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## Memorandum on the draft European Convention on Action against Trafficking in Human Beings: Protection of the Rights of Trafficked Persons

### Introduction

Amnesty International and Anti-Slavery International welcome the focus of the Council of Europe on preventing trafficking of human beings and ensuring the respect and protection of the rights of the victims of these human rights abuses.

The Council of Europe's Committee of Ministers has mandated the *Ad Hoc Committee on Action against trafficking in human beings*, (known as CAHTEH), to prepare a text of a *European Convention on action against trafficking in human beings*. This mandate requires that, in their work, the CAHTEH put a special focus on the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, take into account gender equality aspects, as well as the effective prevention, investigation, prosecution and on international co-operation and improve on the protection afforded within the Palermo Protocol. Amnesty International and Anti-Slavery International consider that this mandate requires the CAHTEH to ensure that the draft Convention it proposes strengthens standards of protection for trafficked persons; as such it has the potential to be an important and timely advance in clarifying states' obligations to respect and protect the rights of trafficked persons.

Amnesty International and Anti-Slavery International are convinced that effective action to combat trafficking must be multi-dimensional and multilateral, and must place the

respect for and protection of the rights of trafficked persons at its core. Such human rights include, among others, the rights to dignity; life; freedom from torture and other inhuman or degrading treatment, slavery and slavery-like practices and forced labour; freedom of movement; privacy; the highest attainable state of health; safe and secure housing; access to employment; freedom from discrimination including gender-based discrimination; and to effective redress, including reparation, for the human rights abuses to which trafficked persons have been subjected.

We believe that respect for and protection of the rights of trafficked persons, including ensuring the provision of effective measures for their protection, assistance and possibilities of social inclusion in destination or source countries, will also assist law enforcement efforts to bring the perpetrators of these crimes to justice and to prevent trafficking.

This memorandum briefly identifies some of the key issues which, in the view of both Amnesty International and Anti-Slavery International, must be addressed in the *European Convention on action against trafficking in human beings*. In doing this we draw not only on existing human rights standards, but also on our experience of working in conjunction with trafficked persons and with other organizations which provide direct services to trafficked persons in the Council of Europe region. In this way Amnesty International and Anti-Slavery International seek to assist the CAHTEH in fulfilling its Terms of Reference in drafting a European treaty which not only reinforces the letter and spirit of existing international and regional standards, such as the Palermo Protocol and the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking<sup>1</sup> and Recommendations of the Council of Europe's Committee of Ministers<sup>2</sup>, but also improves and strengthens measures for the protection of the rights of trafficked persons, and ensures a strong and coordinated criminal justice response to the crime of trafficking.

## **Identification of victims of trafficking**

The protection of the rights of trafficked persons under international and domestic law requires that these individuals are identified correctly and not treated as criminals or smuggled migrants.

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<sup>1</sup> UN Document: E/2002/68/Add.1, 20 May 2002.

<sup>2</sup> See, among others, Committee of Ministers Recommendation 2002(5) on the protection of women against violence; Recommendation (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation ; Recommendation Rec. (2001) 16 on the protection of children against sexual exploitation; Recommendation (rec.(97)13 on intimidation of witnesses and the rights of the defence; Recommendation No. R (85) 11 on the position of the victims within the framework of criminal law and procedures and Recommendation No. R (87) 21 on assistance to victims and the prevention of victimization.

As stated in Guideline 2 of the UN Recommended Principles Guidelines on Human Rights and Human Trafficking “a failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights. States are therefore under an obligation to ensure that such identification can and does take place.”

In our view, rapid accurate identification of trafficked persons is complex and remains a key challenge. Even though some destination countries have adopted laws protecting trafficked persons, implementation has been impeded due to failures to identify trafficked persons as such. In many cases, trafficked people have irregular immigration status, their passports and/or other identity documents may have been held and/or taken away by their traffickers, and they are identified as ‘undocumented’ or ‘illegal migrants’; or those trafficked into forced prostitution are often identified only as ‘prostitutes’.

In practice, identification of trafficked persons can be very difficult. Differences in the status and circumstances of a trafficked person and a smuggled migrant or an undocumented migrant may not always be apparent. For trafficked persons themselves, many of whom are unaware of their rights and how to access them, self-identification may be equally difficult, due to trauma, fear, lack of information or understanding of their circumstances, or an inability or reluctance to acknowledge the position they are in. In many of the destination countries those who the authorities fail to identify as possibly having been trafficked, face detention, prosecution and forcible deportation.

