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Amnesty International and Anti-Slavery International Comments on revised draft European Convention against Trafficking in Human Beings

Introduction

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 draft a European Convention against Trafficking in Human Beings by year's end. The Committee of Ministers has specifically requested the CAHTEH to focus "on the human rights of victims of trafficking" as well as on prevention, investigation, prosecution and international cooperation and to "design a comprehensive framework for the protection and assistance of trafficked persons and witnesses".

The Committee of Ministers has instructed CAHTEH that in their work they should take into account existing international and regional standards dealing with trafficking, including the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime (known as the "Palermo Protocol"), with a view to developing these standards so as to improve the protection afforded by them to trafficked persons.

As the number of people affected by this contemporary form of slavery in the Council of Europe region has dramatically increased over the last decade, Amnesty International and Anti-Slavery International welcome the Council of Europe's focus on trafficking of human beings. The organizations particularly welcome the mandate given by the Committee of Ministers to CAHTEH to draft a treaty which improves the protection of the human rights of trafficked persons.

We consider that this mandate requires the CAHTEH to ensure that the treaty includes provisions which go beyond existing standards- some of which *invite* rather than *require* states to take specific steps to protect the rights of trafficked persons - and in some cases national legislation to ensure enhanced protection of and respect for the rights of trafficked persons. If it succeeds in doing this, the Council of Europe will fill a significant gap, since today there are no international treaties on trafficking which comprehensively address states' obligations to respect and protect the rights of trafficked persons.

The drafting of this treaty by the CAHTEH is well underway; a first reading of the draft was completed in May, 2004. As a result of a decision by the Committee of Ministers of the Council of Europe on 9 June 2004, the text of the current draft, (with the exception of the preamble), has been made available by CAHTEH to some non-governmental organizations (NGOs), including Amnesty International and Anti-Slavery International for the purpose of consultation.

In this document, Amnesty International and Anti-Slavery International assess some of the Articles in the current draft of the Convention in relation to existing international standards and commitments. In the light of this analysis and our experience in working with and on behalf of trafficked persons, we recommend ways in which the current text can be amended to ensure that it does *more* than reinforce the letter of existing international and regional standards, such as the Palermo Protocol and the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking¹ and Recommendations of the Council of Europe's Committee of Ministers². Consistent with the Committee of Ministers' mandate to CAHTEH, our recommendations are designed to *improve* and *strengthen* measures for the protection of the rights of trafficked persons, to ensure a comprehensive framework.

This document also calls on the Council of Europe and on its 45 member states to ensure that in the course of this treaty drafting process they draw on the experiences of trafficked persons and ensure wide consultation with members of civil society, most notably NGOs and other experts who work with and on behalf of trafficked persons.

Preamble, Article 1: Purpose of the Convention and Article 45: Relationship with other international instruments

Trafficking is widely recognized as a violation of human rights.³ It results in violations and abuses of the human rights of trafficked persons, including their rights

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

² See, among others, the Council of Europe's 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.

³ Trafficking has been characterized as a violation of human rights by the Council of Europe's

to: physical and mental integrity; life; liberty; security of the person; dignity; freedom from slavery, slave-like practices, torture and other inhuman or degrading treatment; family life; freedom of movement; privacy; the highest attainable standard of health; safe and healthy working conditions and fair remuneration for work; and safe and secure housing.

Measures addressing trafficking must place the protection and respect of these rights at their core, as well as guaranteeing the right of trafficked persons to effective redress, including reparation, for the human rights abuses to which they have been subjected.

Recommendation:

Amnesty International and Anti-Slavery International therefore urge the CAHTEH to include within the Preamble to the Council of Europe's European Convention against Trafficking in Human Beings a paragraph which clearly identifies that trafficking in human beings is, in itself, a human rights violation; results in a range of human rights violations, and is an offence to the dignity and integrity of the human being.

The organizations warmly welcome Article 1 of the revised draft of the Convention which states that the purposes of the Convention are:

- to prevent and combat trafficking in human beings;
- to protect the human rights of the victims of trafficking and design a comprehensive framework for the protection and assistance of victims and witnesses, including gender equality aspects;
- to promote international cooperation, investigation and prosecution in combating trafficking in human beings;

Committee of Ministers in Recommendation (2000)11 on action against trafficking in human beings for the purpose of sexual exploitation, in the Preamble at paragraph 5; *see also*, Recommendation (2002)5 on violence against women, which defines violence against women as including trafficking and states that violence against women both violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms. The Organization of American States, in the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women affirms, in the Preamble, that violence against women constitutes a violation of their human rights and fundamental freedoms; the definition of violence against women in Article 2 of this Convention includes trafficking as a form of violence against women. The European Union (EU), in its Council Framework Decision on combating Trafficking in Human Beings of 19 July 2002 states that "trafficking in human beings comprises serious violations of fundamental human rights and human dignity..."(at para 3). Treaty monitoring bodies of the United Nations, including the Human Rights Committee and the Committee on the Elimination of Discrimination against Women, have also identified trafficking in human beings as a violation of human rights, *See, inter alia*, UN Docs: CCPR/CO/79/LVA, dated 06/11/2003 and A/53/38/rev.1, respectively. *See also*, the Budapest Declaration on Public Health & Trafficking in Human Beings of 19-21 March 2003.

