

*Global Alliance Against Traffic in Women
Foundation Against Trafficking in Women
International Human Rights Law Group*

HUMAN RIGHTS STANDARDS FOR THE TREATMENT OF TRAFFICKED PERSONS

January 1999

SUMMARY

These Standards are drawn from international human rights instruments and formally-recognized international legal norms. They aim to protect and promote respect for the human rights of individuals who have been victims of trafficking, including those who have been subjected to involuntary servitude, forced labour and/or slavery-like practices. The Standards protect the rights of trafficked persons by providing them with an effective legal remedy, legal protection, non-discriminatory treatment, and restitution, compensation and rehabilitation.

Under international law, states have a duty to respect and ensure respect for human rights law, including the duty to prevent violations, to investigate violations, to take appropriate action against the violators and to afford remedies and reparation to those who have been injured as a consequence of such violations.

Accordingly, the Standards adopt the following definition of trafficking and mandate the following State obligations towards trafficked persons:

Trafficking: All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.

Principle of Non-Discrimination: States shall not discriminate against trafficked persons in substantive or procedural law, policy or practice.

Safety and Fair Treatment: States shall recognize that trafficked persons are victims of serious human rights abuses, protect their rights notwithstanding any irregular immigration status, and protect them from reprisal and harm.

Access to Justice: The police, prosecutors and court shall ensure that their efforts to punish traffickers are implemented within a system that respects and safeguards the rights of the victims to privacy, dignity and safety. An adequate prosecution of traffickers includes prosecution, where applicable, for rape, sexual and other forms of assault (including, without limitation, murder, forced pregnancies and abortions), kidnapping, torture, cruel, inhuman or degrading treatment, slavery or slavery-like practices, forced or compulsory labour, debt bondage, or forced marriage.

Access to Private Actions and Reparations: States must ensure that trafficked persons have a legal right to seek reparations from traffickers as well as assistance in bringing such actions, if necessary.

Resident Status: States shall provide trafficked persons with temporary residence visas (including the right to work) during the pendency of any criminal, civil or other legal actions and shall provide trafficked persons with the right to seek asylum and have the risk of retaliation considered in any deportation proceedings.

Health and Other Services: States shall provide trafficked persons with adequate health and other social services during the period of temporary residence.

Repatriation and Reintegration: States shall ensure that trafficked persons are able to return home safely, if they so wish, and when they are able to do so.

State Cooperation: States must work cooperatively in order to ensure full implementation of these Standards.

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INTRODUCTION

These Standards are drawn from international human rights instruments and formally-recognized international legal norms. They aim to protect and promote respect for the human rights of individuals who have been victims of trafficking, including those who have been subjected to involuntary servitude, forced labour and/or slavery-like practices. Victims of trafficking are treated as objects or commodities by traffickers who use coercion, deception or debt bondage to deprive victims of their fundamental freedoms, such as their ability to control their own bodies and labour. To remedy this injustice and address the needs of the victims, the Standards adopt a victim-rights perspective. They protect the rights of trafficked persons by providing them with an effective legal remedy, legal protection, non-discriminatory treatment, and restitution, compensation and rehabilitation.

States have a responsibility to provide protections to trafficked persons pursuant to the Universal Declaration of Human Rights (UDHR) and through ratification or accession to numerous other international¹ and regional instruments. These and other instruments to which states have acceded or ratified are binding, while non-treaty declarations and standards adopted by the General Assembly have a strong hortatory nature and establish a standard by which national practices can be and are measured. International human rights instruments impose a duty upon states to respect and ensure respect for human rights law, including the duty to prevent and

¹ International Covenant on Civil and Political Rights (ICCPR)
International Covenant on Economic, Cultural and Social Rights (ICESCR)
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment (CAT)
Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)
Convention on the Rights of the Child (CRC)
Slavery Convention (SC) and the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (SCAS)
International Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (ICPRMW) (not yet in force)
International Labor Organization Conventions No. 29 Concerning Forced Labour (ILO No. 29) and No. 105 Concerning Abolition of Forced Labour (ILO No. 105).

investigate violations, to take appropriate action against the violators and to afford remedies and reparation to those who have been injured as a consequence of such violations. Nonetheless, as yet, few states have fulfilled their obligation to implement these commitments or to provide adequate human rights protections to trafficked persons.

