Shaafi was a 16 year old boy from Somalia who did not get any documentation when he arrived in South Africa. He was an unaccompanied asylum seeker, who fled from a war situation in his own country. He travelled an enormous distance over land by himself in order to arrive at his chosen destination. Once in Pretoria, he drifted around living on the streets for a while, and got arrested and temporarily detained several times. He finally found a job in a Somali shopkeeper's corner shop where he slept on the floor under the counter at night. He was offered opportunities to come into the care and protection system, but he did not want to. He also expressed a strong preference to work, rather than attend school. The reasons he cited for why he did not want to come into the system was that he liked his freedom, and also that as a Muslim, he did not believe his religious observances would be respected. Shaafi was assisted by public interest lawyers who took a case to court for him to get his asylum seeker permit, but they did not force him to go into the care and protection system (which he was entitled to under South African law) due to his reluctance. Shaafi was responsible and law abiding, and his choices were respected. Shaafi took himself off the street, and he wanted to do it in his own way. This case study shows some of the interesting issues that arise in effectively assisting unaccompanied migrant children who have a strong sense of autonomy and want to make their own solutions.

CASE STUDY 2

Trafficking in street children / child victims as witnesses

A girl named Natasha was born in Belgrade in 2000. She has lived in Belgrade with her stepfather, mother, brother and 4 sisters. Her stepfather was a medicaster while her mother was unemployed.

In 2011, Natasha and her younger sister have reported on a number of occasions the occurrences of physical and psychological violence committed by their stepfather and elder brother (21). A social welfare center (CSW) was informed about this, yet they believed that no sufficient reasons existed for separation of the girls from their family. However, in January 2012, the girls went to the CSW personally and insisted that they should be removed from their family. This was realised that very day as the girls were placed in a home for children without parental care.

On every occasion of recounting the violent incidents, the girls reacted very emotionally, were highly anxious and distressed, and showed noticeable fear from the stepfather and brother, as well as animosity.
towards their mother who “has never taken their side”. Providing that they had repeatedly been abused in their family, the girls were also latently aggressive, hyperactive and prone to impulsive reactions. Simultaneously, the proceeding was initiated before the competent court for the parents to be deprived of their parental right, and for the girls to be placed in the custody of CSW.

Due to high incidence of physical and sexual abuse by other wards, the girls often left the home arbitrarily, only to return after a while (assisted by the police, upon the initiation of a search for a runaway ward of an institution). Finally, in June 2012, they decided it would be safer for them to continue their life in the street, where they survived by resorting to begging and washing windshields of cars at crossroads. They slept in vestibules, lobbies and under bridges. Meanwhile, they met the man who organised the begging in that part of the city, and he demanded that they should surrender all their earnings to him providing that they begged “on his territory”, while he obliged himself to “take care of their safety and give them food”. Having refused to do so, they were beaten more than once only to finally give in to his demands.

In January 2013, Natasha’s sister reported to an NGO that Natasha was abducted by her stepfather and brother and taken to Sweden in order to be sold and married to a sixteen-year-old with disability. The case was reported to the competent CSW and the police. In mid-2013, Natasha was located through international cooperation in Sweden, in the house of the family to which she had been sold, having suffered months of abuse, sexual exploitation and been forced to work hard and long hours in the house. After few months, the stepfather, brother and intermediary were arrested and accused of the crime of human trafficking, while after stabilisation, Natasha was repatriated to Serbia.

Having been identified by the competent CSW to be a victim of trafficking in human beings, she was referred to an NGO shelter for the victims of human trafficking and became a beneficiary of a (re)integration programme. She was provided medical, psychological and legal help. It has been worked daily with Natasha on developing mechanisms of overcoming trauma and stressful situations, as well as on realising one’s own values and qualities, and achieving the desired level of confidence and positive mind frame.

In 2015 she was accompanied by a lawyer delegated by an NGO to the human trafficking trial against the stepfather, brother and intermediary, where she acted as a witness. Both her parents and the brother demonstrated strong animosity towards Natasha and her sister, because they “sent father to prison”. The trial was open to public, while the court denied the proposal of Natasha’s lawyer for her to be heard via video link,
arguing that the required equipment is out of order. The court also rejected the proposal of the attorney to exclude the public during Natasha’s hearing, as well as the demand for the accused to be removed from the courtroom in order to avoid re-traumatisation of the victim. After her giving evidence, Natasha was asked to confront the traffickers in order to shed light on the circumstances incongruous in their respective stories (an archaic institute of continental justice in some countries). During their confrontation, she was offended and humiliated by the trafficker, the fact which failed to produce any reaction of the court in spite of the fact that the attorney insisted that the confrontation should be terminated. During the entire proceeding the public prosecutor remained passive. Natasha had refused to testify against her stepfather and brother, so they were released due to insufficient evidence.

The intermediary in trafficking was sentenced to three years in prison in the first instance procedure (still waiting for the final judgment), while the court referred Natasha to seek compensation in a civil procedure. The organiser of beggary was never arrested.

Natasha presently lives with her partner and their child in a rented apartment in another city.

*NOTE: Names used in the case studies were changed in order to protect identities.*
ISSUE 3: CROSS BORDER ISSUES

ISSUE BRIEF

Statement of the Issue

Children who have crossed borders often face unique legal issues related to their lack of immigration status. National laws, policies, and practices often marginalize such children and lead to a deprivation of their rights as children. This may include excluding them from eligibility for certain legal protections and social services programs and creating barriers that limit their economic opportunities. Exacerbating this is the lack of access that migrant children often have to the legal representation that is necessary either to obtain lawful immigration status or to qualify for such basic rights as education, health care, or employment. As a result, children who faces challenges because they have been uprooted from their countries of origin may be in even more vulnerable situations in countries of destination.

Equally complex are the challenges in respecting children’s autonomy and desire to identify for themselves solutions that are in keeping with their cultural, religious, or ethnic backgrounds. Systems in place in the host country for the guarantee of family care and support, safety and stability may not be appropriate or be viewed as desirable from the perspective of the child.

This session will explore the gaps in law and policy that may render migrant children uniquely vulnerable in host countries. It will propose basic guarantees of protection that are cross-cutting across borders and should provide fundamental supports to children regardless of where they find themselves. It will seek to connect the reasons for a child’s migration to the design of appropriate systems to care for and protect them. For example, how should the rights and needs of a child who has moved across borders for purposes of economic opportunity or family reunification be viewed--as the same as or different from those of children who have been forcibly displaced by armed conflict, human rights abuses, domestic violence, or trafficking? If a child has been a victim of crime, including trafficking or smuggling, does the child have a right not to cooperate with law enforcement? Should children who have crossed borders without the requisite documentation be subject to penalization in
the same way that adults are, e.g., detention or removal to the country of origin? Should their right to family reunification be respected, and how does that differ when considering reunification with family in the country of origin versus the country of destination? When is return to the home country appropriate?

Undergirding these concerns very often is the nexus—and tension between—respect for the rights of the child under international law and the desire of destination countries to regulate the flow of migrants and deter irregular migration. In this discussion, children especially may be viewed with hostility as their very needs as children are viewed as particularly burdensome for host countries to address.

It is important to note that many of the established standards that are discussed in the materials apply to all migrant children, regardless of the reason for their migration. In addition, although set forth separately in this paper, victims of trafficking are not an entirely separate group subject to separate standards, but rather there are additional mechanisms in many countries for their support and protection. As recognized during the UN Day of Discussion, “given the reality of migration as it relates to children, a single child may fall into several categories over time and therefore rigid definitions or categorization are of limited help.”

**Specific Conditions and Solutions**

**The Convention on the Rights of the Child:** What does the United Nations Convention on the Rights of the Child (CRC) require State parties to provide to children who have crossed borders regardless of why the children are on the street? In 2005 the CRC Committee issued a General Comment No.6 on the Treatment of unaccompanied and separated children outside of their country of origin. The CRC Committee identifies and elaborates on the provisions of the CRC in particular relevant for these children, regardless why they crossed national borders. Separate attention is given to access for these children to asylum procedure, their legal safeguards and rights in asylum. Relevant for the issues discussed during this session are also the results, in particular the recommendations, of the Day of General Discussion 2012 on the rights of the migrant child.

**Migrant Youth Workers:** What differences are there between youth who migrate for economic opportunity or education and those who are forcibly displaced? These children often have a strong sense of autonomy and independence and may resist placement in care systems that limit their
ability to pursue employment or education. At the same time, destination
countries may limit their access to employment or school, thus driving
them into black market activities or rendering them vulnerable to false
promises of an education or job.

**Trafficked Children:** What obligations are placed on host countries to
protect children who are survivors of human trafficking? What forms of
legal status are available to regularize such children’s immigration status
and does such status protect them from further victimization? How should
trafficked children be treated in the criminal justice system in order to
balance prosecution of the perpetrator with the need not to re-traumatize
or render more vulnerable the child who may have information pertinent to
the prosecution?

**Children Seeking Family Reunification:** When is it appropriate to
reunify a child with family in the home country? When is it appropriate to
reunify children with family in the country of destination? What about the
child who has family in both countries? How does the best interests of the
child factor into such decision making?

**Children who are repatriated:** What are the obligations of destination
countries to ensure the safe return and reintegration of children who are
deporated? What are best practices in this regard? What standards should
countries apply to children who do not qualify for immigration status but for
who it is not in their best interests to be repatriated?

**Some information from the CRC Concluding Observations on
implementation of standards by governments:** It seems fair to assume
that the country specific concluding observations of the CRC Committee
contain in principle recommendations, which are in line with the rules, and
standards presented in General Comment No. 6, although it is possible
that some new rules are added. However, it may be more interesting to
summarize the concerns of the Committee, which reflect in a certain way
the degree to which the rules and standards presented in GC. No. 6 or in
other relevant international documents are complied with and
implemented. The following are examples of the concerns expressed by
the CRC Committee in its Concluding Observations for the 23 countries
examined over the last two years regarding refugee and asylum seeking children, concerns that in principle also apply to unaccompanied children.¹

Asylum-seeking and refugee children.

In all 23 Concluding Observations the rights of these children were addressed.

Concerns expressed were related to for instance:

- The lack of an adequate procedure for the identification of children seeking asylum or refugee status and the delays in processing claims of children in that regard (Switzerland amended the Asylum Act in 2014 and gives priority to asylum applications of unaccompanied children). Sometimes no proper determination of the age of the child (paying attention only to physical aspects) and the best interests of the child.

- Very few countries have a practice of appointing a guardian for unaccompanied children (Sweden, the only one with a specific Act on Guardians for unaccompanied children, and Croatia) but the concern of the Committee was that the guardians were not always properly trained, that they were overburdened social workers. It should be noted that the Committee did not systematically raise concerns regarding the absence of a system of appointing guardians or the access to free legal representation (example: Indonesia and Uruguay).

  o Asylum-seeking and refugee children are often arrested and detained, sometimes in facilities for adults and if they are in reception centers the health conditions are sometimes very poor.

  o In some countries there is a serious lack of access to health care and education and the Committee notes the fact that in some countries insufficient attention is paid to the possibility that these children escaped armed conflict or have been child soldiers which results in a lack of adequate support for these children in recovery from their traumatic experiences.

¹ For only one country there was a separate paragraph dealing with unaccompanied children (Uruguay).
The matter of great concern is the protection of children in refugee camps where they are at risk of becoming victims of sexual or other forms of violence, e.g. girls are given away for paying debts or are subject to forced marriage. Health care and education, if available are often of poor quality or not available at all.

There are other more country specific concerns, e.g. the discrimination of Palestinian children fleeing with their families from Syria to Jordan who are denied entry into Jordan and are sent back to Syria and the treatment of families and children fleeing North Korea by the Chinese authorities: they are sent back to North Korea in violation of the non-refoulement principle of international law.

Finally, it is remarkable that the CRC Committee does not systematically refer to General Comment No. 6 recommending the States to develop and implement rules and practices in full compliance with this document (only examples: Congo and Portugal).

**Trafficking of children.**

This matter gets relatively a lot of attention in the States parties to the CRC. Quite a number of countries have an Anti-trafficking in persons or similar Act and/or national anti-trafficking action plan. The concerns of the Committee are often related to the lack of (adequate) implementation of these acts or Plans, the lack of awareness of the problems of trafficked children and of sufficient training of people dealing with trafficked children. Another concern frequently expressed is the lack of investigating cases of trafficking, prosecution and conviction of child traffickers and the fact that children victims of trafficking are sometimes treated as criminals. They often do not have access to rehabilitation and recovery services suitable to their specific needs.

Cross border trafficking is a huge and serious problem but let us not forget that many children are trafficked inside the country (see e.g. the Concluding Observations for India).

**Migrant Children**

It is widely recognized that lack of status is often extremely problematic for children accessing support or services. The UN Day of Discussion recommended the following:
Access to regular and safe migration channels and secure residence status

91. Wherever possible, States should make available regular and non-discriminatory migration channels, as well as provide permanent and accessible mechanisms for children and their families to access long-term regular migration status or residence permits based on grounds such as family unit, labour relations, and social integration. These regularisation programmes should aim at facilitating migrants’ social integration and protecting children’s rights, including their right to family life.