- to ensure effective implementation by the Parties of the provisions of this Convention by defining a monitoring mechanism.

Amnesty International and Anti-Slavery International also welcome Article 45 of the draft European Convention against Trafficking which states that the European Convention against Trafficking “is intended to enhance the protection afforded by [the Palermo Protocol] and develop the standards contained therein”(emphasis added). In doing so, we note that some of the existing standards *recommend* rather than *require* states to take measures to protect and respect the rights of trafficked persons.

Article 7: Border Measures:

Article 7 of the draft European Convention against Trafficking sets out a range of measures for States to take in relation to border controls.

Recommendation

Amnesty International and Anti-Slavery International urge the CAHTEH to amend Article 7 so as to require state Parties to ensure that the measures taken are without prejudice to:

- the right to seek and enjoy asylum from persecution and other international obligations
- the right to privacy.

The organizations recommend that the CAHTEH amend Article 7(1) and 7(6) as follows:

Article 7(1)

Without prejudice to *other* international commitments, *including* in relation to the free movement of persons *and the right to seek and enjoy asylum from persecution and other forms of international protection*, Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings.

Article 7(6):

Without prejudice to the right to privacy and, in particular, article 12 herein, parties shall consider strengthening co-operation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication

Article 10 – Assistance for Victims of Trafficking

Existing international standards make provision for the support and protection of trafficked persons, in recognition of the human rights abuses to which they have been

subjected in the course of trafficking and the need to ensure the promotion and protection of and respect for their human rights. Such rights include the right to dignity and to protection from exposure to re-victimisation and additional human rights abuses, including re-trafficking.⁴

The current draft of Article 10 of the European Convention against Trafficking sets out two options. Both Option 1 and Option 2 require each Party to adopt legislative or other measures necessary to provide for the physical, psychological, and social recovery of victims. Both drafting options also require that in applying the provisions, each Party shall take into account the age, gender and needs of victims, including the special needs of children.

⁴ For example, the EU's **Brussels Declaration on Preventing and Combating Trafficking in Human Beings**, states at paragraph 13 that "victims of trafficking must be granted access to a full range of support measures that should include access to shelter accommodation, physical, sexual and psychological health care and support and independent health, legal and social counseling. The provision of such treatment must be on a consensual and fully informed basis and victims should not be subjected to mandatory testing for HIV-AIDS or other forms of sexually transmitted diseases." In addition, **Article 7(1) of the European Union's Council Directive on residence permits issued to third country nationals who are victims of trafficking....** states in part that "Member States shall ensure that the third-country nationals concerned, who do not have sufficient resources are granted standards of living capable of ensuring their subsistence and access to emergency medical treatment. ..."

The Council of Europe's Recommendation R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation at para.s 3, 26, 27, 29, 30, 32 invites the Council of Europe's member states to: give absolute priority to assisting victims of trafficking through rehabilitation programs and to protect them from traffickers; establish or develop facilities where victims of trafficking can benefit from information about their rights, and from psychological and medical care, social, and administrative support and legal assistance in their own language; establish protection systems which offer effective means to combat intimidation and threats to the security of victims and their families, and to extend protection, where appropriate, to members of associations or organizations assisting victims. **Council of Europe Recommendation Rec (2002) 5 on the protection of women against violence** (including trafficking) states that "member states should ensure that victims, without discrimination, receive immediate and comprehensive services, provided by a co-ordinated, multidisciplinary and professional effort, whether or not they lodge a complaint, including medical and forensic medical examination and treatment, together with post-traumatic psychological and social support as well as legal assistance..." on a confidential basis, free of charge and available around the clock.

The Stability Pact for South East Europe, Task Force on Trafficking, Statement of commitments, Tirana 2002 (hereafter the Tirana Declaration) agreed, among other things to refer possible victims of trafficking to shelters, providing them with social assistance, health care, counseling and legal advice as to their situation and options.

See, Principle 7 and Guideline 6 of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking and Article 6(3) and 9(1)(b) of the Palermo Protocol.

