country to prosecute some participants, while one or more other countries prosecute others. Either method is permitted under this paragraph. Finally, the obligation to consult is not absolute: consultation is to take place "where appropriate". Thus, for example, if one of the Parties knows that consultation is not necessary (e.g. it has received confirmation that the other Party is not planning to take action), or if a Party is of the view that consultation may impair its investigation or proceeding, it may delay or decline consultation.

334. The bases of jurisdiction set out in paragraph 1 are not exclusive. Paragraph 5 of this article permits Parties to establish other types of criminal jurisdiction according to their domestic law. Thus, in matters of trafficking in human beings, some States exercise criminal jurisdiction whatever the place of the offence or nationality of the perpetrator.

## **Chapter VI – International co-operation and co-operation with civil society**

335. Chapter VI sets out the provisions on international cooperation between Parties to the Convention. The provisions are not confined to judicial cooperation in criminal matters. They are also concerned with cooperation in trafficking prevention and in victim protection and assistance.

336. As regards judicial cooperation in the criminal sphere, the Council of Europe already has a substantial body of standard-setting instruments. Mention should be made here of the *European Convention on Extradition* (ETS No. 24), the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30), the protocols to these (ETS Nos. 86, 98, 99 and 182) and the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141). These treaties are cross-sector instruments applying to a large number of offences, not to one particular type of crime.

337. The drafters opted not to reproduce in the present convention provisions identical to those in cross-sector instruments like the aforementioned ones. They took the view that the latter are better adapted to harmonisation of standards and can be revised to achieve better cooperation between Parties. They had no wish to set up a separate general system of mutual assistance which would take the place of other relevant instruments or arrangements. They took the view that it would be more convenient to have recourse generally to the arrangements set up under the mutual assistance and extradition treaties already in force, enabling mutual assistance and extradition specialists to use the instruments and arrangements they were familiar with and avoiding any confusion that might arise from setting up competing systems. This chapter therefore comprises only those provisions which offer special added value in relation to existing conventions. The Convention (Article 32) nonetheless requires Parties to cooperate to the widest extent possible under the existing instruments. As the Convention provides for a monitoring mechanism (Chapter VII), which, among other things, is to be responsible for monitoring the implementation of Article 32, the manner in which such cross-sector instruments are applied to combating trafficking in human beings is likewise to be monitored.

#### **Article 32 – General principles and measures for international co-operation**

338. Article 32 sets out the general principles which are to govern international co-operation.

339. Firstly, the Parties must cooperate with one another “to the widest extent possible”. This principle requires them to provide extensive cooperation to one another and to minimise impediments to the smooth and rapid flow of information and evidence internationally.

340. Then, Article 32 contains the general part of the obligation to cooperate: cooperation must include the prevention of and combat against trafficking in human beings (first indent), the protection of and assistance to victims (second indent) and to investigations or proceedings concerning criminal offences established in accordance with this Convention (third indent), ie. the offences established in conformity with Articles 18, 20 and 21. Taking into account the dual criminality principle, this cooperation can take place as regards the offence contained in Article 19 only between those Parties which criminalise in their internal law the acts contained in this article. The application of the dual criminality principle will limit this cooperation, as regards the offence established in Article 19 of this Convention, to the Parties having included such an offence in their internal law.

341. Lastly, cooperation is to be provided in accordance with relevant international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation, and domestic law. The general principle is thus that the provisions of Chapter VI neither cancel nor replace the provisions of relevant *international* instruments. Reference to such instruments or arrangements is not confined to instruments in force at the time the present convention comes into force but also applies to any instruments adopted subsequently. In relation to this Convention, relevant general agreements and instruments should have precedence in matters of judicial cooperation.

342. Parties also have to cooperate with each other, in accordance with the provisions of this Convention. Thus, as regards international cooperation to protect and assist victims, Article 33 provides for special measures relating to endangered persons. Article 34, paragraph 4, refers to transmission of any information necessary for providing the rights conferred by Articles 13, 14 and 16 of the Convention.