The protections called for in these Standards apply to all trafficked persons - women, men and children. However, it should be noted that trafficking disproportionately affects women and girls. The overwhelming majority of the persons trafficked to work in sweatshops and brothels are women and girls due to their inferior and vulnerable status in most societies. The gendered nature of trafficking derives from the universal and historical presence of laws, policies, customs and practices that justify and promote the discriminatory treatment of women and girls and prevent the application of the entire range of human rights law to women and girls.²

The historical linkage of 'women and children' has proven problematic in multiple ways. Linkage often encompasses the treatment of women as if they are children and denies women the rights attached to adulthood, such as the right to have control over one's own life and body. The linkage also serves to emphasize a single role for women as caretakers for children and to deny the changing nature of women's role in society, most notably, women's increasing role as the sole supporter of dependent family members and, consequently, as economic migrants in search of work. Nearly half of the migrants today are women. Consequently, the Standards focus upon the rights and needs of adults and pay particular attention to the concerns and needs of female victims of trafficking.

The Standards do not contain specific provisions addressing the special status, rights and needs of the girl child or children generally. Adults, particularly women, have legal positions and require legal remedies that are not always consistent with the legal positions and needs of children. The special rights and needs of children should be protected according to the principles contained in the Convention on the Rights of the Child.

The second component of the Standards is effective prosecution of traffickers, which depends upon the cooperation of victims. However, trafficked persons typically fear authority and are unwilling to trust the police. Traffickers exploit persons who are trapped in conditions of poverty and subordinated by conditions, practices or beliefs, such as gender discrimination, gender violence and armed conflict. Their ability to operate further depends upon the existence of lax or corrupt law enforcement officials and traffickers themselves are often corrupt officials. Thus, a critical component in the effective detection, investigation and prosecution of traffickers is the willingness of trafficked persons to assist in prosecutions. In recognizing and protecting the rights of trafficked persons, the Standards provide an incentive to trafficked persons to report to the authorities and act as witnesses.

In furtherance of achieving the full implementation of the rights of trafficked persons, we urge states to take all necessary measures to adopt and amend laws, where necessary, and to implement laws and policies extending the universally-accepted basic human rights of all persons

² See Declaration on the Elimination of Violence against Women, General Assembly, A/RES/48/104 (2/23/94).

to all trafficked persons. At a minimum, those laws and policies should contain the provisions set out below.

I. DEFINITIONS

States shall adopt and/or implement and periodically review and analyse legislation to ensure its conformity with the following definitions:

Trafficking: All acts and attempted acts involved in the recruitment, transportation within or across borders, purchase, sale, transfer, receipt or harbouring of a person

(a) involving the use of deception, coercion (including the use or threat of force or the abuse of authority) or debt bondage

(b) for the purpose of placing or holding such person, whether for pay or not, in involuntary servitude (domestic, sexual or reproductive), in forced or bonded labour, or in slavery-like conditions, in a community other than the one in which such person lived at the time of the original deception, coercion or debt bondage.³

Commentary: Trafficking can involve an individual or a chain of individuals starting with the recruiter and ending with the last person who buys or receives the victim (such as the owner of the sweatshop) or the person who holds a person in conditions of slavery or subjects such person to slavery-like practices, forced or bonded labour or other servitude. Persons are trafficked into a multitude of exploitative or abusive situations, such as in the garment, agricultural, fisheries, begging, sex and other industries and in domestic labour as servants or through forced ‘marriages’ where they held as virtual prisoners, raped continually by their ‘husbands’ and often forced to become pregnant for the purpose of providing their ‘husbands’ with children. Trafficking does not require the crossing of borders.

A large portion of modern trafficking consists of moving persons from one region to another within one country. The violations and harms suffered by in-country victims are no less than for cross-border victims. For example, the harm suffered by a person trafficked several thousand kilometers within a country can be as great or even greater than the harm suffered by a person trafficked a few hundred kilometers across a border.

The core elements of the act of trafficking are the presence of deception, coercion or debt bondage and the exploitative or abusive purpose for which the deception, coercion or debt bondage is employed. Typically the deception involves the working conditions or the nature of the work to be done. For example, the victim may have agreed to work in the sex industry but not to be held in slavery-like conditions or to work in a factory but not in a brothel.

³

See ICPRMW 68.1.

The nature of the labour or services provided as such, including those in the sex industry⁴, are irrelevant to the question of whether or not the victim's human rights are violated. The trafficker's use of deceit, coercion, or debt bondage to force the victim to work in slavery-like or exploitative or abusive conditions deprive the victim of her or his free will and ability to control her or his body, which constitutes serious violation of the fundamental rights of all human beings.