Option 1 includes a list of seven services and protection and other measures to be provided, in particular:

- (a) Appropriate and secure housing;
- (b) Medical, psychological and material assistance;
- (c) Counselling and information, in particular as regards their legal rights, in a language that the victims can understand;
- (d) Assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- (e) Financial support;
- (f) Educational, vocational guidance and vocational training opportunities;
- (g) Employment opportunities, including the possibility of obtaining a working permit

In contrast, the current wording of Option 2 requires states to take measures only to ensure the provision of the services and measures set out in sub-paragraphs (a)-(d), above. Rather than affirmatively requiring states to take measures to provide trafficked persons with the services etc set out in paragraphs (e)-(g) above, it requires states to *endeavour* to take such measures as may be necessary to provide trafficked persons with financial support, educational and vocational guidance, vocational training and employment opportunities, including the possibility of obtaining a working permit.

Amnesty International and Anti-Slavery International also note that other relevant protection measures are set out in Article 28 of the draft European Convention against Trafficking.

Recommendation:⁵

Amnesty International and Anti-Slavery International recommend that

⁵ This recommendation is consistent with the Opinion of the *European Commission's Experts Group on Trafficking in Human Beings* to the Council of Europe, dated 10 May 2004, which states that during reflection and residence periods trafficked persons should be given access to full support services including medical, housing, legal, psychological, social and financial, and access to employment, vocational and education opportunities.

CAHTEH adopt and strengthen Option 1. Doing so would be consistent with the mandate of the Committee of Ministers which calls on the CAHTEH to “design a comprehensive framework for the protection and assistance of victims and witnesses... which improves the protection afforded by the Palermo Protocol...”.

- Amnesty International and Anti-Slavery International urge the CAHTEH to strengthen Option 1 so as to require state Parties to: ensure that information about available options and services is provided promptly to trafficked persons in a language which they understand;
- ensure that the assistance given enables their rights and interests to be protected as well as presented and considered in criminal proceedings against alleged offenders and in other relevant proceedings (including civil or administrative proceedings related to compensation), and , when relevant the appointment of an independent legal guardian for children;
- ensure that the services, including among others any testing for HIV/AIDs and other sexually transmitted diseases, are provided on a fully informed and consensual basis;⁶
- assess and provide as necessary, the service and protection measures to third persons, including members of the trafficked person’s family.

In making these recommendations, the organizations oppose the notion implicit in Option 2 that the provision of financial support, educational and vocational training and employment opportunities are not fundamental to the protection of and respect for the rights of trafficked persons. In fact, such assistance is fundamental to ensure the dignity of the trafficked person, to break the dependence created and fostered by their traffickers and to protect them from the risk of re-trafficking and other additional violations of their human rights.

In summary, Amnesty International and Anti-Slavery International propose that Article 10 of the European Convention against Trafficking in Human Beings read as follows:⁷

⁶ See reference to paragraph 13 of the EU’s Brussels Declaration on Preventing and Combating Trafficking in Human Beings, set out in footnote 4 above, which requires such services to be provided on a fully informed and consensual basis and specifically prohibits mandatory testing of trafficked persons for HIV/AIDs and other sexually transmitted diseases.

⁷ Amendments are indicated by striking out text and by words in *italics*.

Article 10 : Protection and Assistance for Victims of Trafficking

(1) Each party shall adopt such legislative or other measures as may be necessary to provide for the physical, psychological and social recovery of victims, *and, as necessary third persons including members of the victims' family and witnesses*, and in particular the *timely* provision of:

- (a) Appropriate and secure housing;
- (b) Medical, psychological and material assistance;
- (c) Counselling and information, in particular as regards their legal rights, *options, redress and services* available, in a language that the victims ~~can~~ understands;
- (d) Assistance to enable their rights and interests to be presented and considered, *including* at appropriate stages of criminal proceedings against offenders *and other legal or administrative proceedings, which may require the appointment of an independent legal guardian for children*;
- (e) Financial support;
- (f) Educational, vocational guidance and vocational training and *education* opportunities;
- (g) Employment opportunities, including the possibility of obtaining a working permit

(2) *In applying the provisions of this article*, each Party shall ensure that *the services are provided on a fully informed and consensual basis and take into account, ~~in~~ applying the provisions of this article, the age, gender and special needs of trafficked persons and other third persons, including their families and witnesses, ~~victims, in~~ as well as the particular ~~the~~ special needs of children, including *for* appropriate housing, education and care.*

Article 13: Identification of the victims

The provisions in Article 13 relate to identification of trafficked persons.

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.