343. As regards international cooperation in criminal matters for the purposes of investigations or proceedings, the general principle is that the provisions of Chapter VI neither cancel nor replace the provisions of relevant international or regional instruments on mutual legal assistance and extradition, reciprocal arrangements between Parties to such instruments and relevant provisions of domestic law concerning international cooperation. In this area, the relevant international instruments include the *European Convention on Extradition* (ETS No. 24), the *European Convention on Mutual Assistance in Criminal Matters* (ETS No. 30) and the protocols to these (ETS Nos. 86, 98, 99 and 182). In the case of European Union member States, the European arrest warrant introduced by the *Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States* is likewise relevant. As regards cooperation to seize the proceeds of trafficking, and in particular to identify, locate, freeze and confiscate assets associated with trafficking in human beings and its resultant exploitation, the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141) is relevant.

344. It follows that international cooperation in criminal matters must continue to be granted under these instruments and other bilateral or multilateral treaties on extradition and mutual assistance applying to criminal matters.

345. Mutual assistance may also stem from arrangements on the basis of uniform or reciprocal legislation. This concept exists in other Council of Europe conventions, in particular the *European Convention on Extradition* (ETS No. 24), which used it to allow Parties which had an extradition system based on “uniform laws”, i.e. the Scandinavian countries, or Parties with a system based on reciprocity, i.e. Ireland and the United Kingdom, to regulate their mutual relations on the sole basis of that system. That provision had to be adopted because those countries did not regulate their relations in extradition matters on the basis of international agreements but did so or do so by agreeing to adopt uniform or reciprocal domestic laws.

### **Article 33 – Measures relating to endangered or missing persons**

346. This provision requires a Party to warn another Party if it has information that suggests that a person referred to in Article 28, paragraph 1, (a victim, a witness, a person co-operating with the judicial authorities or a relative of such a person) is in immediate danger in the territory of the other Party. Such information might, for example, come from a victim reporting pressures or threats from traffickers against members of the victim’s family in the country of origin. The Party receiving such information is required to take appropriate protection measures as provided for in Article 28.

### **Article 34 – Information**

347. Article 34 deals with supply of information. It has to do with all the types of cooperation dealt with in Chapter VI, i.e. not just international cooperation in criminal matters but also cooperation to prevent and combat trafficking in human beings and protect and assist victims.

348. Article 34, paragraph 1, places a duty on a requested Party to inform the requesting Party of the final result of action taken further to a request for international cooperation. It also requires that the requested Party inform the requesting Party promptly if circumstances make it impossible to meet the request or are liable to significantly delay meeting it.

349. Paragraphs 2 and 3 are concerned with information spontaneously provided for purposes of cooperation in criminal matters. This article is derived from provisions in earlier Council of Europe instruments, such as Article 10 of the *Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime* (ETS No. 141), Article 28 of the *Criminal Law Convention on Corruption* (ETS No. 173) and Article 26 of the *Convention on Cybercrime* (ETS No. 185). It is an increasingly frequent occurrence for a Party to possess valuable information that it believes may assist another Party in a criminal investigation or

proceedings, and which the Party conducting the investigation or proceedings is not aware exists. In such cases no request for mutual assistance will be forthcoming. This provision empowers the country in possession of the information to forward it to the other country without a prior request, within the limit of its internal law. The provision was thought useful because, under the laws of some countries, such a positive grant of legal authority is needed in order to provide assistance in the absence of a request. A Party is not under any obligation to spontaneously forward information to another Party; it has full discretion to do so in the light of the circumstances of the particular case. In addition, spontaneous disclosure of information does not preclude the disclosing Party from investigating or instituting proceedings in relation to the facts disclosed if it has jurisdiction.

350. Paragraph 3 addresses the fact that in some circumstances a Party will only forward information spontaneously if sensitive information is kept confidential or other conditions can be imposed on use of the information. In particular, confidentiality will be an important consideration in cases where important interests of the providing State could be endangered if the information is made public, e.g. where it is necessary not to reveal how the information was obtained or that a criminal group is being investigated. If advance enquiry reveals that the receiving Party cannot comply with a condition made by the providing Party (e.g. it cannot comply with a confidentiality condition because the information is needed as evidence at a public trial), the receiving Party must advise the providing Party, which then has the option of not providing the information. If the receiving Party agrees to the condition, however, it must honour it. It is foreseen that conditions imposed under this article would be consistent with those that a providing Party could impose further to a request for mutual assistance from the receiving Party.