The CRC Committee addresses the plight of these children under the heading: Children in migration situations indicating that the attention is not limited to children crossing borders.

To illustrate this: The Committee expresses its concern of the high number of children with one or both parents employed as migrant workers in other States who are particularly vulnerable while no special protection measures are taken (Jamaica and Uzbekistan) and recommends inter alia to support through community based services families and caregivers in order to facilitate their child-rearing responsibilities and take measures to secure maintenance from parents working abroad (see art. 27, para. 4 CRC). Only 4 out of the 22 Concluding Observations contain concerns and recommendations regarding children in situations of migration. One should not conclude that there are no children in the other countries who may be affected by cross-border or internal migration.

General Comment No. 6 does not pay specific attention to the plight and rights of unaccompanied children who cross borders in the context of migration. However, in 2012 the CRC Committee devoted its Day of general Discussion to the Rights of all children in the context of international migration and endorsed 35 Recommendations, which provide States parties to the CRC with guidance for the implementation of the CRC for internationally migrating children. In these recommendations very little specific attention is given to unaccompanied children, although there are many of them migrating through or to a country outside of their country of origin.

Most of the recommendations are of a general nature underscoring the obligations of the States where migrant children live (legally or illegally): ensure that the rights of these children are guaranteed and address violations of these rights. In that regard, not immigration agencies but
childcare and protection services should take responsibility for all children in situation of international migration. Guaranteeing the right of the migrant child includes of course full implementation of the General Principles of the CRC (art. 2, non-discrimination; art. 3 the best interests of the child as a primary consideration; art. 6 the right to life, survival and development: art. 12, the right to be heard).

The detention of a (unaccompanied) child because of their or their parent’s migration status constitutes a child rights violation. States should cease the detention of children based on their immigration status expeditiously and completely. In such cases, the lack of adequate legal advice and representation is a significant obstacle to migrant children realizing their rights. General Comment 14 on best interests is clear that:

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

In addition, many young migrants face great adversity upon turning eighteen. While, domestically, there is often tension between children’s rights and immigration control at least when a child is under eighteen, there are additional safeguards – often when making the transition to adulthood, the child loses that support and protection, which is significant when thinking about street youth. ²

Various other recommendations are made e.g. to take the necessary measures for the protection of migrant children from violence and economic exploitation, and for the implementation of the right to family life, the economic, social and cultural rights.

I. Migrant Youth Workers and Opportunity Seekers

One of the complexities of working in this field is that the international laws and guidelines are largely directed at children who accidentally become separated from their parents because of war or disaster. Thus there is a

² See UNHCR’s work the challenges facing displaced youth: http://www.refworld.org/docid/5142d52d2.html
focus on safe reunification with parents, and on asylum claims or refugee status in cases where the circumstances fit the tests related to fleeing persecution and present danger.

In reality, many of the children who move across borders in the world do so in order to seek better opportunities such as education or work. In cross-border situations where there are many adult economic migrants, one will usually also find a sizable proportion of children – mostly adolescents – who are taking the same risks as adults.

Problems facing child migrant workers are:

- they are usually unable to obtain any documentation such as asylum seeker permits or work permits
- they are frequently exposed to arrest, detention and deportation as a result of their undocumented status
- they are often exploited by employers – often farming, domestic work or even illegal industries such as sex work
- they often live and work on the street and are vulnerable to abuse, crime, and xenophobic attacks

One solution for these children is to treat them as children in need of care and protection, as they are in the country without parental care. This could at least be a temporary solution while authorities try to trace their families and consider their future options.

However, many of these children resist the care and protection system. They are typically autonomous and have travelled many miles by themselves, they do not want to be taken care of, and they feel they can care for themselves.

The restrictive rules and child-like settings of children’s homes do not generally suit them. They want to be linked to opportunities for learning and for work.

Although the push factors that cause children and youth to become economic migrants such as poverty, poor education systems and lack of opportunities in their countries of origin are not grounds for asylum, they should not be dealt with simply as illegal immigrants.

Where migrant children are found to be economic migrants who have no asylum claim, the laws of the receiving country are likely to require their repatriation. Their safe management while in the destination country and
careful repatriation to their countries of origin (following a proper social inquiry) should be achieved through co-operation between the countries concerned, with the assistance of international organizations where appropriate.

II. Trafficked Children

A. Background

Human trafficking implies the selling and buying of human beings with the purpose of exploiting them under forced labor or slavery-like conditions, or for sexual exploitation, as well as all actions that may be a part of the exploitation process (e.g. recruitment, transportation, concealment). The exploitation is initiated and maintained by the use of force, coercion, threat, deceit, and abuse of authority and often the abuse of the victim’s vulnerable position (e.g. debt, immigration status, substance abuser). When coercion and deceit are used, the consent of the victim is not relevant. When trafficking involves the exploitation of children, the elements of threat, coercion, abuse of power, need not be present because the law recognizes that those elements are inferential to the age divergence. The trafficker’s goal is to earn a profit (or some other benefit) through the exploitation of the victim.

There are two main types of human trafficking: sex trafficking involving forced prostitution and other forms of forced sexual services, and labor trafficking involving forced labor through substandard wages and living conditions. Labor trafficking impacts all areas of industry and ranges from forced agricultural migrant farming to forced domestic labor. A subset of labor trafficking includes the trafficking of human organs for profit. Regardless of the type, trafficking involves the use of Coercion and control of a more powerful individual over a less powerful individual. This power can also take many forms including the power to control one’s immigration status, financial independence, identification documents, living conditions, wage, and familiar relations.

At its core, human trafficking is a human rights violation prohibited by numerous international instruments and treaties and countless individual state laws. The victims of trafficking are deprived of their freedom of movement and freedom of choice. The trafficker has complete control over the victim’s life by controlling most basic aspects of life such as food, shelter, and clothing. Victims often are deprived of any personal identification documents leaving them powerless to establish any independence. Often, trafficking is called “modern slavery” because the
victims are often held in slave-like conditions and are treated as property of the trafficker.

Human trafficking victims can be controlled by large crime organizations linked to other types of criminality including drugs or gangs. Victims can also be controlled by smaller independent traffickers who are opportunistic and profit from their abuse of humans within a smaller community. Often public corruption is employed to maintain the success of the organization. Bribes to public authorities such as local law enforcement or federal border enforcement often allow the crime to go undetected. In short, the traffickers run a criminal business conditioned by supply and demand in the market. Human trafficking has been labeled the second most lucrative illegal trade, paralleling the illegal firearms trade and second only to the illegal drug trade. It has been estimated traffickers earn approximately a few hundred billion dollars [annually?]. Unlike dealing in illegal firearms or drugs, human trafficking is generally considered a highly profitable and low-risk criminal activity. Setting up and maintaining a business based on human trafficking requires minimal funds in comparison the enormous profits to be gained. Unique to human trafficking is that the product to be sold, a human for sex or labor, can be sold repeatedly; unlike the product of guns or drugs which must be continually obtained in order to be sold. Therefore, the draw to this illegal trade by those who can benefit financially is significant. Aside from the lure of the profits that can be made with little overhead costs, internationally, the number of trafficking prosecutions and convictions is miniscule in comparison to the number of estimated victims. This low number of prosecutions is due in significant part to the lack of training in this area of law. With high profits and little fear of being prosecuted for his crimes, there is little to deter the trafficker from continuing his illegal trade in humans.

Human trafficking is a global phenomenon that affects all countries regardless of economic strength and political stability. However, those countries that are in political turmoil, economic transition, civil conflict, post civil conflict or are underdeveloped or developing countries have greater risk of becoming source countries for the human trafficker. When there is economic upheaval and extreme poverty, the trafficker preys on the desperation of those in need of survival and lures his victims by false promises of stability. Similarly, countries suffering from civil unrest are deprived of an established rule of law that might protect the victimization from occurring. When the victim is uncertain as to who is in charge, there is little hope that she can seek help. Finally, a country suffering from natural disaster is also a prime target for the trafficker who will seek to exploit the destroyed infrastructure and the chaos of the disaster to gather his victims. The idea of being a source country or one of destination is often discussed in the academic literature; yet, the anti-trafficking laws make no distinction between the two. According to a report by the UN
Office on Drugs and Crime, cases of human trafficking were identified in 161 countries, where 127 countries occur as countries of origin, while 137 countries are countries of destination.

Even though some demographic groups appear more often as victims, the statistics reveal that anyone can become a victim of human trafficking – men or women, boys or girls -- regardless of national origin, age, nationality, education, or social status. Similarly, no one demographic applies to traffickers. A variety of men and women may play a role in the trafficking chain, from recruitment to exploitation. On the one hand, human traffickers can be members of organized criminal groups; on the other, they may be relatives of the victims, even the closest family members, as well as friends and acquaintances of the victims. Human trafficking often functions as a “family business”, where every family member has his or her own role.

Victims may also be recruited and exploited by an unfamiliar person who the victim met while looking for a job, a possibility of schooling in another country or city, or marriage.

Children living and working in the street are one of the most vulnerable groups preyed upon by the trafficker because of the significant risk factors involved in street life, which make them susceptible to becoming victims. By the time street-involved children are on the street, they have experienced panoply of potential social ills. They may have come from extreme poverty and were not cared for by an adult, they may have been physically or psychologically abused and have run from that exploitive situation, they may suffer from mental illness preventing them from assimilating into society, and their familial structure may have been shattered by war, violence, natural disaster, illness, extreme poverty or death. These children are prime candidates for the trafficker to exploit and pull into the chain of human trafficking. Because administrative obstacles prevail and only unclear or inefficient bureaucratic procedures exist to aid these children and their families in stepping out of the crude cycle of survival, children have no recourse but to seek survival on the streets. One of the most serious problems they face is the problem of legal invisibility.

The most common types of exploitation of these street children include sexual exploitation, forced begging, labour exploitation, forced marriage, coercion to commit another crime. Child victims of labour exploitation (mainly begging) often are not identified as the victims of trafficking because many countries fail to recognize this form of exploitation as trafficking in human beings. The underlying reasons include that children are reluctant to report family members or other relatives who force them to engage in or organize begging or forced labour to the police or to social
services. Furthermore, child victims of forced marriage are rarely supported by institutional interventions since forced marriages is often not recognized as a form of trafficking in human beings. Complicating the analysis is that in many countries this form of exploitation is perceived as consistent with the traditions and customs of national minority groups.

When considering the relation between trafficking in children and street children we need to be careful not to generalize human trafficking by categorising all exploitation incidents as such, regardless of the fact that they do not involve all the elements of trafficking. Otherwise, this can lead to criminalisation of poverty, or connection of every labour exploitation incident to human trafficking, which is not the case.

In criminal proceedings against traffickers, child victims mostly appear as victims or witnesses. Victims in most countries have a right to representation through their legal representative in the entire course of the proceedings. This legal representative can be a lawyer for the victim, or in some countries, can be an advocate for the victim that the court appoints to protect the rights of the victim (e.g. a guardian ad litem). The victim’s legal representative in some countries has a right to participate in all procedural actions, propose evidence, examine the accused, witnesses, expert witnesses and other participants, submit compensation claim and, finally, give the closing. In case of the absence of a Public Prosecutor in some countries, the victim’s advocate may actually assume prosecution. In those countries, it is necessary that in all stages of the proceedings for trafficking offenses that the victim is ensured representation by professional and sensitized attorneys, ready to understand and challenge the often-encountered challenges of misogyny, xenophobia, and who also understand the personal risks and different modalities of representational obstruction.

In some countries, the victim, and consequently her legal representative, does not have the status of a party to the proceedings but may participate in the proceedings in only a limited manner and at specific stages. In these countries, the court may not be obligated to send the victim the indictment, expert witnesses’ findings or even the judgment. The victim does not have the right to appeal the judgment, except for the part pertaining to costs or in a case where the Public Prosecutor has assumed the prosecution from the victim who instituted the proceedings as a private plaintiff. For this reason, good cooperation with the Public Prosecutor is vital for the protection of victims’ personal rights, because this is the only
way in which the arguments of her legal representative may be presented through Public Prosecutor's appeal.

B. United States

In the United States, the victim’s rights are protected by statute and include her right to be notified of all court proceedings, to be heard by the prosecutor regarding any potential sentence that may be obtained through plea bargain, to have her name and identity redacted from the public record, and to have an attendant be with her throughout all court proceedings. A number of other codified rights include the destruction of any video deposition and/or evidence containing the victim’s image after the completion of the case. All parties and the court personnel are also required to maintain evidence in a protected and confidential place. Alternative means of testifying in open court against the defendant are also available provided that the court makes a finding that the victim will suffer harm from confronting the defendant during her testimony. If such a finding is made based on professional evidence, the court can then provide alternative means of testimony including the use of two-way closed circuit television. Aside from these courtroom rights, there are a number of other rights that include a variety of public social services that are coordinated through a victim/witness coordinator. The position of victim/witness coordinator is mandated by law and each prosecuting attorney’s office must hire one and make that individual available to aid the victim in obtaining available services and access to the proceedings. These services include the ability of the victim to obtain medical testing for HIV and other sexually transmitted diseases and to be given access to shelters, mental and physical healthcare.