The definition reiterates existing international human rights standards prohibiting such acts. The Slavery Convention, article 1(1), defines slavery as: "the status or condition of a person over whom any or all of the power attaching to the right of ownership are exercised." The Supplementary Convention to the Slavery Convention, article 1, calls for the elimination of the slavery-like conditions in which many trafficked persons find themselves. It calls for "the complete abolition or abandonment...[of] [d]ebt bondage, that is to say, the status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined", forced marriages, the transfer of a woman "for value received or otherwise", and delivery of a child "to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour." Article 6.2 prohibits the act of "induc[ing] another person to place himself or a person dependent upon him into the servile status resulting from any of the institutions or practices mentioned in article 1...."

The International Labour Organization also condemns such slavery-like practices.⁵ Article 2 of ILO No. 29 prohibits the use of forced or compulsory labour, defined as "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." Also, article 4 holds that "[t]he competent authority shall not impose or permit the imposition of forced or compulsory labour for the benefit of private individuals, companies or associations."

Trafficked Person: A person who is recruited, transported, purchased, sold, transferred, received or harboured as described in 'Trafficking' above, including a child (as defined by and consistent with the principles in the Convention on the Rights of the Child), whether the child has consented or not.

⁴ The International Labour Organisation has officially recognised that sex work is a form of labour. *The Sex Sector: The economic and social bases of prostitution in Southeast Asia*, ed. by Lin Lean Lim (ILO 1998). Similarly, Anti-Slavery International proposes the redefinition of prostitution as sex work as a preliminary condition for the enjoyment by sex workers of their full labour and human rights. *Redefining prostitution as sexwork on the international agenda*, Anti-Slavery International with the participation of Jo Doezema (Network of Sexwork Projects) (July 1997). These Standards adopt the same position and argue that the human rights of sex workers can only be realised through the recognition, application and protection of the same rights and protections to sex workers that are available to other workers.

⁵ ILO No. 105, art. 1, obliges each state party to undertake "to suppress and not make use of any form of forced or compulsory labour...as a method of mobilising and using labour for the purposes of economic development." See also, UDHR, art. 4; ICCPR, art. 8.

Commentary: The definition distinguishes between adults who freely agree to travel (within or across borders) and who are fully informed about the type and conditions of work or services they are expected to perform and adults who do not consent at all or whose apparent, implied or express consent is vitiated by the use of deception, coercion or debt bondage. It respects the right of adults to make decisions about their lives, including the decision that working under abusive or exploitative conditions is preferable to other available options. However, even when migrants know the type of difficult and even dangerous work they will be required to perform, they often become victims of trafficking because the traffickers routinely confiscate their passports, hold them in confinement through coercion, and otherwise deprive them of their freedom of movement and choice.

In situations where labour conditions are no worse than those expected by the worker and the worker is not deprived of her or his freedom of movement or choice, the abuser or exploiter remains criminally liable for other crimes, such as assault, unlawful detention, and labour abuses and for appropriate administrative and civil offenses. The existence of consent to work under such conditions does not excuse the abuser or exploiter from being subjected to the full force of domestic laws that prohibit such practices.

Lastly, the definition recognizes that children need special protection and that ‘consent’ can never be a defence to a charge of trafficking in children.

Trafficker: A person who, or an entity that, intends to commit, is complicitous with, or acquiesces to, any of the acts described in ‘Trafficking’ above.

Commentary: The definition is intended to punish only those persons or entities that have the requisite mental element, including persons and entities that intentionally remain ignorant of the manner in which their acts contribute to the trafficking chain. It excludes persons and entities that unwittingly (and without any reason to suspect the existence of trafficking) become a link in the trafficking chain, such as an innocent taxi driver or hotel owner.

II. STATE RESPONSIBILITIES

As discussed in the Introduction, all states have obligations to recognize and protect the human rights of all persons in conformity with the Universal Declaration of Human Rights and other international human rights instruments. States are obligated to respect and protect the human rights of the persons within its territorial boundaries, as well as to enable such persons to realise those rights, which includes the concept that human rights encompass not only states’ obligations to respect and protect but also their obligation to provide or make available the means (including information, capacity and structures) to ensure the realisation of rights possible by each person.