351. To guarantee the effectiveness of the rights established in Articles 13, 14 and 16 of the Convention, paragraph 4 requires Parties to transmit without delay, subject to compliance with Article 11 of the Convention, requested information necessary for granting the entitlements conferred by these articles.

#### **Article 35 – Co-operation with civil society**

352. The strategic partnership referred to in this article, between national authorities and public officials and civil society, means the setting up of co-operative frameworks through which State actors fulfil their obligations under the Convention, by coordinating their efforts with civil society.

353. Such strategic partnerships may be achieved by regular dialogue through the establishment of round-table discussions involving all actors. Practical implementation of the purposes of the convention may be formalised through, for instance, the conclusion of memoranda of understanding between national authorities and non-governmental organisations for providing protection and assistance to victims of trafficking.

#### **Chapter VII – Monitoring mechanism**

354. Chapter VII of the Convention contains provisions which aim at ensuring the effective implementation of the Convention by the Parties. The monitoring system foreseen by the Convention, which is undoubtedly one of its main strengths, has two pillars: on the one hand, the Group of Experts on action against trafficking in human beings (GRETA) is a technical body, composed of independent and highly qualified experts in the area of human rights, assistance and protection to victims and the fight against trafficking in human beings, with the task of adopting a report and conclusions on each Party's implementation of the Convention; on the other hand, there is a more political body, the Committee of the Parties, composed of the representatives in the Committee of Ministers of the Parties to the Convention and of representatives of Parties non-members of the Council of Europe, which may adopt recommendations, on the basis of the report and conclusions of GRETA, addressed to a Party concerning the measures to be taken to follow up GRETA's conclusions.

### **Article 36 – Group of experts on action against trafficking in human beings**

355. As indicated above, GRETA is in charge of monitoring the implementation of the Convention by the Parties. It shall have a minimum of 10 and a maximum of 15 members.

356. Paragraph 2 of this Article stresses the need to ensure geographical and gender balance, as well as a multidisciplinary expertise, when appointing GRETA's members, who shall be nationals of States Parties to the Convention.

357. Paragraph 3 underlines the main competences of the experts sitting in GRETA, as well as the main criteria for their election, which can be summarised as follows: "independence and expertise".

358. Paragraph 4 indicates that the procedure for the election of the members of GRETA (but not the election of the members) shall be determined by the Committee of Ministers. This is understandable as the election procedure is an important part of the application of the Convention. Being a Council of Europe Convention, the drafters felt that such a function should still rest with the Committee of Ministers and the Parties themselves will then be in charge of electing the members of GRETA. Before deciding on the election procedure, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to determine such a procedure and are on an equal footing.

### **Article 37 – Committee of the Parties**

359. Article 37 sets up the other pillar of this monitoring system, which is the more political "Committee of the Parties", composed as indicated above.

360. The Committee of the Parties will be convened the first time by the Secretary General of the Council of Europe, within a year from the entry into force of the Convention, in order to elect the members of GRETA. It will then meet at the request of a third of the Parties, of the Secretary General of the Council of Europe or of the President of GRETA.

361. The setting up of this body will ensure equal participation of all the Parties alike in the decision-making process and in the monitoring procedure of the Convention and will also strengthen cooperation between the Parties and between them and GRETA to ensure proper and effective implementation of the Convention.

362. The Rules of Procedure of the Committee of the Parties need to take due account of the specificities regarding the number of votes cast by the European Community in matters falling within its competence. It is also understood that the rules of procedure of the Committee of the Parties need to be drafted so as to make sure that the Parties to this Convention, including the European Community, will be effectively monitored under Article 38, paragraph 7.

### **Article 38 – Procedure**

363. Article 38 details the functioning of the monitoring procedure and the interaction between GRETA and the Committee of the Parties.

364. Paragraph 1 makes it clear that the evaluation procedure is divided in cycles and that GRETA will select the provisions the monitoring will concentrate upon. The idea is that GRETA will autonomously define at the beginning of each cycle the provisions for the monitoring procedure during the period concerned.

365. Paragraph 2 states that GRETA will determine the most appropriate means to carry out the evaluation. This may include a questionnaire or any other request for information. This paragraph makes it clear that the Party concerned must respond to GRETA's requests.