Victim’s right to participate in criminal proceedings and testify is in the majority of cases respected in practice. However, the right often collides with the reality of the victimization. As in all cases involving minors and/or sexual molestation, trafficking victims often choose not to participate in the prosecution of their offenders due to fear of the traffickers’ reprisals, or due to the long-term effects of the psychological trauma that they have suffered at the hands of the trafficker. The literature suggests that it takes years for a victim to assimilate back in to a “normal” lifestyle and only after significant help and social services are provided to enable a “rescued” child to recover. Much has been written in recent years about the TVPA’s requirement that a victim cooperate with law enforcement in order to receive aid in the form of immigration relief called a “t-visa” and most
commentators have concluded that the burden is onerous for a victim who is attempting to overcome the trauma of isolation and abuse. Best practices suggest that actual testimony is not the only form of cooperation that can result in immigration relief. Overall, however, the majority of successful prosecutions depend significantly on the testimony of victims. Without victim testimony, the prosecutor is unable to present to the judge or jury the story of the victimization because it is a unique and concealed story not recorded in any other way except through the eyes of the victim.

Traffickers use force, isolation, violence, manipulation, ruses to maintain control over their child victims. These means leave lasting and severe physical and psychological health consequences for the child victim, which in turn, affects their ability to testify. It is also well documented that the law enforcement interview, the prosecution and the subsequent trial can also cause secondary victimization to a child due to the often-unnecessary repetition of interviews, forced direct contact with the defendant, speaking in open court in an unfamiliar and intimidating setting, and by unnecessarily questioning the victim about her private life. Educating judges and prosecutors and law enforcement about this secondary victimization becomes essential in the effective prosecution of offenders. Though judges and the prosecutor play an important role in preventing secondary victimization, lawyers can also help prevent this. The better the victim knows what she can expect, the more realistic their expectations are, the safer they feel and the more they can trust somebody who speaks her language and defends their interests, the less is the risk on secondary victimization.

C. Examples of Other State-specific Conditions

This section focuses on the situation of trafficked street children in Croatia, Macedonia, Bosnia and Herzegovina and Serbia related to their position in criminal justice system particularly to legal assistance, trafficked persons as witnesses, right to adequate and appropriate remedies, non-detention of trafficked persons and compensation.

Bosnia and Herzegovina

The Committee for Human Rights stated a concern for the fact that child rights are still being neglected and that there are insufficient funds for the child protection policy. The main problems are: non-implementation of laws, non-existence of budget for children, lack of data about children, insufficiently developed cooperation between NGOs and ruling authorities,
increase in violence against children, juvenile delinquency is at growth, schools are being equipped but very few investments are contributed for the training of teachers and development of programs, while the level of children’s participation is quite low.

**With respect to the issue of right not to cooperate with law enforcement**, the injured parties in criminal proceeding have certain rights, but this specific issue is not strictly regulated within relevant legal acts. It can be stated that injured party cannot be forced to participate in criminal proceeding. With respect to the testifying in front of the Court, domestic Criminal Procedure Codes imposes general obligation to testify to all persons when there is likelihood that their statements may provide information concerning the offense, perpetrator or any other important circumstances. On the other hand, should the witness fail to appear, or justify his absence, the Court may impose upon him a fine in the amount of up to 2,500 or 15,000 EUR (depends under which jurisdiction), or may order the apprehension of the witness. Victim’s access to supporting services does not depend on level of cooperation with the law enforcement.

Separate issue of **exclusion of public** during the criminal proceeding is regulated by the relevant criminal procedure codes. In general, the public can be excluded from the trial if it is necessary to protect the personal and intimate life of the accused or the injured or to protect the interest of a minor or a witness (Article 235 BiH CPC). Court decision to exclude the public is not determined by the nature of the offence or specific victim profile. It means that trafficking cases are not especially stipulated as reason for imperative exclusion of the public from the trial.

As it was stated before, main problem of all these legal instruments is that they do not recognize specific categories of victims including victims of trafficking.

**Protection of witnesses** in criminal procedure regardless of type of crime in case is regulated by special Law on protection of witnesses under threat and vulnerable witnesses and Law on witness protection program in Bosnia and Herzegovina, Federation of Bosnia and Herzegovina, Republic of Srpska and Brcko District. These legal instruments are also dedicated to the protection of **physical integrity** of witnesses in criminal procedure and are applicable to victims of trafficking in human beings. Victims’ protection programs are mainly implemented for war crimes cases, and organized crime including trafficking of human beings. Within State
Investigation and Protection Agency--SIPA specially designed department for witness protection was established and it is working under strong support of international partners from law enforcement. Protection of witnesses out of criminal procedure, regardless of the type of crime in question is regulated by the Law on Witness Protection Program of Bosnia and Herzegovina. This legal instrument is also dedicated to the protection of victims of trafficking in human beings.

Any injured party in criminal procedure in Bosnia and Herzegovina can put **compensation claim** during the procedure. In case of witnessing injured party being examined as the witness shall be asked about his desires with respect to satisfaction of a property claim in the criminal proceedings (Article 86.10 BiH CPC). A claim under property law may pertain to reimbursement of damage, recovery of items, or annulment of a particular legal transaction (Article 86.10 BiH CPC). There are rare cases when this provision was applied in practice. Generally, asset forfeiture laws and their provisions are still weak point of law enforcement and rule of law in BiH.

Even in those cases when Court had brought decision to confiscate property of traffickers such decisions have not been enforced due to the lack of efficient capacities of domestic institutions in area of asset confiscation and its management. In Bosnia and Herzegovina, pursuant to Article 112 of the state Criminal Code, victims of human trafficking may claim compensation from the offenders in criminal proceedings. However, such claims are discouraged in practice, as their examination would imply establishing the damage sustained to evaluate compensation, which in turn would delay the delivery of the judgment on the human trafficking case. Consequently, victims are reportedly advised to claim compensation through civil proceedings. However, in practice, very few victims do so because of the length of the civil proceedings and the fact that the burden of proving the damages sustained lies on the victim. According to representatives of the judiciary, the current legislation does not provide sufficient possibilities to decide on compensation of victims by the offenders in criminal proceedings. The main obstacle for such situation is lack of efficient asset forfeiture legislation in general, asset management capacities of state institutions and low level of awareness about importance of criminal asset confiscation for more efficient prosecution of organized crime including human trafficking.

Victims of trafficking as witnesses in criminal proceeding cannot be **prosecuted and punishment** since the enjoy rights of injured party. This also includes issue of **detention of the injured parties**, which is not
allowed. Victims of trafficking as any other subjects who have status of injured party are generally not excluded from prosecution for committed criminal offences unless they are granted with the immunity from General prosecutor. On other hand, the witness who has been granted immunity and is testifying because of that granted immunity shall not be prosecuted except in case of false testimony.

Obligation to testify in criminal proceeding is general rule in Bosnia and Herzegovina (Articles 81-91 BiH CPC). Victims of trafficking are not recognized by the law as a special category, which has the right to refuse testimony. In cases when they are afraid for their safety special laws on witness protection can be applied.

US State Department - Trafficking in Persons report (2013) recommends that that Bosnia should ensure identified victims, including Bosnian children older than 14 and children subjected to forced begging, are not punished as a direct result of being trafficked;

Greta report recommended to Bosnia (2013) to identify gaps in the investigation procedure and the presentation of cases in court, inter alia, with a view to ensuring that crimes related to THB are investigated and prosecuted effectively, leading to proportionate and dissuasive sanctions; take measures to ensure that crimes related to THB are investigated and prosecuted promptly and effectively, in order to avoid undue delays in criminal proceedings; strengthen their efforts to proactively investigate THB offences, with a special emphasis on cases involving trafficking for the purpose of labor exploitation and trafficking of children

Further, GRETA considers that the knowledge and awareness of judges, prosecutors, investigators and lawyers about THB needs to be improved, including as regards specific elements of the offence, the rights of victims and access to compensation. Future training programs should be designed with a view to improving the knowledge and skills of relevant professionals, which enable them to effectively assist and protect victims of trafficking, and to ensure traffickers receive adequate convictions. During the training, particular attention should be paid to overcoming entrenched negative attitudes and prejudices vis-à-vis victims of trafficking.

GRETA urges the authorities of Bosnia and Herzegovina to take legislative and practical measures to ensure the effective protection of victims of THB, especially children, during the investigation and to prevent their intimidation during and after court proceedings.
Croatia

According to the 2011 EU Progress report for Croatia, human rights continued to be generally well respected. However, there has been limited progress with children's rights, implementation of women's and children's rights and protection against all forms of discrimination demand further attention.

Non-prosecution/non-punishment/non-repetition-Given that in Croatian criminal legislation (both substantive and procedural) there is no explicit provision that protects victim of THB from being subjected to criminal / misdemeanor prosecution / punishment, it seems that Croatian system adopts the model of coercion. Beside the legal framework of witness protection, Croatia has been engaged in the international project WINPRO\(^3\) since 2010, which aims to improve the efficiency and effectiveness in the fight against transnational organized and serious crime, and corruption. Specific objectives of the project are to strengthen cooperation in the fight against organized crime and corruption at regional and European level through strengthening the institutional capacity of the Witness Protection Unit and other relevant agencies and to provide protection of witness and collaborators of justice to beneficiaries before, during and after the trial within and/or outside their territory.

Compensation-In order to establish an effective guarantee of the right to compensation and redress for the victims of THB according to international and European commitment of the Western Balkan countries, the specialized compensation system should be established within the legal framework and monitoring institutions.\(^4\) According to the Ministry of Interior, the Law on Financial Compensation for Victims of Criminal Activities (Official Gazette 80/08) will be in force after the Croatian EU Accession – 1 July 2013. According to the Protocol on the Integration / Reintegration of Victims of Trafficking\(^5\), each person who is classified as a victim of trafficking on the territory of the Republic of Croatia has the right


to access compensation defined by the Social Welfare Act. Victim who has temporary residence is entitled to safe accommodation in a shelter for victims of human trafficking, health care, financial assistance, education and work. The amount of financial assistance for the victim who is unemployed and has no incomes is determined by the body responsible for social affairs. Criminal Procedure Act also regulates right to compensation for victims of THB. Article 16 reads, “The victim of a serious crime of violence shall be entitled to compensation from the State Budget. Funds are raised from fines and confiscated assets gained from crime in a separate fund.”

Right not to cooperate-Criminal Procedure Act regulates the legal framework that defines victim’s right not to cooperate. Article 45 reads:

“Victim of a crime against sexual freedom and sexual morality, under the Article 43 and 44 of this law has the right to: 1. prior to the examining, to talk to a counselor at the expense of budget funds; 2. to be interrogated by the person of same sex in the police and State Attorney’s Office; 3. to refuse to answer questions that relate to personal life of the victim; 4. to require to be examined through an audio-video device under Article 292 Paragraph 4 this Act; 5. to the confidentiality of personal information; 6. to require the public to be excluded from the trial.”

In case of victim being witness of a criminal activity, Article 291 of the same Act is relevant. Article 291 reads:

(1) If a duly summoned witness fails to appear and does not justify the absence, or without permission or valid reason moves away from the place where she needs to be tested, she can be ordered to forcibly summoned.

(2) If the witness appears and after being informed of the consequences of not testifying without legal cause, following the proposal of the public prosecutor, the investigating judge can fine her up to 50,000.00, and if the witness then refuses to testify, she can be imprisoned. Imprisonment lasts

7 CRIMINAL PROCEDURE ACT. Official Gazette No: 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13. Available from: http://narodne-novine.nn.hr/clanci/sluzbeni/2013_05_56_1142.html [Accessed 27/05/13].
until the witness agrees to testify or until his/her testimony becomes unnecessary or until the criminal case is over, but no longer than a month.

FRY Macedonia
In the Macedonian legislation, the protection of witnesses is regulated with the Law on witness protection from 2005. The protection of witnesses, collaborators of justice and victims is also regulated in a separate chapter of the Law on Criminal Procedure. The Law provides that the prosecutor, investigative judge or the trial judge can undertake measures for protection if the witnesses or victims are exposed to any intimidation, treats, retaliation and other risks towards their lives.

In accordance with Article 303 from the Law on Criminal Procedure (LCP) the main hearing is open to the public. Article 304 provides that the trial chamber can *ex officio* at any given time during the main hearing exclude the public, but this can ONLY be done after the parties have been heard and if that is necessary to preserve and protect public order, to protect the moral, the personal and private life of the defendant, witness or injured party. For any such exclusion of the public, the trial chamber shall deliver a decision, which must be PUBLICLY declared and elaborated.

If a juvenile stands trial, the proceedings shall always be confidential and the public is to be excluded. The only present parties inside the courtroom are the juvenile as a defendant, other defendants or injured parties, the guardian of the juvenile, her legal counsel and a representative from the institution that is responsible for the guardianship – the Center for social work. In procedures where juveniles are on trial, the Trial Chamber may also permit the presence of individuals that are engaged in the education of young persons, of researchers of juvenile crime and other science workers. The obligation not to disclose any details from the court proceedings is valid and applicable to all of them. The media can report on such procedures using information and data received from the participants in the procedure, but they are not allowed to reveal the identity of the juvenile under any circumstance or to disclose information about his or her

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9 According to the new Law on Criminal Procedure, from November 2010, this issue is regulated in Articles 226-233. This law should enter into force in 2012.
10 According to the new LCP, this area is regulated in Articles 353, 354, 355 and 356.
11 The parties are already heard during investigation process behind closed doors.
address, nickname, education, social status or other information, which can lead to his or her identification.