In recognition and furtherance of those obligations, all states should adopt and/or implement and periodically review and analyse legislation to ensure its conformity with international human

rights standards and its effectiveness in eliminating trafficking and in protecting all rights of trafficked persons.⁶ Accordingly, states shall:

Principle of Non-Discrimination

1. Ensure that trafficked persons are not subjected to discriminatory treatment in law or in practice on account of race, colour, gender, sexual orientation, age, language, religion, political or other opinion, cultural beliefs or practices, national, ethnic or social origin, property, birth or other status,⁷ including their status as victims of trafficking or having worked in the sex industry.
2. Cease enforcing and repeal all measures targeted at preventing or obstructing the voluntary movement of its citizens or legal residents within the country of residence,⁸ into or out of the country upon the ground that the citizen or legal resident might become, might be, or has been a victim of trafficking.⁹

Commentary: Trafficking of women is typically facilitated by the intersection of discriminatory practices and beliefs about women from a particular ethnic, racial, class or other marginalised or disadvantaged group. Anti-trafficking measures must not, in the name of ‘protecting’ all women from harm, deprive any woman of any of her human rights as the principles of non-discrimination and the universality of human rights norms are fundamental and non-derogatory. States have a duty to ensure that all procedural and substantive rights are protected, including the right to non-discriminatory application and interpretation of the law.

Safety and Fair Treatment

3. Ensure access to:
 - a. the embassy or consulate of the country in which the trafficked is a citizen or, if there is no embassy or consulate, ensure access to a diplomatic representative of the State that

⁶ Many of the provisions in these Standards are also contained in The Hague Ministerial Declaration on European Guidelines for Effective Measures to Prevent and Combat Trafficking in Women for the Purpose of Sexual Exploitation, 24-26 April 1997. See also ICPRMW, which contains detailed state obligations towards migrant workers; Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice, Annex to General Assembly Resolution A/RES/52/86, para. 9 (2 Feb. 1998), which Model Strategies serve “as a model for guidelines to be used by Governments in their efforts to address, within the criminal justice system, the various manifestations of violence against women;....”; and Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, GA res. 40/34 (29 Nov. 1985).

⁷ UDHR 2; ICCPR 2.1, 3; ICESCR 2.2, 3; CEDAW 1, 2, 16; CRC 2; ICPRMW 7, 25; Model Strategies 4-6(a); Declaration of Basic Principles, art. 3.

⁸ UDHR 13.1; ICCPR 12.1

⁹ UDHR 13.2; ICCPR 12.2-4; CEDAW 15.4; ICPRMW 8.

takes charge of the country's interests or any national or international authority whose task it is protect such persons,¹⁰ and

b. non-governmental organizations that provide services and/or counselling to trafficked persons.¹¹

4. Provide protection to trafficked persons and witnesses in a manner that does not subordinate the safety and integrity of trafficked persons or witnesses to the interests of the prosecution, including:

a. Before, during and after all criminal, civil or other legal proceedings, measures to protect trafficked persons from intimidation, threats of reprisals and reprisals from traffickers and their associates, including reprisals from persons in positions of authority and, where necessary, provide similar protection to family members and friends of the trafficked persons.¹²

b. A change of identity, where necessary.

c. Take into account the need for the safety of the trafficked person, family members and friends in decisions on the arrest, detention and terms of any form of release of the trafficker, and notify the trafficked person prior to the release from custody or detention of persons arrested for, or convicted of trafficking, abusing or exploiting the trafficked person.¹³

5. Provide all trafficked persons, as well as all persons who might be victims of trafficking (such as illegal migrants held in custody) with information about their legal rights and the procedures available for claiming compensation, restitution and rehabilitation as a result of being trafficked.¹⁴

6. Not detain, imprison or prosecute any trafficked person for offences related to being a victim of trafficking, including for lack of a valid visa (including a work visa), solicitation, prostitution, illegal stay and/or the use of a false visa or false travel or other documents; and not hold trafficked persons in a detention centre, jail or prison, at any time, prior to, during and after all civil, criminal or other legal proceedings.¹⁵

7. Prohibit public disclosure of the names of persons trafficked into the sex industry and/or the use, by any person, of a person's history of being trafficked to discriminate or cause harm to any

¹⁰ Standard Minimum Rules for the Treatment of Prisoners 38; ICPRMW 23.

¹¹ Model Strategies 10; Declaration of Basic Principles 14-15.

¹² Rome Statute of the International Criminal Court (ICC) 57.3, 64.2, 64.6(e), 68; ICPRMW 16.2; Declaration of Basic Principles 6(d); Model Strategies 6(c), 7(h), 9(h).

¹³ See Model Strategies 7(i), 8(c), 9(b).

¹⁴ ICPRMW 16.5-7; Model Strategies 10(a).