As stated in Guideline 2 of the UN Recommended Principles and 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 the view of Amnesty International and Anti-Slavery International, 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 or destroyed by their traffickers, and they are identified as ‘undocumented’ or ‘illegal migrants’; those trafficked into forced prostitution are often simply identified 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 immediately apparent. All have rights, but a different set of rights may pertain, depending on the circumstances of the person. 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 that 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 against Trafficking* should therefore include an obligation on state Parties 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 has been completed and the trafficked person is given a reasonable period of time to recover, is advised of their rights and is provided the opportunity to exercise them - the “reflection period”. It should also prohibit the detention of trafficked persons, including in immigration detention, for the illegality of their entry into or residence in a country or for any offences committed in the context of their situation as a trafficked person.

Recommendation:

Amnesty International and Anti-Slavery International urge the CAHTEH to amend Article 13 so as to ensure that all persons, including the authorities who have the responsibility of identifying trafficked persons, are themselves sensitized, trained and qualified in the field of identifying victims of trafficking in a gender-and-culturally-sensitive manner.

The organizations also consider that access to a process of appeal to an independent impartial and competent body should be provided to the individual.

Amnesty International and Anti-Slavery International therefore recommend that Article 13 be amended as follows:

1. Each Party shall ~~provide its~~ ensure that the competent authorities ~~with~~ are persons who are *sensitized*, trained and qualified to *accurately identify trafficked persons in a gender and culturally sensitive manner* ~~in the field of trafficking in human beings~~ and *that, in doing so* they shall collaborate with each other as well as with relevant ~~support~~ organisations, with a view to enabling an identification of victims and, in appropriate cases, issuing residence permits.
2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims and to ensure that, if ~~the-such~~ competent authorities have ~~[sufficient]~~ [reasonable] grounds to believe that a person has been victim of trafficking in human beings, such a person [shall not be removed from its territory] [could stay in its territory] until the identification process has been completed. *The individual concerned shall be ensured the right to appeal decisions against them to an independent, impartial, competent and qualified body.*

Article 14 - Recovery and Reflection Period

Amnesty International and Anti-Slavery International welcome the fact that Article 14 of the draft European Convention against Trafficking requires states to ensure that their laws provide that, when there are reasonable grounds to believe that a person has been trafficked, they are allowed to remain in the country for a minimum period of time, known as the reflection period. The organizations also welcome the acknowledgement that, during this period, the person should be entitled to assistance and protection.

It is widely recognized that such a reflection period serves several purposes including: allowing the accurate identification of trafficked persons; ensuring that a trafficked person has access to necessary medical and psychological care and treatment; protecting the person from the traffickers or their associates; enabling the person to separate themselves from their traffickers and their (financial and other) dependence thereon; and allowing them to begin to recover, to make informed decisions about their options for the future, such as cooperation with law enforcement and other action, and to begin to take such action.

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. They are often treated by law enforcement officials as criminal suspects rather than victims of human rights abuses.

The organizations consider, however, that the protection of the rights of trafficked persons requires that the provisions of Article 14 of the draft be strengthened.

Recommendation:

Amnesty International and Anti-Slavery International urge the CAHTEH to ensure that this Article is strengthened by

- setting a minimum reflection period of three months;
- ensuring that during the reflection period all trafficked persons have access to

full assistance and services necessary for their recovery, dignity and safety, including adequate financial support and that children have access to education.

It is widely viewed that a minimum period of three months is necessary for a trafficked person to begin to recover, receive support services and to make informed decisions, including on whether to cooperate with law enforcement efforts to prosecute those responsible for their trafficking.⁸ Experience from Italy, where a similar procedure exists, suggests that the longer a person is given to consider cooperation, the more trafficked persons are likely to cooperate with law enforcement

It should also be noted that the *Stability Pact for South East Europe, Task force on Trafficking Statement of commitments*, agreed to entitle possible victims of trafficking to remain on the state's territory and to grant them a recuperation period of up to 3 months during which they can stabilize and re-orientate themselves.⁹ Amnesty International and Anti-Slavery International also underscore the importance of ensuring that during such time the trafficked person receives full access to assistance and services necessary for their recovery, including adequate financial support. Such financial support will help to ensure the trafficked persons' right to dignity and to an adequate standard of living and that a trafficked person escapes the influence of and dependence upon their trafficker(s).

In addition, in the case of children, in recognition of their right to education, children should be ensured access to education, without delay.