Separate provisions protecting the rights of underage victims-"The procedure for a criminal act where a victim is minor, courts, prosecutors and officials of the Ministry of Interior can proceed only if they have adequate education, special knowledge and experience in the field of child rights and criminal-law protection of minors.” (Article 137 of the Law on Juvenile Justice)

Victims’ ability to freely/willingly decide whether or not they want to testify in the process against their traffickers.-According to the law any person that is invited to be a witness has the obligation to appear to the court and give testimony, this also applies to the to domestic victims. There are exceptions from the law which are stated in the in the law for criminal proceedings, article 213 and 214.

Access to legal aid for victims of human trafficking-Procedure for obtaining free legal aid is long and time consuming, for this period the court trial usually starts and trafficked persons do not get the required legal assistance on time. The other obstacle that appears is that the victim should file quest for free legal aid with written statement signed by her and if there are members of his/her family in Macedonia also to sign and to allow the inventory of the entire movable and immovable property and have to give permission for inspection at all data for the assets they have available at that moment. If the applicant is a foreigner she must submit confirmation of their status by the competent national authority and the documentation should be sent by mail or in person at the Ministry of Justice.

Regarding the right to exercise the legal property claim\textsuperscript{12}, the victim may exercise in criminal proceedings together with the judgment which advertised defendants guilty, but sometimes the court deprive this right to the victim with adoption of additional judgment because the Court does not want to perform additional evidence in favor of the victim since this will prolong the whole procedure.

\textsuperscript{12} Example: Since in the moment of court proceedings the victim is “potential victim”, her lawyer should give evidences for damage, such as forensic examination and psychiatric examination, which sometimes makes the procedure very long. For that reasons the court decides with additional verdict on compensation.
In terms of **compensation for non-material and material damage**, the victims should be compensated from the state fund under the conditions and manner prescribed by special law. If the fee of damages cannot be provided by the defendant, also in this case the rights of the victims have been denied since the state fund is not functioning\(^\text{13}\).

**Serbia**

When it comes to the rights of the child, the Republic of Serbia is a signatory to many UN documents on human rights, the most important of which is the Convention on the Rights of the Child and its Optional Protocols on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography. Yet, a department solely responsible for children’s rights does not exist within the system. Instead, the ministries perform activities related to the rights of the child separately, according to their scope of work. The only coordinating body for the rights of the child at the level of government - the Council for Child Rights is not active for 2 years, showing there is still no understanding of the need for effective coordination and management of activities in the field of the rights of the child. Pursuant to the Rules of Procedure of the National Assembly of the Republic of Serbia, the Committee on the Rights of the Child was established as a special permanent working body. The Committee has held six meetings and one public hearing so far. In last couple of years, significant progress was made in the area of legislation relevant for the improvement of the position of children. In 2006, three important laws came into force: the *Family Act*, the *Criminal Code* and the *Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles*. A large number of children in Serbia are poor, without elementary health and social care. According to the EU criteria, one third of all children in Serbia live in poverty. What is notable is that the issue of children’s rights in practice is always in the background of still predominant political questions. As far as sexual abuse of children is concerned, it is estimated that every third girl and every seventh boy have suffered this form of violence. The number of reported cases is far smaller than actual incidence of sexual abuse of children. Children in Serbia are victims of other forms of violence, too, but there is no precise data on the size of the problem. When it comes to human trafficking, following types of exploitation are known to have happened to children in Serbia: sexual exploitation, forced begging, coercion to petty crime, forced marriage,

\(^{13}\) The compensation should be gain from the assets of the trafficker or from the RM state budget. The verdict should be submitted to an “enforcement agent” who should collect money from the trafficker. Usually the traffickers do not have any assets on their name and the state budget provision still is not functioning for compensation of victims. For that reason all the verdicts for compensation are not realized (the victims did not get any money).
labor exploitation and illegal adoption. Among identified victims, percentage of children is very high – around 40% in the last five years.

**Right not to cooperate with law enforcement.** According to domestic law trafficked persons are not allowed to refuse to cooperate with law enforcement and testify in court proceedings (*Criminal Procedure Code*, art. 96, and art. 92). Regardless of her reason, if the victim decides not to press charges or act as witness, this decision is not respected. In regards to the victim, i.e. the witness, an expert witness can determine that the victim is not capable to give testimony. The victim’s mental health condition is evaluated based on this expertise. Everybody else is obliged to report a criminal act as stipulated in the Criminal Procedure Code (art. 223, Item 1). A failure to report a criminal act is a criminal act in itself (*Criminal Code of Serbia*, Art. 332).

There are cases where victims were called to testify more than a decade after they were exploited.

**Right to compensation** (*Criminal Code – Chapter VII Confiscation of Material Gain – Art. 91 - Grounds for Confiscation of Material Gain, Art. 92 - Conditions and Manner of Seizure of Material Gain, Art. 93 – Protection of the Injured Party; Criminal Procedure Code – Art. 60, Art. 103, Art. 156, Art. 188, Art. 191; Chapter XV Indemnification claims, Art. 201 – 212; Law on Seizure and Confiscation of the Proceeds From Crime*¹⁴, General provisions – Art. 1, Art. 2 and Art. 49)*- Although the issue of compensation is included in the minimum standards of protection and regulated by domestic law, there is hardly any case law in this area. Only one court proceedings in 2012 pertained to compensation of damages, which the victim initiated following the completion of criminal proceedings wherein she had been referred to litigation. In all the cases monitored, the criminal courts did not decide on victims’ compensation claims, but referred them to litigation. The fact that trafficking victims are instructed to exercise their right to compensation in civil proceedings, and that compensation claims are hardly ever decided on in the criminal proceedings despite the normative possibilities, represents an additional obstacle to exercise of full rights of victims of this crime.

**Non-prosecution, non-detention and non-punishment of trafficked persons** (*Criminal Procedure Code – 6. Detention – art. 141 and art. 142.)*-For many years, i.e. until bylaws on victims’ status of residence were adopted, foreign victims in Serbia (including children) were accommodated in closed-type shelters and banned from leaving these premises. An excuse offered by both institutional representatives and NGOs that ran such shelters - for keeping the victims captive in such way

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was unregulated residential stratus of foreigners. On the other hand, they claimed victims of Serbian nationality were kept in such shelters for safety reasons, i.e. to avoid dangers of traffickers. After the bylaws were adopted, the situation improved significantly, but this overlaps with the fact that currently number of foreign citizens among victims identified in Serbia is extremely low. What remains unchanged is the fact that visits to the reception centers for asylum seekers or to detention centers for irregular migrants are not within the regular activities of NRM actors, although this could contribute to proactive victim identification among this vulnerable group.

**Position of trafficking victims in court proceedings** (Law on Juvenile Criminal Offenders and Criminal Justice Protection of Juveniles (hereinafter: Law on Juveniles); Special Protocol on the Conduct of Police Officers in the Protection of Minors from Abuse and Neglect\(^\text{15}\) (hereinafter Special Protocol); Instruction on the Conduct of Police Officers towards juveniles and young adults\(^\text{16}\) (hereinafter Instruction). When a police officer determines that a crime against sexual freedom, human trafficking, trafficking in minors for the purpose of adoption, or a crime with an element of violence was committed against a minor, he informs the authorized public prosecutor (who obtained specific knowledge in the area of child’s rights and legal protection of juveniles) and files criminal charges or a report.\(^\text{17}\) The main problems are:

- Hearings are postponed often, because of the absence of the defendants and defense counsel or the unavailability of the judge. Postponement of hearings presents a serious problem, especially when this means that the victim has to come again to give testimony.

- In all proceedings the victims’ full names are given and their identity revealed, despite the fact that a large number of victims are underage at the time of the crime or the trial. Despite the fact that intimidations and threats to victims’ security intensify during the trial, their address is still revealed in most cases.

- Provisions of the Criminal Procedure Code allowing the exclusion of the public from (part of) the hearings for the protection of the privacy of the victim/witness are hardly ever used; the same is true for those pertaining to protected witness status.

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• Victims and/or their families are not provided with professional assistance of a guardianship authority, psychologist or social worker by the state; the Agency for Coordination of Protection of Victims provides such assistance only sporadically. Usually, NGOs take care of escorting the victim to the court and supporting him/her throughout the proceedings.

• In the majority of cases the defendants are in custody during proceedings. However, this does not prevent them or their relatives from threatening or intimidating their victims. Also in cases of threats and intimidation of the victim immediately before or after the hearing, in the court building or in front of the courtroom, the court and the prosecution largely remain passive. Measures to protect the victim’s safety are rarely taken despite the fact these are stipulated by provisions in the Criminal Procedure Code (to protect witnesses and/or the injured party against insults, threats and other assault). Upon reporting such incidents, victims are usually being told by the prosecutor’s office to file a criminal complaint with the help of NGOs.

• In addition, provisions allowing defendant’s temporary exception from the courtroom if a witness refuses to testify in his/her presence or where there are indications that the presence of the defendant will inhibit the victim/witness to tell the truth are scarcely applied.

• Finally, whereas the law prescribes that the defendant will be heard with decency and respect for their integrity, similar provisions for the hearing of the victim/injured party do not exist.

• The Criminal Procedure Code envisages various possibilities to prevent the (repeated) confrontation of the victim with the defendant, e.g. by reading or using recordings of the victim’s testimony or by applying the protected witness provisions. However, judges tend not to use these provisions in spite of the effects on both the physical and mental condition of the victim and the process of truth finding.

**Right not to cooperate with law enforcement** - Once summoned by the court, victims cannot refuse to take part in the proceeding and give their testimony. According to the Criminal Procedure Code, victims as the injured party witness must come and testify. A minor who, because of age and psychological development, is not capable of comprehending the significance of the right to exemption from duty of testifying, cannot be

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18 Criminal Procedure Code, Art 94, stipulates who can be exempted from duty of testifying: 1) person who is the spouse of the accused, or is cohabiting with the accused in any permanent form; 2) a relative of the accused, in consanguinity and lineally, as well as collaterally up to thrice removed inclusive, and in-law up to twice removed inclusive; and 3) adoptee and adopter of the accused.
examined as witness, except in the case when the accused has requested it. The witness/injured party may request to not answer certain questions, if it is likely that answering them would incriminate him/her or his/her relatives or exposed them to severe disgrace or considerable material damage. This is also the only possibility for exempting the victim from duty of testifying in the case of all human trafficking victims. However, in the specific case of children, the possibility of exempting minors from testifying is almost never applied. Criminal Procedure Code envisages that the witness who refuses to testify can be fined up to 150,000.00 RSD, and if after that s/he refuses to testify again, s/he can be punished with the same penalty again.

Sources and References:

Concluding Observations on the following countries:

China, CRC/C/CHN/CO/ 3 – 4, 29 October 2013;
Congo, CRC/C/COG/CO/ 2 – 4, 25 February 2014;
Croatia, CRC/C/HRV/CO/3 – 4, 13 October 2014;
Dominican Republic CRC/C/DOM/CO/3 – 5, 6 March 2015;
Gambia CRC/C/GMB/CO/2 – 3, 20 February 2015;
Germany CRC.C.DEU/CO/3 – 4, 25 February 2014;
Hungary, CRC/C/HUN/CO/3 – 5, 14 October 2014;
India, CRC/C/IND/CO/3 - 4, 7 July 2014;
Indonesia, CO/C/IDN/CO/3 -4, 10 July 2014;
Iraq, CRC?C?IRQ/CO/ 2 – 4, 3 March 2015;
Jamaica, CRC/C/JAM/CO/3 - 4, 10 March 2015;
Jordan. CRC/C/JOR/CO/4 – 5, 8 July 2014;
Kyrgyzstan, CRC/C/KGZ/CO/3 - 4, 7 July 2014;

19 In the identification of the documents you will find after CO numbers e.g. 2 – 3, 3-4 or 2 – 4. This indicates that the Concluding Observations relate to a combination of two or more reports (allowed by the Committee) consolidated in one report. This combination is meant to allow States parties to catch up with their reporting obligation. If only one number appears after /CO/ it means that the country is on time with its reporting. Of the listed countries Sweden and Yemen complied with their reporting obligation.
Mauritius, CRC/C/MUS/CO/3 – 5, 27 February 2015;
Morocco, CRC/C/MAR/CO/3 - 4, 14 October 2014;
Portugal, CRC/C/PRT/CO/3 – 4, 25 February 2014;
Tanzania, CRC/C/TZA/CO/3 – 5, 3 March 2015;
Sweden, CRC/C/SWE/CO/5, 6 March 2015;
Switzerland, CRC/C/CHE/CO/2 – 4, 26 February 2015;
Uruguay, CRC/C/URY/CO/3 – 5, 5 March 2015;
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# SESSION 3: CROSS-BORDER ISSUES

## Standards

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I. The United Nations Convention on the Rights of the Child

A. Introduction

The UN Convention on the Rights of the Child applies to all children in 195 States and is therefore an important source of information on the standards States should comply with when developing and implementing legislation and policies for the treatment of children who crossed their borders.