¹⁵ ICPRMW 16.4.

trafficked person or her or his family or friends in any way whatsoever, particularly with regard to the right to freedom of travel, marriage, or search for gainful employment.¹⁶

8. Establish, whenever possible, specialised police and prosecutorial units that are trained to deal with the complexities, gender issues and victim sensitivities involved in trafficking.¹⁷

Commentary: The above provisions, as well as others, are intended to ensure that trafficked persons are not treated as criminals but as victims of crimes who have suffered serious human rights abuses. The General Assembly recently called upon states “[t]o encourage and assist women subjected to violence in lodging and following through on formal complaints.¹⁸ These provisions seek to meet that goal and constitute one leg of the stool upon which successful prosecutions sit. Unfortunately, most governments continue to treat trafficked persons as illegal migrants and criminals, thereby further victimising the victims.

Practice shows that current policies in the majority of states have the effect of deterring trafficked persons from reporting to the authorities, as reporting may result in arrest, detention and/or expulsion. The decision to press charges may have major consequences for the persons concerned, both in relation to their safety, in the light of the risk of retaliation against the person or her/his family (especially in cases of organised crime), and in relation to their future prospects, in the light of the risk of stigmatising exposure, social exclusion and/or harassment by authorities.

In order to obtain successful prosecutions of traffickers, states must implement policies and laws to allay the fear most trafficked persons have towards authority and law and must further provide incentives to encourage trafficked persons to seek help, report to the authorities and, if they wish, act as witnesses. The names of trafficked persons should not be recorded in any court or other public documents, nor should they be released to the press or members of the public, including family members, without the consent of the trafficked persons.

Access to Justice

9. Take all necessary steps to ensure that all trafficked persons, irrespective of their immigration status or the legality or illegality of the work they perform (e.g., begging or sex work) have the right to press criminal charges against traffickers and others who have exploited or abused them. In the case of a trafficker who has diplomatic immunity, states shall make a good faith effort to obtain a waiver of immunity or, alternatively, shall expel the diplomat. States should adopt a mechanism for promptly informing trafficked persons of their rights to seek this and other forms of redress.¹⁹

¹⁶ Model Strategies 7(c).

¹⁷ ICC 42.9; Model Strategies 11(f).

¹⁸ Model Strategies 16(b).

¹⁹ UDHR 8; ICCPR 2.3; ICPRMW 16.2; Declaration of Basic Principles 4-5.

10. Provide trafficked persons with a competent, qualified translator and legal representation before and during all criminal, civil, administrative and other proceedings in which the trafficked person is a witness, complainant, defendant or other party, and provide free transcripts or copies of all documents and records related to any and such proceedings, in their own language. Trafficked persons and defendants shall have different translators and legal representatives. If the trafficked person cannot afford to pay, legal representation and translation shall be provided without cost.²⁰

11. Recognize that trafficking is often only one of the crimes committed against the trafficked person.²¹ In addition to charging defendants with the crime of trafficking, states should consider bringing charges, for example, of:

- a. Rape, sexual and other forms of assault (including, without limitation, murder, forced pregnancies and abortions) and kidnapping.²²
- b. Torture, cruel, inhuman or degrading treatment.²³
- c. Slavery or slavery-like practices, involuntary servitude, forced or compulsory labour.²⁴
- d. Debt bondage.²⁵
- e. Forced marriage, forced abortion, forced pregnancy.²⁶

12. Ensure that trial proceedings are not detrimental or prejudicial to the rights of the trafficked person and are consistent with the psychological and physical safety of trafficked persons and witnesses.²⁷ At a minimum, states must ensure that:

- a. The burden of proof prior to and during any prosecution of a person alleged to be guilty of trafficking lies with the prosecution and not with the trafficked person.²⁸
- b. The prosecutor either calls at least one expert witness on the causes and consequences of trafficking and the effects of trafficking on victims or consults with such expert in preparation for the criminal proceedings.²⁹

²⁰ ICCPR 14.3; ICPRMW 18.3.

²¹ Model Strategies 8a, 9(a)(i).

²² UDHR 3; ICCPR 6; CEDAW 2(f), 6 and Recommendation 19 on Violence Against Women).

²³ UDHR 5, ICCPR 7; CAT, all, CRC 37(a); ICPRMW 10.

²⁴ UDHR 4; ICCPR 8; SC, all; SCAS, all; ILO Nos. 29 and 105, all; CRC 32; ICPRMW 11.

²⁵ SCAS 1(a).

²⁶ UDHR 16.1-2; ICESCR 10.1; ICCPR 23; CEDAW 16; SCAS 1(c).

²⁷ Model Strategies 10(d).