366. Paragraph 3 indicates that GRETA may also receive information from civil society.

367. Paragraph 4 underlines that, subsidiarily, GRETA may organise country visits to get more information from the Party concerned. The drafters stressed that country visits should be a subsidiary means and that they should be carried out only when necessary. These country visits have to be organised in cooperation with the competent authorities of the Party concerned and the "contact person" to be appointed by that Party.

368. Paragraphs 5 and 6 describe the drafting phase of both the report and the conclusions of GRETA. From these provisions, it is clear that GRETA has to carry out a dialogue with the Party concerned when preparing the report and the conclusions. It is through such a dialogue that the provisions of the Convention will be properly implemented. GRETA will publish its report and conclusions, together with any comments by the Party concerned. Such report and conclusions are sent at the same time to the Party concerned and the Committee of the Parties. This completes the task of GRETA with respect to that Party and the provision/s concerned. The reports of GRETA, which will be made public as far from their adoption, cannot be changed or modified by the Committee of the Parties.

369. Paragraph 7 deals with the role of the Committee of the Parties in the monitoring procedure. It indicates that the Committee of the Parties may adopt recommendations indicating the measures to be taken by the Party concerned to implement GRETA's conclusions, if necessary setting a date for submitting information on their implementation, and promoting cooperation to ensure the proper implementation of the Convention. This mechanism will ensure the respect of the independence of GRETA in its monitoring function, while introducing a "political" dimension into the dialogue between the Parties.

## **Chapter VIII – Relationship with other international instruments**

### **Article 39 – Relationship with the *Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime***

370. The purpose of Article 39 is to clarify the relationship between the Convention and the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the *United Nations Convention against Transnational Organized Crime*.

371. Article 39 has two main objectives: (i) to make sure that the Convention does not interfere with rights and obligations deriving from provisions of the Palermo Protocol and (ii) to make clear that the Convention reinforces, as requested by the Committee of Ministers in the terms of reference it issued to the CAHTEH, the protection afforded by the United Nations instrument and develops the standards it lays down.

### **Article 40 – Relationship with other international instruments**

372. Article 40 deals with the relationship between the Convention and other international instruments.

373. In accordance with the 1969 Vienna Convention on the Law of Treaties, Article 40 seeks to ensure that the Convention harmoniously coexists with other treaties – whether multilateral or bilateral – or instruments dealing with matters which the Convention also covers. This is particularly important for international instruments which ensure greater protection and assistance for victims of trafficking. Indeed, this Convention intends to strengthen victims'



protection and assistance and for this reason paragraph 1 of Article 40 aims at ensuring that this Convention does not prejudice the rights and obligations derived from other international instruments to which Parties to the present Convention are also Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking. This provision clearly shows, once more, the overall aim of this Convention, which is to protect and promote the human rights of victims of trafficking and to ensure the highest level of protection to them.

374. Paragraph 2 states positively that Parties may conclude bilateral or multilateral agreements – or any other international instrument – relating to the matters which the Convention governs. However, the wording makes clear that Parties are not allowed to conclude any agreement which derogates from the Convention.

375. In relation to paragraph 3 of Article 40, upon the adoption of the Convention, the European Community and the member States of the European Union, made the following declaration:

“The European Community/European Union and its Member States reaffirm that their objective in requesting the inclusion of a “disconnection clause” is to take account of the institutional structure of the Union when acceding to international conventions, in particular in case of transfer of sovereign powers from the Member States to the Community.

This clause is not aimed at reducing the rights or increasing the obligations of a non-European Union party vis-à-vis the European Community/European Union and its Member States, inasmuch as the latter are also parties to this Convention.

The disconnection clause is necessary for those parts of the convention which fall within the competence of the Community / Union, in order to indicate that European Union Member States cannot invoke and apply the rights and obligations deriving from the Convention directly among themselves (or between themselves and the European Community / Union). This does not detract from the fact that the Convention applies fully between the European Community/European Union and its Member States on the one hand, and the other Parties to the Convention, on the other; the Community and the European Union Members States will be bound by the Convention and will apply it like any party to the Convention, if necessary, through Community / Union legislation. They will thus guarantee the full respect of the Convention's provisions vis-à-vis non-European Union parties.”

As an instrument made in connection with the conclusion of a treaty, within the meaning of Article 31 paragraph 2(b) of the Vienna Convention on the Law of Treaties, this declaration forms part of the “context” of this Convention.