The UN Convention on the Rights of the Child (CRC) entered into force in September 1990 and is now ratified by 195 States\(^1\) and I assume that the participants are rather familiar with its content and the monitoring role of the CRC Committee.

In 2005, the CRC Committee issued a General Comment No.6 on the Treatment of unaccompanied and separated children outside of their country of origin\(^2\). In this document, the CRC Committee identifies and elaborates on the provisions of the CRC in particular relevant for these children, regardless why they crossed national borders. Separate attention is given to access for these children to an asylum procedure and their legal safeguards and rights in asylum. Relevant for the issues discussed during this session are also the results, in particular the recommendations, of the Day of General Discussion 2012 on the rights of the migrant child.\(^3\)

The Committee’s primary mandate is to examine the progress states parties have made in the implementation of the CRC. This examination is based on the report of the State party submitted to the Committee and reports of UN agencies and NGO’s. The result of this examination is known as the (country specific) Concluding Observations. It contains among others the recommendations of the Committee, specifying actions the State party examined should take to improve the implementation of the provisions of the CRC. After the presentation of the documents mentioned before some examples of these recommendations regarding countries

\(^1\) South Sudan ratified the CRC in May this year as the 195th State. Only Somalia and the USA have not yet ratified the CRC, although Somalia seems to be in the process of finalizing the ratification process.

\(^2\) UN Doc. CRC/GC/2005/6, 1 September 2005. The term “separated children” is used for children separated from their parent(s) or their previous legal or customary primary caregiver but not necessarily from other relatives.

\(^3\) The CRC Committee regularly organizes Days of General Discussion allowing it to engage in discussions about a certain topic with representatives of States parties, NGO’s, UN agencies (e.g. UNICEF) and other individuals and the implementation of the CRC regarding this topic. Participation is free and everybody interested in the topic can participate.
examined during the last two years will be presented to illustrate which recommendations were made relevant to the issues to be discussed in this session.

The following information on the rights of children who have crossed borders is relevant not only for street youth but for all children outside of their country of origin. However, it is important to pay some separate attention to the relevance of the CRC for street children given the fact that they don’t as such appear in the text of the CRC and that the Committee has not issued a General Comment on the rights of these children nor did it devote a Day of General Discussion to their rights. The main source of the views of the Committee on the rights of street children is therefore its Concluding Observations.

Twenty-three States parties were examined in the last two years and for 13 states specific recommendations were made regarding street children, which the Committee presents under the heading: Children in street situations, indicating that it wants to avoid the term “street children”.  The main issues addressed in the Concluding Observations:

1. Develop a national strategy aiming at preventing situations in which children resort to living and working on the streets and address, the root causes of this phenomenon and provide or improve the support and assistance to families as a preventive measure;

2. Prevent street children from becoming victims of trafficking, economic, and sexual exploitation;

3. Provide street children, assisted by trained street counselors, with adequate nutrition, clothing and shelter, as well as with social and health services, including recovery and social reintegration services, and educational opportunities, including vocational and life-skills training, in order to support their full development; sometimes these

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4 The States examined were: Uzbekistan, China, Congo, Yemen, Germany, Portugal, Kyrgyzstan, Jordan, India, Indonesia, Venezuela, Croatia, Morocco, Hungary, Dominican Republic, Gambia, Iraq, Jamaica, Mauritius, Tanzania, Sweden and Switzerland. The fact that for 9 States no recommendations were made for the rights of children in street situations does not necessarily mean that street children don’t exist there or that there are no problems in that regard. For most cases the explanation is that in the reports submitted to the Committee, street youth were not explicitly mentioned as a matter of concern.
recommendations included recommendations to involve NGO’s and establish cross-sectoral coordination and multidisciplinary interventions.

4. Provide or improve support and assistance to families as a measure conducive to the return of children to their families and support reunification programs for this family reunification when that is in the best interest of the child.

5. Do not treat street children as criminals and ensure that they are not arrested and detained and protect them from violence, in particular law enforcement violence;

6. Participation of children in developing and implementing policies and/or programs.

The core message of these recommendations is that States parties to the CRC should take all necessary measures to ensure that children in street situations are enjoying all their rights enshrined in the CRC, such as the right to an adequate standard of health, to education and an adequate standard of living (art. 24, 28 and 27) and the protection from all forms of violence and exploitation (art. 19, 32 – 38) and the right to recovery and reintegration (art. 39), without discrimination of any kind.

The CRC Committee has explicitly stated that article 19 CRC which requires States parties to take all kinds of measures to protect a child from all forms of violence, **while in the care of parents, legal guardians, or any other person who has the care of the child (emphasis added J.E.D.)** also applies to children without such care, for instance street children and unaccompanied children outside their country of origin. The Committee is of the view that the State is obliged to take responsibility as the de facto caregiver “to ensure the child such protection and care as is necessary for his or her well-being” (art. 3, para. 2 CRC).\(^5\)

Finally, already in 1992 the UN General Assembly invited the CRC Committee to consider the possibility of a general comment on street children.\(^6\) So far, the Committee has not issued such GC and this Summit may be an occasion to repeat the invitation of 1992.

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\(^5\) See general Comment No. 13 (2011) on the right of the child to freedom from all forms of violence, para. 35. UN Doc. CRC/C/GC/13, 18 April 2011

\(^6\) UN General Assembly Resolution A/RES/47/126 of 18 December 1992
B. Children outside their country of origin and the CRC.

Many children are on the move and they leave their country for various reasons and under different circumstances. Among them, many are moving without the company of their families. For instance: According to the US Customs and Border Protection agency, from October 1 2013 to September 30 2014 at least 66,127 children cross through Mexico unaccompanied.

Based on the reports from States parties to the CRC and other sources the CRC Committee observed already 10 years ago that the number of unaccompanied children on the move is increasing. It also had identified a number of protection gaps in the treatment of such children who face greater risks of sexual exploitation and abuse, military recruitment, child labor and detention. They are often denied access to food, shelter, housing, health services and education. In some circumstances, these children have no access to proper and appropriate identification, registration, age assessment, documentation, family tracing, guardianship systems or legal advice.

The Committee raised and continues to raise (see hereafter) its concerns on the treatment of unaccompanied children who have crossed borders.

In order to provide the States parties with guidance and support in meeting their obligation under the CRC regarding these children the Committee, in close cooperation with the office of the UN High Commissioner on Refugees (UNHCR), issued a General Comment on the treatment of unaccompanied and separated children outside of their country of origin. It compiles and consolidates the standards the Committee has developed in its Concluding Observations.

This document is not binding. But it is, given the fact that it has been issued by a Committee elected by the States parties to the CRC with the mandate not only to examine progress made in the implementation of the CRC but also to provide States parties in this regard with recommendations for measures they should take to respect, protect and fulfill the rights of children, an authoritative source of information on the implementation of the rights of unaccompanied and separated children crossing borders.

It goes beyond the purpose of this paper to present in details the content of this General Comment and the following is a brief summary of the rules and standards applicable to unaccompanied and separated children
outside of their country of origin. For practical reasons I will limit it to unaccompanied children and not repeat all the time “outside their country of origin” because that is self-evident”. The document starts with a presentation of the principles that are applicable to unaccompanied children (in particular art. 2, 3 6 and 12 known as the General Principles of the CRC), followed by paragraphs on the responses to general and specific protection needs, the access to the asylum procedure and on family reunification, return and other durable solutions.

**Applicable Principles.**

1. **Non-discrimination (art. 2 CRC)**

The enjoyment of enshrined in the CRC must be available for all children within the State’s territory and all children subject to its jurisdiction and that includes asylum-seeking, refugee and migrant children, irrespective of their nationality, immigration status or statelessness. It means among others that policing or order measures concerning unaccompanied children relating to public order are only permissible if based in the law. Such measures should comply with the principle of proportionality and use the least intrusive option.

2. **Best interests of the child (art. 3)**

In all actions concerning children, the best interests of the child shall be a primary consideration. The determination of the best interests of the unaccompanied child must be well documented in preparation of any decision affecting the child’s life. It requires an assessment of the child’s identity, nationality, upbringing, ethnic, cultural and linguistic background, particular vulnerabilities and protection needs. What is in concreto in the bests interests of the child depend on the circumstances and much is left to the decision makers. However, the CRC Committee presents non-hierarchical lists in its General Comment No.14 (2013) provided more guidance for the implementation of the bests interests of the child as a primary consideration. The Committee has identified the elements, which should be taken into account when assessing the child’s best interests; it is a non-exhaustive list. The elements are: the child’s views, the child’s

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7 The rules and standards in the GC No. 6 apply to both categories of children. Although the fact that a separated child is in the company of a relative (other than parents or guardians) should be taken into account.

8 General Comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1). UN Doc CRC/C/GC/14, 29 May 2013
identity, the preservation of the family environment and maintaining relations, the care, protection and safety of the child, the child’s vulnerability, and the child’s right to health and education. Applying these elements is of ticking them off. Not all elements will be relevant to every case, and different elements can be used in different ways in different cases. The elements should be weighed against each other in order to find the action/decision that is in the best interests of the child. For instance, preserving the family environment may conflict with the need to protect the child.

3. The right to life, survival and development (art. 6)

In order to ensure this right the State should take practical measures at all levels, as a matter of priority, to protect unaccompanied children from the risks they may encounter, such as trafficking for the purpose of sexual or other exploitation or involvement in criminal activities with proper follow-up and regularly evaluation of their effectiveness.

4. The right of the child to express her or his views (art. 12)

Establish adequate opportunities for the child to feely express her views. This requires that the child be provided with all relevant information concerning e.g. their entitlements, services available including means of communication, the asylum process, family tracing and the situation in her country of origin. The information should be provided in a manner that is appropriate to the maturity and level of understanding of the child and with the participation of interpreters when necessary. The CRC Committee has issued a General Comment on the implementation of article 12 emphasizing among other things, that article 12 does not impose an age limit and discourages the States parties from introducing age limits either in law or in practice which would restrict the right of the child to express her or his views. The Committee refers to research which shows that the child is able to form views from the youngest age, even when he/she may be unable to express them verbally.9

5. The principle of non-refoulement (art. 33 1951 Refugee Convention).

The obligation of States under this principle is that they shall not return a child to a country (either of origin or of any other country) where there are

9 General Comment No.12 (2009), the right of the child to be heard. UN Doc. CRC/C/GC/12, 1 July 2009.
substantial grounds for believing that there is real risk of irreparable harm to the child. For instance the returning of the child to the borders of a State where there is a real risk of underage recruitment, not only as a combatant but also to provide sexual services for the military, or where there is a real risk of direct or indirect participation in hostilities as a combatant or in any other way.

Confidentiality (art. 16 CRC).

The State is obliged to keep all information received from the unaccompanied child confidential and that obligation applies for all settings, including health and social welfare. Confidentiality is important e.g. to prevent the endangerment of the well-being of person still within the child’s country of origin, especially the child’s family members. Furthermore, information about the whereabouts of the child shall be withheld from the parents where that is required for the safety of the child.

Response to general and specific protection needs

In this section, the CRC Committee presents various rules and standards based on the provisions of the CRC e.g. regarding the right to health, education an adequate standard of living and protection from all forms of violence and exploitation.

The most important rule, critical for the enjoyment of the rights mentioned before, is that States should appoint a guardian or adviser as soon as the unaccompanied child is identified. This person should be consulted and informed regarding all actions taken in relation to the child and should have the authority to be present in all planning and decision-making processes, including immigration and appeal hearings, care arrangements and all efforts to search for a durable solution. In addition to the appointment of the guardian, the unaccompanied child involved in asylum procedures or administrative or judicial proceedings shall be provided with legal representation.

The response to the protection needs is only possible if the child has been identified, in this case as unaccompanied child, and should include age assessment and the collection of bio data and social history of the child and if possible the identity of the parents and siblings.
Unaccompanied children need alternative care (art. 20 CRC) and the challenge to find a suitable place preferably in a family environment, which recognizes and respects the ethnic, religious, cultural and linguistic background. 10

A similar challenge is encountered in the realization of the right to education. Every unaccompanied child shall have full access to education in the country she has entered, without any discrimination. All unaccompanied children have the right to maintain their cultural identity and values (even if we do not agree with these values?), including the maintenance and development of their native language.

Under the right to health, the Committee highlights the importance of providing services for the mental health of unaccompanied children by rehabilitation and physical and psychological recovery services for the children who have been the victim of abuse, violence and cruel, inhuman and degrading treatment or armed conflict.

Prevention of trafficking requires regular and updated information about the whereabouts of the child. Trafficking may result in the status of being unaccompanied and trafficked children should not be penalized but should receive assistance as victims.