The organizations therefore urge the CAHTEH to amend Article 14 as follows:

Article 14

⁸ For example, *the Opinion of the European Commission's Experts Group on Trafficking in Human Beings* to the Council of Europe states: "A reflection delay should be granted immediately to all those who there is reason to suspect are trafficked. The purpose of the reflection delay includes enabling identification of whether a person is trafficked, as well as the possibility for the trafficked person to begin to recover and to make an informed decision about her/his options, including the decision on whether to assist in criminal proceedings and/or to pursue legal proceedings for compensation claims." It should also be noted that Article 6(1) of the *European Union's Council Directive on residence permit issued to third-country nationals who are victims of trafficking....* provides that "Member States shall ensure that third-country nationals concerned are granted a reflection period allowing them to recover and escape the influence of the perpetrators of the offences so that they can take an informed decision as to whether to cooperate with the competent authorities."

⁹ See also, *the EU's Brussels Declaration on Preventing and Combating Trafficking in Human Beings*, at para 14, which provides that removal of victims of trafficking should be avoided in cases where it is necessary for their protection or where they can contribute to the investigation against the traffickers, and for a long enough reflection period before such a short-term residence permit is issued.

(1) Each party shall provide in its internal law a minimum recovery and reflection period of *at least three months*, allowing a person, when there are reasonable grounds to believe he or she is a victim, to remain in the country whilst he or she recovers, as well as to escape the influence of the traffickers *and* so that she or he can take an informed decision on cooperating with the competent authorities. ~~This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned.~~

2. During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 10, subparagraphs (a) to ~~(d)~~ (e) *and children shall be entitled to access to education*

Article 15- Residence Permit

Article 15 of the draft European Convention against Trafficking requires states Parties to provide trafficked persons with renewable residence permits, to the extent that it is necessary owing to their personal circumstances or for the purpose of investigation or prosecution of the persons responsible for their trafficking. In the determination of whether to grant a trafficked person permanent residence, the draft text of the Article also requires states Parties to take into account the fact that a person has been granted a temporary residence permit.

Unlike Article 8(3) of the European Union *Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings...* which provides for the issue or renewal of a residence permit for six months (renewable) after the expiration of the reflection period, the current text of draft Article 15 does not specify a suggested minimum length for a temporary residence permit.

Amnesty International and Anti-Slavery International consider that the granting of renewable temporary and permanent residence permits to victims of trafficking are necessary in order to ensure the protection of the rights of trafficked persons, including to life and freedom from torture and cruel, inhuman or degrading treatment or punishment, and protection from *refoulement*. As such it is consistent with international obligations of all Council of Europe member states under the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights).

The organizations consider that the provisions of Article 15 of the current draft of the European Convention against Trafficking need to be strengthened to ensure protection of the rights of trafficked persons, including their right to seek and enjoy asylum and

to avoid the risk of re-victimisation and further human rights abuses, such as re-trafficking. In addition, we note that the granting of a residence permit with a minimum time frame is likely to enhance law enforcement efforts to investigate and prosecute those responsible for the trafficking and to ensure that the trafficked person can begin to recover, can take steps towards economic and emotional independence that will render them less vulnerable to re-trafficking, and avail themselves of redress available, including administrative or judicial measures available for reparation. The organizations note that experience from Italy, where the so-called “Article 18 system” for residence and assistance has been in place, has shown that such a system is not prone to immigration abuse, and has both aided law enforcement efforts and the recovery of trafficked persons.¹⁰

Recommendation

Amnesty International and Anti-Slavery International recommend that Article 15 be strengthened to:

- set out a minimum length of a temporary residence permit;¹¹
- allow for the renewal of temporary residence permits;
- ensure that the granting of residence permits does not prejudice the right of a trafficked person to seek and enjoy asylum; and

¹⁰ In recognition of their status as victims, the so-called social path in **Article 18 of Legislative Decree no. 286 of 1998** grants a residence permit to victims of trafficking whose safety is at risk as a consequence of their escape, on the basis of a ‘statement by an accredited organization or local social service agency, regardless of their agreement to participate in criminal proceedings. “The residence permit issued in pursuance to this article has a duration of six months and may be renewed for one year or for a longer period, if required for judicial purposes. The residence permit provided for by this article enables access to social services and to educational institutions, as well as enrolment in the Employment Bureau, and the possibility of access to employment, providing that the minimum age requirement is met. Should the holder of the residence permit be employed at the date of expiry, then said permit may be renewed for the duration of the employment contract. In the case of an indefinite employment contract, the modalities for the issuance of residence permits on such grounds shall apply. The residence permit provided for by this article may also be converted into a residence permit for educational purposes, when the holder of said permit is enrolled in an official educational institution.” **Research has shown that given time and options for recovery under this path, more victims have cooperated with law enforcement, and have been able to provide a better degree of information and cooperation. The administrative procedures associated with the Article 18 process have ensured that the system is not been characterised by immigration abuse.** Regione Emilia-Romagna, Associazione On the Road (eds.), *Article 18: protection of victims of trafficking and fight against crime (Italy and the European scenarios)*, On the Road Edizioni, Martinsicuro, 2002.