Failure to identify the particular circumstances of a given individual may mean that a trafficked person is not informed of their specific rights, including to access to legal and other assistance and protection measures which are designed to protect their rights and support and assist them. Secondly, when trafficked persons are not identified as victims of crime, they cannot provide information and evidence which may be necessary to ensure the successful prosecution of those responsible for trafficking. Thirdly, if deported without identification and examination of the circumstances to which they would be returned, there is a risk that they would face re-trafficking or other human rights abuses.

The *European Convention on action against trafficking in human beings* should therefore include an obligation on States to ensure that they have in place appropriate gender and culturally sensitive measures to ensure the rapid and accurate identification of trafficked persons. It should require that where there are grounds to believe that a person has been trafficked, states must ensure that the person is not removed from the territory before identification of their status as a trafficked person and the trafficked person is given a reasonable period of time to recover, be advised of their rights and provided the opportunity to exercise them - the “reflection period”. It should also prohibit the detention of trafficked persons, including in immigration detention.

## Reflection Period

As explained above, immediate identification of a trafficked person is difficult to achieve, due to the complexity of the crime and the vulnerability of the trafficked person.

The *European Convention on action against trafficking in human beings* must require States to provide a reflection period for those persons it has grounds to believe or suspect are trafficked persons, for a minimum period of at least three months.

The purpose of such a reflection period is to enable the trafficked persons to escape the power and influence of their traffickers, to ensure that they are provided with advice about their rights and afforded legal and other assistance. This period thus enables them to begin to recover from their ordeal and to access remedies available.

According to the information available to Amnesty International and Anti-Slavery International, on their first contact with law enforcement authorities, many trafficked persons may be traumatized, and frightened, as well as confused and disempowered, having been subjected to multiple serious human rights abuses. They are likely to have been subjected to torture or other forms of inhuman or degrading treatment. They are likely to have been threatened by their traffickers. They may have little trust in law enforcement authorities, not least because, in some countries, law enforcement officials may have been complicit in their trafficking or availed themselves of the “services” of the trafficked person.

Time, and a safe and secure environment are needed for trafficked persons to begin to recover from their ordeal, and to decide what they want to do in the future, including whether they wish to cooperate with law enforcement. It also allows law enforcement and prosecution authorities to investigate the crimes committed and to gather evidence and provides the trafficked person time to make an informed decision, including in the light of the protection services available, about cooperation with any law enforcement/prosecution efforts.

Experience from Italy, where a similar scheme exists, shows that, if given a period to reflect and recover, more trafficked persons are likely to cooperate with law enforcement.

## Provision of support services and protection

Protection and respect of the rights of trafficked persons require states to go beyond seeing trafficked people as sources of information about crime and potential witnesses in prosecutions. Instead, states must be expressly required to treat and protect trafficked persons as victims of grave human rights violations. The violations have likely occurred in the destination, transit and source countries and must be addressed by them. States must also be required to protect trafficked persons from further exploitation and harm.

As stated in Principle 7 of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking “protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings”. The *European Convention on action against trafficking in human beings* must require that protection and assistance for trafficked persons be provided, regardless of the trafficked persons’ ability or willingness to cooperate in law enforcement efforts aimed at prosecution of the perpetrators.

Protection and support services must be provided on a consensual basis (upon full disclosure of all mechanisms and services available) and should be based on an individualized needs and risk-assessment, without delay at the time of identification, and thereafter should be regularly and periodically reviewed. Such services and protection should continue as long as necessary.

The *European Convention on action against trafficking in human beings* should require that during the reflection period, and any period of residence, States must provide services to assist the protection and recovery of trafficked persons. These should include:

- Access to effective and competent legal assistance, without charge; such assistance shall be provided promptly, and should continue for the duration of any criminal, civil or other actions, including those brought on behalf of or involving the trafficked person and those brought against the perpetrators;
- Access to independent and competent interpreters and, if necessary, translation services, free of charge;
- Information about their rights, as well as their options and assistance and services available to them, and how to access such rights, assistance and services;
- Provision of safe and secure accommodation;
- Access to medical care and treatment and psychological counseling and support services;
- Financial support;
- Access to employment, education and training opportunities;
- Measures to ensure the protection of the right to privacy of the trafficked person;

Measures to ensure the effective protection of the trafficked person must be provided immediately; protection needs should be regularly reviewed and assessed and continued for as long a necessary. Such measures may include third country resettlement.