Extensive attention is given to the prevention of military recruitment and protection against effects of war (art. 38 and 39 CRC)

Child soldiers often find themselves unaccompanied at the cessation of the conflict or defection. They shall be given all the necessary support to enable reintegration in normal life and should normally not be interned. If internment is unavoidable, for instance if the child poses a security risk, the conditions of such internment should be in conformity with international standards which includes the right to prompt access to legal assistance and the right to challenge the legality of this deprivation of liberty (art. 37 CRC).

These international standards apply to all unaccompanied children in the exceptional where they are detained. Illegal entry of a country may be justified if it is the only way to prevent violations of fundamental human

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rights of the unaccompanied child and States should ensure that such children are not criminalized solely for the reasons of illegal entry.

*Access to asylum procedure, legal safeguards and rights in asylum. (art.22 CRC)*

For unaccompanied and all other children who seek asylum article 22 CRC is in particular relevant, next to all the other relevant provisions of international law, in particular the 1951 Refugee Convention. A full discussion of all relevant provisions goes well beyond the scope of this paper. I will limit myself to the rights and standards highlighted by the CRC Committee in General Comment No.6:

1. The obligation of States parties to the CRC to ensure that a child seeking refugee status receives appropriate protection includes the responsibility to set up a functioning asylum system and to enact legislation with a view to realize that the unaccompanied child receives treatment in accordance with her rights under the CRC and other applicable international rules.

2. All asylum-seeking children shall enjoy access to asylum procedures irrespective of their age. An unaccompanied child may not be aware of the possibility to seek asylum. But when it becomes clear during the identification and registration process that such child may have well-founded fear of persecutions for reasons of race, religion, nationality or membership of a particular social group or political opinion the authorities should refer the child to the asylum procedure.

3. The States parties shall ensure that the asylum-seeking child is represented by an adult familiar with the child’s background and competent to represent her best interests. For unaccompanied children such an adult may not be available and therefore he/she should be given, free of charge, access to a qualified legal representative.

4. When the age and maturity of the unaccompanied child permits a personal interview of the child shall be carried out by a qualified official before any final decision is made, with the assistance of a qualified interpreter when the child is unable to communicate in a common language.
5. The process of assessing the refugee claim of an unaccompanied child has to be a case-by-case examination of the unique combination of factors presented by the child, including the child’s personal, family and cultural background. In addition, the definition of refugee in the 1951 Refugee Convention must be interpreted in an age and gender sensitive manner, taking into account the particular motives for, and forms and manifestations of persecution experienced by the child. For instance, child-specific forms and manifestations of persecution may include the persecution of a member of the family, under-age military recruitment, trafficking for prostitution and other forms of sexual exploitation and female genital mutilation. States should give utmost attention to such child-specific forms of persecution in determining the refugee status of a child.

C. Durable Solutions

If the child has been identified as an unaccompanied child outside her country of origin efforts must be undertaken to find a durable solution that addresses her protection needs and takes into account the views of the child. It should be noted that the child’s voice should be heard in any court proceeding affecting her and she should be afforded legal representation in such proceedings. Such a solution can be, as a priority, family reunification or return to the country of origin, local integration, inter-country adoption or resettlement in a third country. Some rules and principles for each of these durable solutions:

Family reunification

Family reunification should be considered in all cases for children who are unaccompanied or separated with the best interest of the child as the primary consideration in the determination as to whether to reunify the child with a family member in either the country of destination or the country of origin. The child should grow up in a family environment and be cared for by her parent(s) (Preamble + art. 7 CRC) and should not be separated from his parents unless that is necessary in her best interests (art. 9 CRC). In the efforts to find a durable solution, family reunification is the first option. This reunification in the country of origin is not in the best interests of the child if the return to that country lead to reasonable risks that the rights of the child are violated. Such risks are well documented in the granting of refugee status.
When the return of the unaccompanied child to her country of origin is not an option a family reunification in the host country could be considered.

In that regard, art. 9, para. 4 CRC implies that the State of origin shall provide the child (“upon request” but not specifying who can make such request) with the essential information concerning the whereabouts of her absent parents. This information could contribute to a family reunification.

However, keep in mind that this rule is only applicable if the separation of the child from her parents has been the result of any action initiated by a State party.

Article 10, para. 1 CRC allows the unaccompanied child with a permanent residence outside her country of origin (e.g. thanks to him being granted refugee status) may apply for a permission for her parents to enter the host country for the purpose of family reunification; a similar application can be made by the parents. Such applications shall be dealt with in a positive, humane and expeditious manner by the States parties involved (permission for parents to leave their country and to enter another country).

If such reunification is not possible (for whatever reason) the unaccompanied child should be given the opportunity (based on her right to maintain contact with both parents, art. 9, para. 3 CRC) to apply for the permission for her parents to visit the country he/she lives in for the purpose of realizing her right to maintain personal relations and direct contact with her parents. Such request should be dealt with in the same manner as request for family reunification.

**Return to the country of origin**

Children should not be repatriated unless and until their need for asylum or other forms of legal protection are fully considered through a fair adjudication process. This return should be arranged, in principle only, if it is in the best interests of the child. If a reasonable risk exist that the child’s rights will be violated this return is not an option. This also applies in cases where the care that should be provided by the parents or members of the family is not available, unless in advance secure and concrete arrangements of care and custodial responsibilities are made which can be implemented upon return of the child. The authorities of the country of origin of the child are responsible for this implementation. Experiences show that systematic monitoring of this process is necessary in order to prevent that the child does not or no longer receives the care and
protection that was promised and that she is facing the same risks that made her flee the country.

**Local integration**

If the return to the country of origin is not possible, measures have to be taken for integration of the child in the local community where he/she is staying. A secure legal status is critical for this integration (refugee status granted or permanent residence permit). It is understood that this child should enjoy all the rights of the CRC. Special measures are most likely needed in terms of support for recovery from the trauma’s experienced and for the full enjoyment of the right to education (e.g. extra language training).

**Inter-country adoption (art. 21 CRC).**

If inter-country adoption is considered as a durable solution all the rules applicable for this form of adoption in article 21 CRC have to be applied and other relevant international instruments to which the host country is a party, such as the Hague Convention (1993) on Inter-country Adoption and the Recommendations Concerning the Application (of this Convention) to refugee and other internationally displaced children. A presentation of all these rules goes well beyond the scope of this paper taking into account that inter-country adoption is not an issue on the agenda of this Summit. Some specific rules for the adoption of unaccompanied children in GC No. 6 are:

- Adoption should only be considered if the efforts regarding tracing and family reunification failed which should be completed in a reasonable period of time after the child entered the host country or if the traced parents have consented to the adoption;

- Adoption should not take place in haste at the height of an emergency situation;

- Article 21 requires that priority is given to domestic adoption but GC No. 6 is not very clear in that regard. Is that the country in which the child is now residing e.g. thanks to a granted refugee status or her country of origin? GC No. 6 states that priority should be given to adoption by relatives in the country of residence or, if that is not an option, preference should be given to adoption within the
Deportation from the community from which the child came or at least within his or her own culture.

**Resettlement in a third country**

Such resettlement may offer a durable solution for unaccompanied children who cannot return to their country of origin and for whom no durable solution can be envisaged in the host country. This resettlement must of course be in the best interests of the child and may be an option if it serves family reunification in the resettlement country. The resettlement in a third country should not take place if this would undermine or seriously hamper future reunion with the family. The key questions not answered in GC No. 6: how does the host country of the unaccompanied child decide which third country should be approached for this resettlement and why would that third country be willing to allow the child to settle there?

**II. Migrant Youth Workers or Opportunity Seekers**

1. The special situation of children and youth who independently cross borders to attempt to work or access education or other opportunities should be recognized as a special category by policy makers.

2. Children and youth who are migrant workers or opportunity seekers must be protected from exploitation by employers, particularly from work that is harmful or hazardous to their health.

3. Children and youth who are migrant workers or opportunity seekers who are living on the street should be protected from abuse, crime and xenophobic attacks.

4. The care and protection system may be used as a solution for these children in suitable cases, but special programs should be developed to meet their needs and are respectful of their autonomy.

5. This category of children and youth should not simply be treated as ‘illegal immigrants’. Their rights should be protected while in the destination country.
6. If the laws of the country require repatriation in cases where such children do not qualify for asylum, then a social inquiry must be held before a decision to repatriate is made.

7. If repatriation is required by law, children must be repatriated safely back to their countries of origin.

8. There should be cross border co-operation, where appropriate assisted by international organizations, in areas where there is a phenomenon of economic migrancy amongst independent children.

III. Specific Standards for Trafficked Children

A. International and EU Instruments

International Instruments

The core international instrument is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (also called Palermo Protocol or Trafficking Protocol). The Trafficking Protocol is one of three protocols attached to the UN Convention against Transnational Organized Crime. The Convention, the Trafficking Protocol and a Protocol on smuggling were adopted by the UN General Assembly in November 2000. They are primarily law enforcement instruments to promote cross-border cooperation by governments and to ensure that all countries have adequate laws to address these crimes. The Trafficking Protocol consists of three instruments: the Protocol, relevant sections of the Convention and the Interpretative Notes (travauxpratiques), which are explanations of some of the provisions of the Protocol.

The term “trafficking” was used as early as the end of the 19th century. However, since then there has been persistent confusion about the exact meaning of the term, that is, which practices should be combated. The Protocol, for the first time, contains an internationally agreed legally binding definition of trafficking in persons.

The different human rights violations that occur during the process of trafficking are addressed in various international treaties. The most
important are the International Covenant on Civil and Political Rights (1966), the International Covenant on Economic, Social and Cultural Rights (1966), the Slavery Convention (1926), the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery (1956), the ILO Forced Labor Conventions no. 29 (1930) and no. 105 (1957), the Convention on the Protection of All Migrant Workers and their Families (1990), the Convention on the Elimination of All Forms of Discrimination Against Women (1979) and the Convention on the Rights of the Child (1989).

Non-binding International Instruments

A crucial human rights-based instrument is the 2002 OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, which intends to provide a foundation for the development, implementation and evaluation of a rights-based response to trafficking. The Guidelines cover prevention, protection and assistance as well as criminalization, punishment and redress. A Commentary was published by the OHCHR in 2010, which further elaborates on them and provides direction on the legal status of the various aspects of the Principles and Guidelines.

Especially in relation to the position of victims, the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the Basic Principles and Guidelines on the Right to a Remedy and Reparation provide further guidance.

European Instruments

A more human rights-oriented instrument is the Council of Europe Convention on Action Against Trafficking in Human Beings (hereinafter CoE Trafficking Convention). The treaty explicitly identifies trafficking as a violation of human rights and covers both cross-border and internal trafficking.

Another core European instrument is the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). According to the European Court of Human Rights (ECrHR) trafficking in human beings constitutes a violation of Article 4 of the convention without the need to determine whether it should be qualified as slavery, servitude or forced labor (Rantsev v Cyprus and Russia, Application no. 25965/04, 7
January 2010. See box on p. 30).

EU Instruments

At the EU level Directive 2011/36/EU of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims (hereinafter EU Directive on Trafficking) and the Directive on sanctions against employers of illegally staying third-country nationals are the most relevant instruments.


Next to the Trafficking Directive, a number of other existing and forthcoming EU Directives are relevant:

The EU Directive on sanctions against employers of illegally staying third-country nationals provides for criminal penalties in case of particularly exploitative working conditions, where the employer knows the worker is a victim of trafficking or a minor. It also requires Member States to ensure that employers are liable to make back payments to workers, such as outstanding remuneration.

The EU Directive on a temporary residence permit for victims of trafficking who cooperate with the authorities provides for a reflection period and a temporary residence permit during criminal proceedings for victims who cooperate with the authorities, including material, medical, legal and other assistance, and access to education and the labor market.

The EU Directive relating to compensation to crime victims aims to ensure that each Member State has a national scheme in place that guarantees fair and appropriate compensation to victims of crime and which is accessible to victims regardless of where in the EU a person becomes the victim of a crime.

The forthcoming EU Directive on combating the sexual abuse, sexual exploitation of children and child pornography obliges Member States to criminalize the demand for child prostitution and pornography and the
involvement of children in sexual exploitation, including sex tourism and activities like 'grooming' (befriending children with the intention of sexually abusing them). Special attention is paid to prevention, the protection of victims against additional trauma resulting from the criminal proceedings (including access to a free lawyer), and the treatment of offenders, so that they do not abuse again.

The Proposal for a Directive on minimum standards on the rights, support and protection of victims of crime is part of the so-called “Victim Package”, which aims at strengthening the rights of victims in the EU. It contains a set of measures to ensure a minimum level of rights, support and protection for victims across the EU, no matter where they come from or live or where the crime takes place. The Directive will replace the EU Council Framework Decision on the Standing of Victims in Criminal Proceedings.

B. Key Rights Engaged in Trafficking in Human Beings

Right to life, liberty and security (art. 2 & 6 EU Charter; art. 2 & 5 ECHR; art. 6 & 9 ICCPR; art. 6 & 37 CRC; art. 5 CERD; art. 9 & 16 ICRMW)

Right to freedom from slavery, servitude, forced labor, or bonded labor (art. 5 EU Charter; art. 4 ECHR; art. 8 ICCPR; art. 10 ICESCR; art. 11 ICRMW; Slavery & Forced Labor conv.)