¹¹ As noted above, such a provision is consistent with Article 8(3) of *the EU Council Directive on the residence permit issued to third-country nationals who are victims of trafficking in human beings....*

- expressly provide for the issuance of permanent residence permits.

The organizations therefore propose that the text of draft Article 15 be amended as follows:

Article 15

1) *Each party shall provide a renewable residence permit to victims , including children,*

a) to enable the trafficked persons to be involved in legal or administrative proceedings (including assisting law enforcement and proceedings for compensation) in relation to their being a victim of trafficking;

or

b) who have suffered, or are at risk of suffering serious harm or abuse (including, but not exhaustively, being at risk of becoming a victim of sexual violence, at risk of being re-trafficked, at risk of stigmatisation or discrimination), as a result of being a victim of trafficking.

The residence permit shall be for a period of at least 6 months and renewable.

2. At the expiry of the residence permit, the residence permit shall be renewed if the conditions in paragraph 1 above continue to be met.

3. State Parties shall consider granting permanent residence at the expiry of a temporary residence permit, in particular to those who remain vulnerable.

4. Having regard to the obligations of states Parties to which article 46 refers, each Party shall ensure that the grant of a temporary, or renewable or permanent residence permit should be without prejudice to the right to seek and enjoy asylum.

Article 16- Repatriation of Victims

Article 16 of the current draft of the European Convention against Trafficking requires state Parties of which the trafficked person is a national or had the right of permanent residence at the time of entry to facilitate and accept their repatriation. Facilitation measures required include verifying the right of the person to abode in the state and issuing required travel or other documents.

It requires state Parties which intend to return a trafficked person to another state Party to make such decisions with due regard to the safety of the person, to their best interests and with regard for the status of any relevant proceeding and for the best interests of the victim.

It states that all returns shall preferably be voluntary.

It also requires state Parties to take measures necessary to establish repatriation programs - involving relevant national and international institutions and NGOs - which favour reintegration of trafficked persons into society and the labour market, in order to prevent re-victimization.

It contains a provision prohibiting state Parties from returning a child to another state Party, if, following a risk and security assessment, there is an indication that such return would not be “in the best interests of the child”.

In view of the obligations of all Council of Europe member States under international law, including the duty to secure to each individual within its territory or subject to its jurisdiction their internationally guaranteed human rights (in particular, among others, the rights to: life; freedom from torture, inhuman or degrading treatment and *refoulement*; privacy and family life), Amnesty International and Anti-Slavery International consider that Article 16 must be strengthened.

The organizations note that many current policies of repatriation often expose trafficked persons to additional human rights abuses including, re-trafficking.

Significantly, and regrettably Amnesty International and Anti-Slavery International also note that the current draft provisions regarding return relate only to situations where the trafficked person is being returned to another *state Party*, rather than to *any state*.

Recommendation

Amnesty International and Anti-Slavery International urge the CAHTEH to ensure that Article 16 of the draft European Convention against Trafficking is strengthened. In particular it should require that repatriation should occur *only* after an individualized *risk assessment* by suitably trained personnel has been carried out, and should prohibit repatriation to ***any State*** in all cases in which there is a risk to life, or further serious human rights abuses to the victim, or where the victim is particularly vulnerable. Doing so will be consistent with the obligations of the member States of the Council of Europe under international law, including under the European Convention on Human Rights.

The organizations therefore propose the following amendments to **Article 16**:

1. The Party of which a victim is a national or in which the person had the right of permanent residence at the time of entry into the territory of the receiving Party shall facilitate and accept, with due regard for the *rights, safety, and dignity* of

that person, the return of that person without undue or unreasonable delay.

2. When a Party returns a victim to another ~~state Party, of which that person is a national or in which he or she had, at the time of entry into the territory of the receiving Party, the right of permanent residence,~~ such return shall be with due regard for the *rights, safety and dignity of that person including respect for their privacy and the confidentiality of their circumstances and/or identification as a victim*, for the status of any legal proceedings related to the fact that the person is a victim **and for the best interests of the victim**, and shall preferably be voluntary. *No return shall be carried out until a thorough risk assessment has been completed by suitably trained personnel. In no event shall a return be carried out if there is risk to the life or safety of the individual, including risk that they will be subjected to further human rights abuses, including re-trafficking or discrimination.*

3. At the request of a receiving Party, a requested Party shall, without undue or unreasonable delay, verify whether a person who is a victim is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving State Party.

4. In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorization as may be necessary to enable the person to travel to and re-enter its territory.