²⁸ UDHR 11.1; ICCPR 14.2; ICPRMW 18.2. "The primary responsibility for initiating prosecutions lies with prosecution authorities and does not rest with women subjected to violence," Model Strategies 7(b).

c. Methods of investigation, detection, gathering and interpretation of evidence minimise intrusion, do not degrade the victims or reflect gender-bias. For example, officials shall not use the personal history, the alleged ‘character’ or the current or previous occupation of the trafficked person against the trafficked person or cite them as a ground for disqualifying the trafficked person’s complaint or for deciding not to prosecute the offenders.³⁰

d. Defendants are not permitted to introduce as a defence evidence of the personal history, alleged ‘character’ or the current or previous occupation (e.g., as a prostitute or domestic worker) of the trafficked person.³¹

e. Trafficked persons subjected to, and witnesses of, sexual violence are permitted to present evidence in camera or by electronic or other special means, after taking into consideration all of the circumstances and hearing the views of the victim or witness.³²

f. Trafficked persons are informed of their role and the scope, timing and progress of the proceedings and of the disposition of their cases.³³

g. The views and concerns of trafficked persons are allowed to be presented and considered at appropriate stages of the proceedings where their personal interests are affected, without prejudice to the accused and consistent with the relevant national criminal justice system.³⁴

13. Ensure that, if a trafficked person is a defendant in a criminal case:

a. She or he has the opportunity to raise a defence of duress or coercion and the same evidence is considered as a mitigating factor in sentencing, if convicted.³⁵

b. In cases involving charges of having committed a crime against a trafficker(s), including homicide, she or he has an opportunity to plead self-defence and to present evidence of having been trafficked and the same evidence is considered as a mitigating factor in sentencing, if convicted.³⁶

c. Trials involving migrant trafficked persons are conducted in accordance with these Standards, relevant provisions of Article 5 of the Vienna Convention on Consular Relations

²⁹ ICC 42.9.

³⁰ ICC 21.3, 54.1(b); Model Strategies 7(d) and 8(b).

³¹ ICC 21.3, 68.1; Model Strategies 7(d).

³² ICC 68.2; Model Strategies 7(c).

³³ Declaration of Basic Principles 6(a).

³⁴ Declaration of Basic Principles 6(b).

³⁵ See ICCPR 14.3(d).

³⁶ See ICCPR 14.3(d).

(VCCR) and the articles 16-19 of the ICPRWM. States providing assistance to their nationals under the VCCR shall act, at all times, in the best interests of, and consistent with the views of, the trafficked person.

Commentary: Action to combat trafficking must be targeted at the offenders and not at those who are victim of such practices. The victim too often is forced to stand trial instead of the offender, thus further undermining the victim's belief in the ability of the legal system to bring about justice. Anti-trafficking legislation, which is often more concerned with illegal migration and criminal prosecutions than with the rights and needs of victims, is often used as an instrument of repression by governments to punish, criminalise and marginalise trafficked persons and to deny trafficked persons their basic human rights.

When laws target typically 'female' occupations, they are usually overly protective and prevent women from making the same type of decisions that adult men are able to make. For example, anti-trafficking laws might prohibit women from migrating for work thereby throwing women into the hands of traffickers. Additionally, many women are deterred from reporting due to discriminatory treatment of migrant women, especially women working in the sex industry. Police and prosecutors have exhibited a tendency in many parts of the world to undermine the credibility of female victims of trafficking and to categorize women as 'fallen' or 'without virtue', and thereby as not deserving of respect for their human rights.

Therefore, measures are needed to encourage and assist trafficked persons to report to the authorities and to act as a witness and to ensure 'fair treatment' by the criminal justice system and the safety and integrity of trafficked persons.

Access to private action and reparations

14. Take all necessary steps to ensure that all trafficked persons, irrespective of their immigration status or the legality or illegality of the work they perform (e.g., begging or sex work), have the right to bring a civil or other action against traffickers and others (including public officials and, when possible, persons having diplomatic immunity) who may have exploited or abused them, and have access to other legally enforceable forms of compensation (including lost wages), restitution and rehabilitation for economic, physical and psychological damages.³⁷ Non-wage compensation, restitution and rehabilitation shall be proportionate to the gravity of the violations and resulting harm.

³⁷ ICCPR 2.3; ICC 75; ICPRMW 22.6 and .9, 68.2; Declaration of Basic Principles 8-11; Model Strategies 10(c); see also, The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms, adopted by the Economic and Social Council, Report of the Economic and Social Council for the year 1998, A/53/3 para. 202; (Draft) Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, Commission on Human Rights, UN (E/CN.4/1997/104, April 1997), which formed the basis for the Commission's examination of the matter.