Right not to be sold, traded, promised or forced into marriage (art. 16 CEDAW; art. 1 Conv. on slavery-like practices; art. 37 CoE Trafficking Conv.)

Right not to be subjected to torture, cruel, inhumane and degrading treatment or punishment (art. 4 EU Charter; art. 3 ECHR; art. 7 ICCPR: art. 3 CAT; art. 37 CRC; art. 10 ICRMW)

Right to be free from gender-based violence (art. 2 CEDAW)

Right to freely choose one’s work and to just and favorable conditions of work (art. 15 & 31 EU Charter: art. 6 & 7 ICESCR; art. 11 CEDAW; art. 32 CRC; art. 25 ICRMW, art. 9 ILO Conv. No. 143 concerning migrations in abusive conditions)

Right to freedom of expression and information (art. 11 EU Charter;
Right to property (art. 17 EU Charter; art. 15 ICRMW)
Right to keep one’s own identity documents (art. 21 ICRMW)
Right to health (art. 12 ICESCR; art. 5 CERD; art. 14 CEDAW; art. 24 & 39 CRC, art. 28 ICRMW)
Right to freedom of movement (art. 45 EU Charter; art. 12 ICCPR; art. 15(4) CEDAW; art. 5 CERD; art. 8 ICRMW)
Right to privacy and protection of family life (art. 7 EU Charter; art. 8 ECHR; art. 17 ICCPR; art. 9 & 10 CRC: art. 14 ICRMW)
Right to protection of personal data (art. 8 EU Charter)
Right to non-discrimination, equality before the law and equal protection by the law (art. 20 & 21 EU Charter; art. 14 ECHR; art. 2, 14 & 26 ICCPR; art. 2 & 3 ICESCR; art. 2 CEDAW; art. 2 CRC; art. 2 & 5 CERD; art. 1 & 24 ICRMW)
Right to an effective remedy (art. 47 EU Charter; art. 13 ECHR; art. 2 ICCPR; art. 6 CERD)
Right to seek asylum (art. 14 UDHR; 1967 Declaration on Territorial Asylum: art. 18 EU Charter; art. 14 UN Trafficking Protocol; art 40 CoE Trafficking Conv.: 1951 Refugee Conv.; UNHCHR’s executive Conclusions on Asylum).\footnote{Taken from: Prevent, Combat Protect Human Trafficking, Joint UN Commentary on the EU Directive – A Human Rights-Based Approach, p. 23. See: www.unhcr.org/refworld/docid/4edcbf932.html}
C. Substantive Standards: Key International Standards on the Treatment of Victims of Trafficking

Information & Legal Assistance

Trafficked persons are given information on relevant judicial and administrative proceedings as from their very first contact with the competent authorities (UN TrafProt art. 6; CoETraf Conv. art. 12 & 15; OHCHR Guidelines no. 6.5; EU Proposal Victim Dir art. 4)

Trafficked persons are provided with counseling and information, in particular as to their legal rights, in a language that they can understand (UN TrafProt art. 6(3)(b); CoETrafConv art. 12)

Trafficked persons are provided with information on available remedies (UN Traf Prot. art. 6; CoETraf Conv. art. 15(1); OHCHR Guidelines, Principle 9 & Guideline no. 4(8) & 9(2); Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; EU Dir. THB art. 12(2); Proposal Victim Dir art. 12)

Trafficked persons have access to legal assistance and free legal aid under the conditions provided by domestic law, for the duration of any criminal, civil or other actions against the traffickers, including for the purpose of obtaining compensation (art. 15(2) CoE Trafficking Conv.; Case law ECrtHR ; Basic Principles and Guidelines on the Right to a Remedy and Reparation, para. 12; OHCHR Guidelines, Principle 9 & Guideline 9(3); 2011 EU Dir. THB art. 12)

Protection of Safety

Measures are taken to protect trafficked persons from further harm and to protect their safety (UN Traf Prot. art. 6; CoETrafConv art. 12 & 28; OHCHR Guidelines no. 8; EU Dir 2004/81/EC art. 7).

Measures take into account the age, gender and special needs of victims of trafficking (UN TrafProt art. 6(4)).

Child victims are given special protection, taking into account the best interests of the child (CoETrafConv art. 28)

Protection of Privacy
The privacy and identity of trafficked persons is protected. This includes setting standards for the storage of personal data and encouraging the media to protect the private life and identity of victims (UN TrafProt art. 6(1); CoETrafConv art. 11; ICCPR art. 17; OHCHR Guidelines no. 6 & 5.8)

The identity of trafficked persons is not publicly disclosed and their privacy is respected and protected to the extent possible, while taking into account the right of any accused person to a fair trial. Trafficked persons are given full warning, in advance, of the difficulties inherent in protecting identities and are not given false or unrealistic expectations regarding the capacities of law enforcement agencies in this regard (OHCHR Guidelines no. 6.6).

**Trafficked Youth as Witnesses**

Trafficked persons are given assistance to enable their views and concerns to be presented and considered at appropriate stages of the criminal proceedings (UN TOC art. 25, UN TrafProt art. 6; CoETrafConv art. 12)

Trafficked persons who act as witnesses (and where appropriate their family and others close to them) are provided with effective protection from harm, threats, potential retaliation or intimidation by traffickers and associated persons during the investigation and trial process and any subsequent period when the safety of the trafficked person so requires. This may include giving testimony in a way that ensures their safety (e.g. through video links), identification of a safe place in the country of destination; protection of identity during legal proceedings; and identification of options for continued stay, resettlement or repatriation (UN TOC art. 25; CoETrafConv art. 28 & 30; OHCHR Guidelines no. 6, 4.10 & 5.8; Basic Principles and Guidelines on Remedy and Reparation, para. 12; EU Dir THB art. 12)

Legal proceedings in which trafficked persons are involved are not prejudicial to their rights, dignity or physical or psychological well-being (OHCHR Guidelines 6.4)

Trafficked persons receive specific treatment aimed at preventing secondary victimization by avoiding, as far as possible and in accordance with by national law, the following:

Unnecessary repetition of interviews during investigation, prosecution or trial;
Visual contact between victims and defendants including during the giving of evidence such as interviews and cross-examination, by appropriate means including the use of appropriate communication technologies;

Testifying in open court; and

Unnecessary questioning concerning the victim’s private life. (2011 EU Dir. THB, art. 12(4)).

**FRY Macedonia** - In terms of hearings, victims are provided special provisions that protect the victim from possible harmful consequences for her and her health. According to Article 138 of the LJJ (Law on Juvenile Justice):

"1) For all offenses in the Criminal Code that has legal characteristics of crime, and juvenile occurs as a victim of crime, courts and other bodies involved in the procedure are obliged to take measures to assist and protect and act in ways that will avoid possible harmful effects on her personality and development.

2) The proceeding for offenses under paragraph 1 of this Article, in which the minor is the victim, is urgent.

3) The minor victim can be heard as a witness only if it does not adversely affect on her physical and mental development. A juvenile can be heard up to two times as a witness, and notwithstanding the third time if required by the particular circumstances of the case.

4) During the hearing of a juvenile as a witness or damaged, the court shall take into account the personal traits and characteristics of juvenile, to protect its interests and its proper development.

5) The hearing of a juvenile, depending on their age and development is carried out in the presence of a psychologist, pedagogue or other expert.

6) If it considers it necessary, given the characteristics of the offense and the characteristics of the person of the minor, the judge will order a hearing by the use of technical means for transferring image and sound. The hearing is conducted without the presence of the parties and other participants in the procedure, in a separate room and asks questions through the pedagogue, psychologist or other expert.

7) When the minor is heard in accordance with paragraph 6 of this Article, the trial will read the minutes of her statement, that will be released recording of the hearing."
Protection of minors as witnesses-victims of trafficking is envisaged in Article 143 of the LJJ and ensures compliance with the provisions of the Law of Criminal Procedure and LPW (Law on Protection of Witnesses). If necessary, the court will order the application of specific measures to protect the integrity of the psychophysical status of the minor.

**Serbia** - Gathering information from a minor citizen, pertaining to a crime which must be prosecuted *ex officio*– including the crime of human trafficking – is performed exclusively by an authorized police officer, i.e. a specialized officer who obtained specific knowledge in the area of the rights of the child and legal protection of juveniles, in the presence of a parent, adoptive parent, or a guardian, if the minor is under guardianship, or in the presence of temporary or collision guardian (in cases where the parents, adoptive parents, or guardians are prevented from attending the hearing, unavailable or under a reasonable suspicion of committing a crime against the minor, or when this is in the minor’s best interest).

The competence and composition of the court that tries adult perpetrators of crimes against minors is determined in accordance with the general provisions of the Criminal Proceedings Code. In cases pertaining to adult perpetrators of 27 crimes specified in Article 150(1) of the Law on Juveniles, including human trafficking, trafficking in children for adoption, holding in slavery and transportation of enslaved persons and if the injured party is a minor, it is expressly envisaged that the action has to be taken by presiding judge, public prosecutor, investigating judge, injured party’s attorney (in case she is appointed by the president of the court) who have special knowledge in the area of children’s rights and legal protection of juveniles. The aim of this measure is special protection of children and juveniles. The specialized public prosecutor may bring action against adult perpetrators of crimes envisaged by the Criminal Code of Serbia, in accordance with the provisions of the third part of the Law on Juveniles, if she assesses that this is necessary for the purpose of special protection of the minor injured party. Minor as an injured party must have an attorney since the first hearing of the person accused of one of the mentioned 27 crimes, human trafficking included.

If the minor does not have an attorney, the attorney is appointed by the decision of the president of the court. Only a lawyer who obtained specific knowledge in the area of children’s right and legal protection of juveniles may be appointed. The minor and her legal representative have to be informed of this right. The costs of representation in these cases are paid from the State budget, as stipulated by the Law on Juveniles.
When the interests of an underage injured party are in collision with the interests of her legal representative, the guardianship authority shall appoint temporary guardian to such child (collision guardian) in accordance with the Family Law (Article 132, Para. 2 Item 3). In such an event the child shall be heard in the presence of her collision guardian and not of her legal representative. The Law on Juveniles also contains provisions on the prohibition of a confrontation between a juvenile injured party and the defendant in the legally prescribed conditions, but it does not expressly prohibit the possibility of such confrontation (Law on Juveniles, Article 153).

A hearing involving a minor is always conducted with the help of a psychologist, pedagogue or other professional, and in cases when the minor injured by one of the 27 mentioned crimes is being heard, the hearing may be conducted two times at the most. More than twice is only allowed in exceptional cases, when additional hearings are necessary for to complete criminal proceedings, in which case the judge is obliged to pay particular attention to the protection of the minor’s personality. The Law on Juveniles provides for, among other things, the usage of audio and video testimonies as evidence, since they can be used repeatedly and help avoid additional testimonies that may cause stigmatization and retraumatization of the trafficked minor. Like the adults, children victims are expected to take a stand before the court, with unresolved issues of their safety and protection. Even in cases involving exploitation of minors, trials are lengthy and victims are summoned to give statements over a long period of time, which is a serious obstacle for their recovery, stopping them from putting trafficking experience behind and moving on. Very often, trials are postponed because of the absence of the defendants, their lawyers or the judge could not attend the session.

Concerning the rights of THB victims listed in this section, Ministry of Justice adopted a Special Protocol on actions of judicial bodies to protect victims of human trafficking\textsuperscript{12} in 2012. This document highlights the role of the judiciary and particularly of the prosecutor's office in observance and exercise of rights of the victims in criminal proceedings. The Protocol provides for the duty of the public prosecutor to build a relationship of confidence with victims, to provide them full information about the proceedings, to advise the victims about their rights, obligations and their role in the proceedings, as well as to assess the need for professional psychological, psychiatric or medical assistance while talking to them, and at the same time to inform them about the non-governmental organizations involved in provision of support to victims of human trafficking. Compliance with this Protocol would considerably improve the standing of victims in criminal proceedings for human trafficking.

\textsuperscript{12}www.mpravde.gov.rs/images/POSEBNI_PROTOCOL_ENG.pdf
Right to Adequate and Appropriate Remedies

Trafficked persons have an enforceable right to effective and appropriate remedies. Remedies may be criminal, civil or administrative in nature (ECHR art. 13; ICCPR art. 2; CERD art. 6; CEDAW General Recommendation No. 19; Basic Principles and Guidelines on Remedy and Reparation, para. 12; Declaration of Basic Principles of Justice; OHCHR Guidelines, Principle 17 & Guideline 9(1); EU Charter art. 47).

There is a legislative and practical possibility for trafficked persons to obtain compensation for damages suffered. This includes both material and non-material damages (UN TOC art. 14(2) & 25(2); UN TrafProt art. 6(6); CoETrafConv art. 15(3); ICRMW art. 25(3); ILO C 97 & 143; OHCHR Guidelines, Principle 17 & Guideline 4(9)); EU Dir on Compensation).

There is a provision for payment of compensation from the State where such compensation cannot be obtained from the trafficker, i.e. through a Victim Fund. Such fund may be financed through the use of confiscated assets (CoETrafConv art. 15(4); OHCHR Guidelines 4.4).