376. The European Community would be in a position to provide, for the sole purpose of transparency, necessary information about the division of competence between the Community and its Member States in the area covered by the present Convention, inasmuch as this does not lead to additional monitoring obligations placed on the Community.

377. Under paragraph 4, the provisions of the Convention do not affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law. Thus, the exercise of fundamental rights should not be prevented on the pretext of taking action against trafficking in human beings. This paragraph is particularly concerned with the 1951 Convention and 1967 Protocol relating to the Status of Refugees. 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 appropriate access to fair and efficient asylum procedures. Parties shall also take whatever steps are necessary to ensure full respect for the principle of *non-refoulement*.

## **Chapter IX – Amendments to the Convention**

### **Article 41 – Amendments**

378. Amendments to the provisions of the Convention may be proposed by the Parties. They must be communicated to all Council of Europe member States, to any signatory, to any Party, to the European Community and any State invited to sign or accede to the Convention.

379. The Group of Experts on Action against Trafficking in Human Beings (GRETA) will prepare an opinion on the proposed amendment which will be submitted to the Committee of Ministers. After considering the proposed amendment and the GRETA opinion, the Committee of Ministers can adopt the amendment. Such amendments adopted by the Committee of Ministers must be forwarded to the Parties for acceptance. Before deciding on the amendment, the Committee of Ministers shall consult with and obtain the unanimous consent of all Parties. Such a requirement recognises that all Parties to the Convention should be able to participate in the decision-making process concerning amendments and are on an equal footing.

## **Chapter X – Final clauses**

380. With some exceptions, the provisions in this chapter are essentially based on the Model Final Clauses for Conventions and Agreements concluded within the Council of Europe, which the Committee of Ministers approved at the Deputies' 315<sup>th</sup> meeting, in February 1980. Articles 42 to 47 either use the standard language of the model clauses or are based on long-standing treaty-making practice at the Council of Europe. It should be noted in this connection that the model clauses have been adopted as a non-binding set of provisions. As pointed out in the introduction to the model clauses, "these model final clauses are only intended to facilitate the task of committees of experts and avoid textual divergences which would not have any real justification. A model is in no way binding and different clauses may be adapted to fit particular cases."

### **Article 42 – Signature and entry into force**

381. The Convention is open for signature not only by Council of Europe member States but also the European Community and States not members of the Council of Europe (Canada, the Holy See, Japan, Mexico and the United States) which took part in drawing it up. Once the Convention enters into force, in accordance with paragraph 3, other non-member States not covered by this provision may be invited to accede to the Convention in accordance with Article 43, paragraph 1.

382. Article 42, paragraph 3, sets the number of ratifications, acceptances or approvals required for the Convention's entry into force at 10. This figure reflects the belief that a significant group of States is needed to successfully set about addressing the challenge of trafficking in human beings. The number is not so high, however, as to unnecessarily delay the Convention's entry into force. In accordance with the treaty-making practice of the Organisation, of the ten initial States, at least eight must be Council of Europe members.

### **Article 43 – Accession to the Convention**

383. After consulting the Parties and obtaining their unanimous consent, the Committee of Ministers may invite any State not a Council of Europe member which did not participate in drawing up the Convention to accede to it. This decision requires the two-thirds majority provided for in Article 20.d of the Statute of the Council of Europe and the unanimous vote of the Parties to this Convention.

#### **Article 44 – Territorial application**

384. Article 44, paragraph 1, specifies the territories to which the Convention applies. Here it should be pointed out that it would be incompatible with the object and purpose of the Convention for States Parties to exclude parts of their territory from application of the Convention without valid reason (such as the existence of different legal systems applying in matters dealt with in the Convention).

385. Article 44, paragraph 2, is concerned with extension of application of the Convention to territories for whose international relations the Parties are responsible or on whose behalf they are authorised to give undertakings.

#### **Article 45 – Reservations**

386. Article 45 specifies that the Parties may make use of the reservation as defined in Article 31, paragraph 2. No other reservation may be made.

#### **Article 46 – Denunciation**

387. In accordance with the United Nations Vienna Convention on the Law of Treaties, Article 46 allows any Party to denounce the Convention.

#### **Article 47 – Notification**

388. Article 47 lists the notifications that, as the depositary of the Convention, the Secretary General of the Council of Europe is required to make, and it also lays down the entities (States and the European Community) to receive such notifications.