15. Confiscate all assets of convicted traffickers and disburse such assets in payment of all court orders for compensation (such as unpaid wages), restitution and rehabilitation due to the trafficked person.

16. Ensure that the relevant authorities, upon the request of the trafficked person and/or her or his legal representative, make available to the requesting party(ies) all documents and other information in their possession or obtainable by them that is relevant to the determination of the trafficked person's claim for monetary damages, including compensation, restitution and rehabilitation.

Commentary: Trafficking in persons has major economic, emotional, psychological and physical consequences for the victims, their families and friends, which consequences are not accommodated by criminal investigation and prosecution of the offender. Adequate assistance and support as well as financial compensation serves not only to remove or redress the consequences, but also acts as a deterrent to traffickers by strengthening the position of trafficked persons.

Whereas, the victims of human rights violations have largely remained outside the spectrum of national and international concern; however, in recent years, the need for attention to the rights of victims, in particular the right to reparation, has increasingly been recognised as an essential requirement of justice. This trend is exemplified by the instruments cited in footnote 34.

Resident Status

17. Prevent immediate expulsion by staying any actions of deportation and provide resident status (including the right to work) for a period of six months initially, during which time the trafficked person can decide whether or not to initiate a civil action or to be a witness in a criminal action against the traffickers.³⁸ *If the trafficked person decides either to initiate a civil action or become a witness in a criminal action, or both, then the state shall provide the trafficked person with resident status (including the right to work) for the duration of such cases, including all appeals.*

18. Not deport any trafficked person if there are substantial grounds for believing that such person would be in danger of being subjected to torture. All deportations shall be carried out in accordance with the law.³⁹

³⁸ ICCPR 13; ICPRMW 22.1-.5. Under Dutch law, a suspected or actual victim of trafficking is entitled to a three-month 'reflexion period' in which to decide whether or not to press criminal charges against the trafficker(s) and act as a witness. If the person decides to press criminal charges, she or he is entitled to a temporary residence permit for the duration of criminal proceedings, including appeals. At the same time, she/he is entitled to benefits (for example, social security, housing, health care, social services, legal aid, counseling) on an equal basis with nationals. Aliens Circular Ch. B17 (1988, rev. 1993 and 1994), TBV 1996/3. Belgium has adopted similar measures. Ministerial Circular *in Monitor Belge* (July 1, 1994; Jan. 13. 1997).

³⁹ CAT 3.

19. Provide trafficked persons with information and an opportunity to apply for permanent residence under national laws and international treaties. In considering applications for asylum, a trafficked person shall be permitted to introduce evidence supporting a claim that repatriation could seriously endanger her or his life, such as a high risk of reprisal by traffickers or persecution or harassment by the authorities.⁴⁰ Guidelines recognising gender-based persecution as grounds for asylum should be followed.

20. If the state in which a trafficked person claims to be a citizen refuses for whatever reason to recognize the trafficked person's claim, consider whether, on the balance of probabilities, the trafficked person was born in and/or has spent most of her life in that country. In such event, the country in which the trafficked person is residing (legally or illegally) must provide the trafficked person with all the rights and privileges granted to other stateless persons contained in the UN Convention relating to the Status of Stateless Persons.

Commentary: Many trafficked person refrain from seeking help or reporting to the authorities for fear of deportation. Although, at first glance, deportation might seem to represent an escape from the trafficking situation, the reality is more complicated. Often, the victim has borrowed money to pay for the costs of recruiters. She may be indebted to her own family and also to the persons who recruited her in the country of origin. Deportation means returning home with empty hands, debts she will never be able to pay off and without any future prospects. If it becomes known that a woman has been in the sex industry, she risks being ostracized by her family or her community.

Moreover, it is questionable whether or not deportation means an escape from the criminal circuit. In many cases women return home only to find the traffickers waiting to take them back immediately. Often, traffickers threaten to inform the victim's family about her activities if she does not comply with their demands. Deportation, in many cases, means that the trafficked person is put at the mercy of the traffickers again, without protection from the authorities or society. In many cases, trafficked persons not only have to fear reprisals from their traffickers but also harassment, arrest or detention from authorities in their own countries.

Providing victims with a stay of deportation, temporary residence during criminal and civil proceedings and an opportunity to apply for a permanent residence removes the fear of trafficked persons of immediate deportation. This serves two interests: first, the trafficked person is able to recover and take back control over her life and, second, it enables the effective prosecution of traffickers by encouraging victims to report to the authorities and to act as a witness.