Trafficked persons have a right to be paid for the work they have performed, independent of the lawfulness of their stay (ILO C 97 & 143; ICRMW art. 25(3); EU Directive on sanctions against employers of illegally staying 3th country nationals).

There are provisions for confiscation of the proceeds of trafficking. A priority option is to use confiscated assets is to compensate victims (UN TOC art. 25(2); OHCHR Guidelines, Principle 16 & Guideline 4(4)).

**The Netherlands** - There are three major ways for the victim/injured party to claim compensation:

A. Through criminal court proceedings;

B. Through civil proceedings; and

C. Through the Criminal Injuries Compensation Fund - The Criminal Injuries Compensation Fund provides a financial allowance(benefit) for victims of violent crimes that have caused serious psychological or physical damage. In this way it recognizes the injustice done. Examples are theft with violence, robbery, threat with a gun, rape, domestic violence,
and stalking or child abuse. Trafficking in human beings falls under the crimes for which the Fund may provide compensation. The Fund is an independent part of the Ministry of Security and Justice. If the damages are not compensated in another way, the Fund can provide compensation through a lump sum of maximum € 10,000, for immaterial damages and € 25,000, for material damages.

**FYR Macedonia** - The Law on Criminal Procedure has been changed also in the part that refers to the claim for compensation made by the victims - injured parties as a result of the crime of Trafficking in persons. The change is that so far, victims were exercising their right to compensation in a separate civil procedure, while now they can request compensation directly as part of the criminal procedure, i.e. with the judgment for conviction of the defendant, the court may also rule and pass a full or partial decision regarding any property or legal claims. Trafficked persons are entitled to compensation - remuneration or non-monetary damages. Generally, a trafficked person can use two main methods of obtaining compensation: through criminal proceedings or through civil action. The *Criminal Procedure Code*\(^\text{13}\) governs the following issues: which individuals can claim compensation and restitution, the conditions and the way in which this can be done, as well as to whom they should submit their claims. A new paragraph has been included, concerning the trafficked person. More specifically, when a trafficked person is the one who submits the claim for restitution, they should specify whether they have been awarded compensation or they have submitted a claim, accordingly Article 43, paragraph 1 of the amended *Criminal Procedure Code*\(^\text{14}\). In the criminal proceedings, *compensation for under - aged trafficked persons* has been regulated separately, with the *Law on Juvenile Justice (LJJ)*\(^\text{15}\). Its amendments\(^\text{16}\) on the other hand, offer legal remedies for compensating the under-aged individual as a victim of violence and other criminal offences, the crime not being specified as trafficking in human beings. All this is stipulated in Article 141, and the monetary compensation awarded to the victim should be provided from

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\(^\text{14}\)&nbsp;&nbsp;Article 111, paragraph 2 of the Criminal Procedure, passed on 18\(^\text{th}\) November, 2010. It becomes effective 2 years from the day of its enforcement.

\(^\text{15}\)&nbsp;&nbsp;Effective as of 20\(^\text{th}\) July, 2007.

\(^\text{16}\)&nbsp;&nbsp;Effective as of 13\(^\text{th}\) November, 2010. Provisions of Article 141, 142, 146, concerning the sources of compensation (providing the finances) for under-aged trafficked persons, shall become effective on 1\(^\text{st}\) January, 2012.
the budget of the Ministry of Justice. Should the trafficked person not receive the compensation through the criminal proceedings, or the court feels the criminal proceedings cannot decide on compensation\(^{17}\), the trafficked person should claim compensation through civil action. Claims on compensation are governed by the Contract Law\(^{18}\). Namely, in a civil lawsuit, the trafficked person is entitled to pursue a civil claim for compensation. This legal action is known as ‘Just Monetary Compensation’. Practice shows that courts in R. Macedonia seldom rule on confiscating the procurer’s property and money, which actually means that there is no source of compensation.

**Non-punishment and non-application of penalties**

Trafficked persons are not detained, charged, prosecuted or punished for violations of immigration law or for their involvement in criminal activities they have compelled to commit as a direct consequence of their being trafficked (CoETrafConv art. 26; OHCHR Guidelines, Principle 7, Guideline no. 2.5 & 4.5; 2011 EU Dir. THB, art. 8).

States provide for the possibility of not imposing penalties on victims of trafficking (CoETrafConv art. 26)

**Non-detention of Trafficked Persons, including Children**

Trafficked persons should not be held in immigration detention centers, other forms of custody or vagrant houses (OHCHR Guidelines 2.6 and 6.1).

Trafficked persons should not be detained by law enforcement authorities for any reason other than their immediate physical protection. They are never detained for reasons of collecting evidence including statements (ICCPR, art. 9 & 12).

Trafficked persons should not be detained by welfare authorities, unless they are in agreement (in which case they are not detained) or unless: i) the detention is for a specific purpose directly related to the immediate needs of that victim, and ii) for the shortest possible period of time (ICCPR, art. 9 & 12; ECHR art. 5).

Trafficked children should not be placed in closed facilities unless it can be

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\(^{17}\) Further information in the section entitled Procedure.

\(^{18}\) Passed on 11\(^{\text{th}}\) July, 2008, Article 189, Paragraphs 190 and 191.
demonstrated that it is in their best interest and there is no reasonable alternative for protection, it is for the shortest possible period of time and is subject to periodic review (CRC art. 25 and 37(b)).

**Reflection Period and Temporary Residence**

Trafficked persons are granted a reflection period of at least 30 days and a temporary residence permit for the duration of criminal and/or other legal procedures. During this period, they have access to material, medical, psychological and legal assistance. If granted a temporary residence permit they also should have access to the labor market, vocational training and education (CoETrafConv art. 12-14; EU Directive on a temporary residence permit, art. 6-9; EU Directive THB art. 11 (1)).

**Non-refoulement and the Right to Seek Asylum**

Trafficked persons are not returned to another state where there is a serious risk they will be subjected to persecution, torture or other forms of ill treatment (UN TrafProt art. 14; CoETrafConv art. 40(4); art. 3 ECHR; 1951 Refugee Conv., art. 33; CAT art. 3(1); ICCPR art. 7; CRC art. 22; OHCHR Guidelines no. 2.7; European Conv on Extradition art. 3(2) )

Trafficked persons have the right to seek and enjoy asylum and have access to fair and efficient asylum procedures, no matter their means of entry, the use of fraudulent travel documents, or their willingness to give evidence against their exploiters (CoETrafConv art. 40(4); UN Traf Prot. art. 14; 1951 Refugee Conv art. 31 & 33; CAT art. 14; OHCHR Guidelines no. 1.6 & .2.7; UNHCR Trafficking Guidelines, para. 45-50; UNHCR 2003 Agenda for Protection)

States should ensure that procedures are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum seekers (CoETraffConv art. 40(4); UN TrafProt art. Art. 14: OHCHR Guidelines no. 1.6 and 2.7)

Trafficked persons are informed about the possibility of receiving international protection in a language they understand and in an age- and gender-sensitive manner

Trafficked persons may qualify for international refugee protection if the acts inflicted on them by their traffickers would amount to persecution on a 1951 Refugee Convention ground and in the absence of effective national protection (UNHCR Trafficking Guidelines; OHCHR Guidelines no. 1.6
and 2) States use a gender-sensitive interpretation of the 1951 Refugee Convention, in particular the recognition of gender and sex-based violence. Women and children trafficked for the purpose of forced prostitution or sexual exploitation are considered refugees when their State is unable or unwilling to provide protection against such harm or threats of harm (UNHCR 2002 Guidelines on Gender-related persecution; CEDAW Gen. Rec. 19 on violence against women).

Anti-trafficking measures do interfere with or otherwise negatively affect established rights, including the right of trafficked persons to seek and enjoy asylum and the principle of non-refoulement (CoETrafConv art. 40(4); UN Traf Prot. art. 14; OHCHR Guidelines no. 1.6)

**Return of Trafficked Persons**

Trafficked persons are protected from summary deportation or return when there are reasonable grounds that this would constitute a risk for the person or her family (CoETrafConv art. 16; OHCHR Guidelines, Principle 11 & Guideline 4.6)

The status of any legal proceedings related to that person being a victim of trafficking is taken into account in any decision on repatriation (UN TrafProt art. 8(2); CoETrafConv art. 16)

The safety of the trafficked person and their family, including the risk of re-trafficking, is taken into account in any decision on repatriation (UN TrafProt art. 8(2); CoETrafConv Art. 16(2); OHCHR Guideline no. 6.7)

The return of a trafficked person is, where possible, voluntary and takes place with due regard for the rights, safety and dignity of the trafficked person and the status of legal proceedings (UN TrafProt art. 8(2); CoETrafConv art. 16(2); OHCHR Rec. Principles, Principle 11 & Guideline 6.7)

States ensure, in partnership with non-governmental organizations, that trafficked persons who return to their country of origin are provided with the assistance and support necessary to ensure their well-being, facilitate their social reintegration and prevent their re-trafficking (CoETrafConv art. 16(5); OHCHR Guidelines no. 6.8)

Repatriation programs avoid re-victimization and respect the right to privacy of the victim (CoETrafConv art. 16(5))
Victims who wish to return are permitted to do so without undue or unreasonable delay (UN TrafProt art. 8(3)-(4) and art. 9(1)(b); CoETrafConv art. 16(1) and (3)).

Resources:

1. United Nations Documents


UN TrafProt art. 6; UN TrafProt art. 6(3)(b); UN Traf Prot. art. 6; UN TrafProt art. 6(4); UN TrafProt art. 6(1); UN TOC art. 25; UN TOC art. 14(2) & 25(2); UN TrafProt art. 6(6); UN TrafProt art. 14; (UN TrafProt 8(2); UN TrafProt art. 8(3)-(4) and art. 9(1)(b);

- UN OHCHR – Recommended Principles and Guidelines on Human Right and Human Trafficking (2002)

OHCHR Guidelines no. 6.5; OHCHR Guidelines, Principle 9 & Guideline no. 4(8) & 9(2); OHCHR Guidelines no. 6 & 5.8); (OHCHR Guidelines no. 6.6); OHCHR Guidelines, Principle 9 & Guideline 9(3); OHCHR Guidelines no. 6, 4.10 & 5.8; (OHCHR Guidelines 6.4); (OHCHR Guidelines 2.6 and 6.1); OHCHR Guidelines, Principle 7, Guideline no. 2.5 & 4.5; OHCHR Guidelines no. 2.7; OHCHR Guidelines, Principle 17 & Guideline 4(9)); OHCHR Rec. Principles, Principle 11 & Guideline 6.7); OHCHR Guidelines no. 6.8); OHCHR Guideline no. 6.7); OHCHR Guidelines, Principle 11 & Guideline 4.6); OHCHR Guidelines no. 1.6; OHCHR Guidelines no. 1.6 and 2; OHCHR Guidelines no. 1.6 & 2.7; OHCHR Guidelines, Principle 16 & Guideline 4(4)).

- UN Convention on the Rights of the Child with three optional protocols
- UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,
- UN GA Resolution no. 40/34 of 20 November 1985
- UNGA Resolution 60/147 on Basic Principles and Guidelines on the Right to remedy and Reparation for Victims of Gross Violations
of International Human Rights Law and Serious Violations of International Humanization Law

- UNGA Resolution 63/156 of 30 January 2009 on Trafficking in Women and Children

2. European Instruments

- Council of Europe’s Convention on Action against Trafficking in Human Beings (2005)

  \[\text{CoETrafConv art. 16(2); (CoETrafConv 16(5)), CoETrafConvart.16(1) and (3)), CoETrafConv art. 16(2); CoETrafConv art. 16}, (\text{CoETrafConv art. 40(4)); (CoETrafConv art. 12-14}; (\text{CoETrafConv art. 26), CoETrafConv art. 15(3); CoETrafConv art. 28 & 30); (\text{CoETrafConv art. 28), CoETraf Conv. art. 15(1); CoETrafConv art. 12), CoETraf Conv. art. 12 & 15; (art. 15(2) CoETrafConv.}; CoETrafConv art. 11; CoETrafConv art. 12); (CoETrafConv art. 15(4); CoETrafConv art. 40(4)};\]

3. EU Instruments

- Council Directive of 29 March 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities (2004/81/EC)

\[\text{EU Proposal Victim Dir art.4; EU Dir. THB art.12(2); Proposal Victim Dir art. 12); 2011 EU Dir. THB art. 12); EU Dir THB art. 12); EU Directive on a temp residence permit art. 6-9; EU Directive THB art.11 (1)). EU Dir on Compensation; (2011 EU Dir. THB, art. 12(4)),2011 EU Dir. THB, art. 8).}
• BBC (n.d.) Bosnia-Hercegovina country profile, http://news.bbc.co.uk/1/hi/world/europe/country_profiles/1066886.stm;


• Compensation of victims of trafficking under international and Dutch law. MarjanWijershttp://lastradainternational.org/lsidocs/3062-policy%20paper%20compensation_Netherlands_28%20April%202014.pdf

4. US Sources


• Title 18 United States Code Section 3509 et seq.