5. Each Party shall adopt such legislative **or** other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and NGOs. Such programmes shall include measures to favour reintegration of victims into society, including *into the education system or the labour market and in order to prevent re-victimisation, [with initiatives to strengthen women's life skills and the mechanisms of child protection]*. With regard to children, these programmes should include *enjoyment of the right to education* and measures to secure adequate care or receipt by their family or other appropriate care structures.

6. Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country **where** they are returned or repatriated, such as law enforcement offices, NGOs, lawyers and social welfare agencies.

7. Child victims shall not be returned to *a state* ~~the Party of which they are nationals or in which they had the right to permanent residence at the time of entry into the territory of the receiving Party~~, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.

Article 19- Fraudulent documents

Article 19 of the draft European Convention against Trafficking requires states to criminalize the production of a fraudulent travel or identity document; the procurement of such a document and the confiscation, concealment or removal of an authentic or fraudulent travel or identity document of another person, when any of such acts are committed intentionally and for the purpose of enabling trafficking in human beings.

Amnesty International and Anti-Slavery International notes with regret that the Article does not require states to criminalize the non-consensual *retention* of another person's travel or identify documents for the purposes of controlling them or otherwise restricting their movement. In addition we note that the current wording of Article 19 does not expressly clarify that trafficked persons should not be prosecuted for such acts.

Recommendation

Given that the retention of travel or identity documents by traffickers is a common means used by traffickers to control trafficked persons, Amnesty International and Anti-Slavery International urge the CAHTEH to amend Article 19 so as to require states also to take measures necessary to criminalize the intentional retention of the travel or identity documents of another for the purpose of enabling trafficking.

Consistent with the principle that victims of trafficking, who by definition have been subjected to coercion and exploitation, should not be prosecuted in connection with crimes which they may have committed due to their situation as a victim of trafficking, which is enshrined, *inter alia*, in Principle 7 and Guideline 2(5) of the UN Recommended Principles and Guidelines on Human Rights and Human Trafficking Article 13 of the EU's Brussels Declaration on Preventing and Combating Trafficking

in Human Beings,¹² the organizations also urge that this article expressly state that it does not apply to any such conduct carried out by the trafficked person.

Amnesty International and Anti-Slavery International therefore urge the CAHTEH to amend Article 19 as follows:

Article 19:

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the following conducts, when committed intentionally and for the purpose of enabling the trafficking in human beings:

- a. producing a fraudulent travel or identity document;
- b. procuring or providing such a document;
- [c. confiscating, destroying, concealing or removing or retaining a travel or identity document, be it authentic or fraudulent, of another person.]**

Each Party must ensure that such legislation and measures expressly prohibit the prosecution of a trafficked persons for such conduct.

Article 26- Non Punishment Provision

The current text of the draft European Convention against Trafficking in Human Beings sets out three different drafting options aimed at ensuring that trafficked persons are not subjected to prosecution or punishment in relation to unlawful activities that are a direct consequence of their situation as trafficked persons.

¹² Principle 7 of the *UN Recommended Principles and Guidelines on Human Rights and Human Trafficking* states: “trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry into or residence in the countries of transit and destination or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as trafficked persons.” The *EU’s Brussels Declaration on Preventing and Combating Trafficking in Human Beings* states: “Trafficked victims should be recognized as victims of serious crime. Therefore they should not be re-victimized, criminalized, prosecuted or held in detention centres for offences that may have been committed due to their situation as victims of trafficking.” See also, Part III, Article 1.8 of the *OSCE Action Plan to Combat Trafficking in Human Beings*. The *UN Committee on Economic Social and Cultural Rights and Committee on the Elimination of Discrimination against Women* have called on states to ensure that victims of trafficking are not penalized, UN Docs: E/2002/22 at para 510 and CEDAW/2004/1/CRP.3/Add.1/Rev.1, at para 28, respectively. See also, the *Council of Europe’s Committee of Ministers’ Recommendation R(2001) 16 on the protection of children against sexual exploitation*, at para 36, which recommends that the Council of Europe member States “ensure that children who have been victims of sexual exploitation cannot be prosecuted for any act connected with this exploitation.”

Option 1, the least protective of the options, requires each Party to the Convention to ensure that its internal law does not allow *for the possibility of punishing* trafficked persons for such unlawful activities, to the extent to which the involvement is a direct consequence of their situation as victims.

Option 2 requires each state Party to ensure that under its laws trafficked victims are not punished for their involvement in unlawful activities, to the extent to which such involvement is a direct consequence of their situation as victims.

Option 3, the most protective option, expressly prohibits the detention, charging or prosecution of a trafficked person for the illegality of their entry into or residence in countries of transit or destination, or for their involvement in unlawful activities to the extent to which the involvement is a direct consequence of their situation as victims.