Health and Other Services

21. Promote and support the development of cooperation between trafficked persons, law enforcement agencies and non-governmental organizations capable of providing assistance to trafficked persons.⁴¹ All persons providing services (health, legal and other) should receive

⁴⁰ Convention Relating to the Status of Refugees, 1.A.2; UDHR 14.

⁴¹ Model Strategies 11, 12.

training to sensitise them to the rights and needs of trafficked persons and should be provided with guidelines to ensure proper and prompt aid.⁴²

22. Provide, on an equal basis with citizens of the State, adequate, confidential and affordable medical and psychological care.⁴³

23. Provide strictly confidential testing service for HIV/AIDS and other sexually-transmitted diseases but only if requested by the person being tested. Additionally, any and all testing must be accompanied with appropriate pre- and post-test counselling and no punitive or restrictive measures should be taken against any trafficked persons who tests positive for HIV/AIDS or any other sexually-transmitted disease. Testing should be provided pursuant to the standards contained in the “Report of an International Consultation on AIDS and Human Rights (UN Centre for Human Rights and World Health Organisation, Geneva, July 1989).

24. During the period of temporary residence status, provide:⁴⁴

- a) Adequate and safe housing
- b) Access to all state-provided health and social services
- c) Counselling in the trafficked person’s mother language
- d) Adequate financial support
- e) Opportunities for employment, education and training

Commentary: In most cases, trafficked persons have no place to stay or means of earning a livelihood once they have escaped from the trafficker’s control. They may not speak the local language or have any family or relatives who can take care of them in the place where they are stranded. Often, they have been subjected to physical violence, unsafe working conditions (e.g., exposure to chemicals), forced abortions or unsafe sexual contacts and are in urgent need of medical care. Apart from physical abuse, they might be severely traumatised by the physical and psychological violence they have endured and suffer from an array of psychological and psycho-somatic complaints. Moreover, viable employment opportunities are often lacking and/or damaged as a result of having been trafficked. Adequate support, employment and educational opportunities enable trafficked victims to regain control over their lives and to improve their prospects.

Repatriation and Reintegration

25. When and if the trafficked person returns to her or his home country, provide the funds necessary for the return⁴⁵ and, where necessary, issue, or provide assistance in the issuance of, new identity papers.

26. Provide reintegration assistance and support programmes for trafficked persons who want to return or have returned to their home country or community in order to minimise the problems

⁴² Declaration of Basic Principles 16.

⁴³ ICPRMW 28; Declaration of Basic Principles 14-15, 16.

⁴⁴ Model Strategies 11(a).

⁴⁵ ICPRMW 67.1.

they face in reintegrating into their communities. Reintegration assistance is essential to prevent or overcome difficulties suffered as a result of rejection by families or communities, inability to find viable employment, and harassment, reprisals or persecution from the traffickers and/or the authorities. Reintegration programmes should include education, training for employment opportunities and practical assistance and should not stigmatise or victimise trafficked persons. All programmes must guarantee the confidentiality and the privacy of the trafficked person.⁴⁶

Commentary: In most cases, trafficked persons have been deprived by traffickers of the financial means to pay for return to their home country or community. Apart from lacking the financial means, trafficked persons may also lack travel documents as traffickers characteristically confiscate the passports or identity papers of their victims. Without money and without papers it is impossible for trafficked persons to return to their home country or community. This might result in them being held in shelters or detention centres, often for years and under inhumane circumstances.

Trafficked persons who are able to return to their home country or community, either voluntarily or as a result of deportation, face multiple problems. The absence of adequate support and opportunities upon their return places them at a heightened risk of repeated abuse and exploitation, including repeated trafficking. Thus, reintegration services are essential to ending the cycle of trafficking.

State Cooperation

27. Cooperate through bilateral, regional, interregional and international mechanisms in the development of strategies and joint actions to prevent trafficking in persons, including cross-border cooperation in the prosecution of traffickers and the protection of the lives and rights of trafficked persons.

28. Coordinate the safe and voluntary repatriation of trafficked persons.

29. Provide support to programs, including those undertaken by non-governmental organizations, for education and campaigns to increase public awareness of the causes and consequences of trafficking.

Commentary: Cooperation between states is absolutely essential if the Standards are to be realised. Trafficking is an international crime, requiring multilateral responses. States must deploy multi-disciplinary and multi-level strategies to combat the sophisticated networks operating throughout the world. States and non-governmental organisations must work together to ensure that traffickers are never able to find a ‘safe haven’ anywhere in the world. Without such a concerted and coordinated effort, trafficking will never be stopped or even minimised.

⁴⁶

ICPRMW 67.2.