The *European Convention on action against trafficking in human beings* should also require states to assess and provide, in each case, service and protection measures required for third persons, including members of the trafficked person's family.

## **Residency Status**

Amnesty International and Anti-Slavery International are concerned that, in some countries, granting residency to trafficked persons after the reflection period is made contingent on the individual's willingness and ability to participate in criminal proceedings against the trafficker, rather than on the basis of the rights of the trafficked person, risk and need. An exception is Italy, where residency permits have been granted to trafficked persons who are considered 'in danger'. Such de-linking of the decision to grant a residence permit from any requirement to participate in criminal proceedings would aim to protect and address the rights and the needs of trafficked persons. In Italy, keeping the issues separate has also helped to ensure that the grant of a residence permit is not used as a basis on which to discredit a victim's testimony during proceedings against the trafficker.

Amnesty International and Anti-Slavery International consider that the provisions of the *European Convention on action against trafficking in human beings* must be consistent with international human rights and refugee law standards which require that no person should be expelled or returned to a country where they are at risk of torture or other serious human rights abuse.

Decisions on the residency status of a trafficked person should be based on a full, fair, transparent, individualized and independent assessment of whether the trafficked person has suffered or risks serious abuse in the country where they are located and also whether they are vulnerable to reprisals or further human rights abuses if they return home, including the risk of being re-trafficked.

Authorities in destination countries need to ensure that trafficked persons are not returned to countries of origin where there is a risk that they would be sent back into the hands of traffickers; vulnerability is heightened for example, especially if they are considered to have a "debt" to "repay" or if there is inadequate protection from intimidation from traffickers. Furthermore if the trafficked person has insufficient means of economically sustaining themselves in the country of origin, the risk of re-trafficking also needs to be considered.

The *European Convention on action against trafficking in human beings* should require States to provide residency status for a reasonable period, which is assessed in accordance to the person's individual circumstances, and in any event for not less than three years, especially if the person is at risk of further human rights abuses (e.g. through stigmatization, discrimination, or if there is a risk of reprisals or likely re-trafficking).



Persons who are assisting the investigation or prosecution of traffickers may also require residence permits.

States should ensure that the residency status afforded is accompanied by measures to ensure an adequate standard of living and the full social inclusion of the trafficked person and, if relevant, their family.

## **Repatriation or Resettlement of Trafficked Persons**

Credible and effective respect and protection of rights of trafficked persons requires that any repatriation of a trafficked person must be consistent with and fully respect their human rights, and thus be safe, sustainable and, as far as possible, voluntary. The safety of their family members' must also be taken into account.

A failure to include provisions within the *European Convention on action against trafficking in human beings* setting out such guarantees for safe and sustainable return would amount to little more than an endorsement of the forced deportation of trafficked persons.

Further, States should be required to cooperate where necessary, to protect the rights or safety of a trafficked person, for their resettlement, with dignity, in a third country.

States should be required to make provisions for granting trafficked persons any necessary travel and identity documents.

In addition the *European Convention on action against trafficking in human beings* must require States to take all necessary measures to ensure that the confidentiality of information about and privacy of trafficked persons is respected and protected. Many trafficked persons would suffer considerable stigmatisation and discrimination if information relating to the abuses that they have suffered (for example, that they were coerced into forced prostitution) were to become known.

In cooperation with non-governmental organizations in receiving countries, States must be required to ensure provision is made for the reception and social inclusion of the trafficked person in the receiving country. This should include shelter, assistance, medical and psychological care and treatment, financial support, education and/or vocational training and access to gainful and safe employment opportunities.

## Remedies

Victims of human rights abuses, such as trafficking and the series of human rights abuses of which trafficking is comprised, have an international legal right to access to effective remedies, including adequate reparation.

The *European Convention on action against trafficking in human beings* should not only require States to ensure the availability of effective redress, including reparation, to trafficked persons but also should require states to facilitate access to such remedies by, *inter alia*, ensuring the provision of objective and comprehensive information to all trafficked persons about their right to a remedy and the availability of remedies, including reparation, for the human rights abuses to which they have been subjected, and by ensuring the provision of effective and competent legal and other assistance to victims to enable them to obtain the redress to which they are entitled.

Access to redress must be effective and available in practice as well as theory; the *European Convention on action against trafficking in human beings* should require States to take measures to ensure that trafficked persons are able to access courts and other mechanisms for redress.

Reparation available to trafficked persons should include compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Compensation should redress the harm suffered as a result of the human rights abuses to which they have been subjected.

The *European Convention on action against trafficking in human beings* should also require States to ensure that trafficked persons receive adequate reparation. To that end, the CAHTEH may also wish to consider the possibility of requiring States to set up funds (which could include assets from confiscated proceeds of the crime of trafficking), for use in the compensation of trafficked persons. Any such provisions should ensure, however, that the absence or limited resources of such a fund, does not relieve the State of its responsibility to ensure adequate reparation, protection or assistance services for trafficked persons.

## Protecting the Rights and Interests of Trafficked Children

The research of Amnesty International and Anti-Slavery International and other organizations indicates that many trafficked persons are children, i.e., people under the age of 18.

The effectiveness of the *European Convention on action against trafficking in human beings* to protect the rights and interests of trafficked children would be maximised through an explicit reference to the fact that children have special rights under international law, including those set out in the UN Convention on the Rights of the Child, which has been ratified by all Council of Europe Member States; that child victims of trafficking have special needs that must be recognized, respected and protected by States; that States are obliged to take measures to prevent trafficking of children; and that in dealing with trafficked children, the best interests of the child - including the right to physical and psychological recovery, to privacy, to family life and social integration - are to be at all times paramount. Reference should also be made to the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography.

In accordance with Principle 11 of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, it is important to ensure that the *European Convention on action against trafficking in human beings* require States to take measures to protect and respect the special vulnerabilities, rights and needs of trafficked children. The *European Convention on action against trafficking in human beings* should also include provisions which expressly require States to ensure that: a trafficked child is not criminalized in any way (for example, through prosecution for status-related offences); the best interest of the child is paramount in all plans and measures taken with respect to the child's future; the child is consulted and their views are taken into account.

The definition of trafficking set out in the *European Convention on action against trafficking in human beings*, should, among other things, incorporate Article 3 (c) and (d) of the Palermo Protocol which defines children as any person under that age of 18 and states that the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered "trafficking in persons" even if this does not involve any of the "means" set out in the definition.

## **Preventing Trafficking**

The acknowledged root causes of trafficking include demand for cheap labour and services; economic factors such as poverty, unemployment, underemployment and indebtedness; social and cultural factors such as violence against women and girls, gender discrimination in the family, the community and by the State; political and legal factors such as a lack of appropriate legislation and public sector corruption; and international factors such as the growing feminization of labour migration on the one hand and increasingly restrictive immigration policies of recipient countries on the other.

In order to address some of these issues Amnesty International and Anti-Slavery International urge the CAHTEH to include in the *European Convention on action against*

*trafficking in human beings* provisions requiring States to take steps to address the root causes of trafficking, including the adoption of policies and practices to assist safe and legal migration and taking measures set out in the Council of Europe's Committee of Ministers' Recommendation (2002) 5 on the protection of women and girls against violence. In addition we urge the CAHTEH to consider including provisions requiring States to monitor, analyze and keep disaggregated statistics related to trafficking, as set out in Guideline 3 of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking. Reference should also be made to the International Convention on the Rights of All Migrant Workers and Members of Their Families.

Recent experience in Europe and elsewhere has demonstrated that trafficking flourishes in situations of internal and international armed conflict. The direct or indirect involvement of peacekeeping, peace-building, civilian policing, humanitarian and diplomatic personnel in trafficking raises special concerns. Therefore Amnesty International and Anti-Slavery International urge the CAHTEH to ensure that the *European Convention on action against trafficking in human beings* obliges States to take effective measures to prevent their nationals, agents and employees from engaging in trafficking and related exploitation. The Convention should also require States Parties to investigate thoroughly all allegations of trafficking and related exploitation in such circumstances, to criminalize and prosecute such acts and to provide for and to apply appropriate sanctions. In accordance, among other things, with Guidelines 10(7) of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking, the *European Convention on action against trafficking in human beings* should expressly require that privileges and immunities attached to the status of such persons should be waived so as to prevent the shielding of persons from prosecutions and sanctions for trafficking and related offences.

### **Prosecution for Status Related Offences:**

In accordance with Guideline 4(5) of the UN Principles and Guidelines on Human Rights and Human Trafficking, the *European Convention on action against trafficking in human beings* should expressly prohibit the prosecution of a trafficked person for the illegality of their entry or residence or for the activities they have been involved in as a consequence of their situation as a trafficked person.

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