Recommendation:

In respect of these options, Amnesty International and Anti-Slavery International urge the CAHTEH to adopt a modified version Option 3, as follows:

Article 26:

1. Trafficked persons shall not be detained, charged or prosecuted for the illegality of their entry, into or residence in countries of transit or destination, or for their involvement in *any* unlawful activities that are a ~~direct~~ consequence of their situation as a trafficked persons

2. *Each Party shall ensure that all authorities who are likely to come into contact with trafficked persons, (including police, immigration officials, members of judiciary, lawyers (including prosecutors), NGOs, doctors, social service professionals labour inspectors), are adequately trained and sensitised about this Article and the status and needs of trafficked persons as victims of human rights abuses and crime. Particular attention shall be paid to the special needs of children and other vulnerable groups.*

As grounds for this recommendation we note that respecting and protecting the human rights of trafficked persons requires that they are treated as victims of human rights abuses, which also constitute serious crimes.

As highlighted above in the discussion of Article 19, the related rights of trafficked persons not to be arrested, detained, including in immigration detention, prosecuted or punished for their illegal entry into or residence in countries of transit or destination or for unlawful activities carried out in connection with their situation as a trafficked

person, have been widely recognized by UN bodies and mechanisms, the Council of Europe, the OSCE and the EU.¹³

Regrettably, in the experience of Amnesty International and Anti-Slavery International, however, the reality for the majority of trafficked persons is in stark contrast with these principles. In fact, if they come into contact with authorities, rather than be treated as victims many trafficked persons will be arrested, detained and deported as illegal migrants, illegal workers or prostitutes.

Many traffickers use their victim's fear of law enforcement as an effective method of control.

To respect and protect the rights of trafficked persons, and treat them as victims of human rights abuses which are serious crimes, and to effectively combat trafficking, it is imperative that trafficked persons not be criminalized for offences connected to their being a victim of trafficking, and that law enforcement, immigration and other officials are appropriately trained and sensitised to their status and needs as victims.

Article 28: Protection of Victims, Witnesses and Collaborators with the Judicial Authorities

The current draft text of Article 28 requires state Parties to the European Convention against trafficking to take legislative or other measures as may be necessary to provide appropriate protection from potential retaliation or intimidation to victims of trafficking; those who report criminal offences related to trafficking or otherwise cooperate with the investigating or prosecuting authorities; witnesses who give testimony concerning criminal offences set out in the treaty, and, as appropriate, family members of such persons.

Significantly the provision requires such protection measures *during* and *after* the investigation and prosecution of perpetrators - but not *before* such investigation or prosecution or *in the absence of a prosecution*.

The Article goes on to require legislative or other necessary measures be taken by state Parties to ensure that there are various methods of protection available, including physical protection, relocation, identity change and assistance in obtaining

¹³ See citations set out in footnote 12, above.

employment. It also requires states to consider entering into agreements or arrangements with other states for these purposes.

Recommendation:

While welcoming the general intent of this article, given the risks faced by trafficked persons who escape their traffickers and by others, including those participating in ensuring that those responsible for trafficking are brought to justice, and the fact that, in some cases, there are risks to the trafficked persons and/or their families which should preclude repatriation, Amnesty International and Anti-Slavery International urge the CAHTEH to strengthen Article 28 in order to:

- ensure protection is available including before (as well as during and after) the start of any formal investigation and prosecution as well as in the absence of a prosecution;
- expressly include in the list of the range of protection measures, asylum and resettlement in a third country.

Accordingly, Amnesty International and Anti-Slavery International recommend that **Article 28** be amended as follows:

1. Each Party shall adopt such legislative **or** other measures as may be necessary to provide effective and appropriate protection **from potential retaliation or intimidation, including before, during and after investigation and prosecution of perpetrators, for:**

- (a) Victims;
- (b) [those who report the criminal offences established in accordance with **Article 17 of this Convention** or otherwise co-operate with the investigating or prosecuting authorities;]
- (c) **witnesses who give testimony concerning criminal offences established in accordance with Article 17 of this Convention;**
- (d) **as appropriate**, members of the family of persons referred to in subparagraphs (a) and (c).

2. Each Party shall adopt such legislative **or** other measures as may be necessary to ensure that protection [programmes][measures] offer various methods of protection. Such measures may include physical protection, relocation, *asylum, resettlement to a third country*, identity change and assistance in obtaining jobs

3. Each Party shall consider entering into agreements or arrangements with other

States for the implementation of this article

Article 33: Jurisdiction

Article 33(1) of the draft European Convention against Trafficking in Human Beings requires, each state Party to adopt such means as are necessary to establish jurisdiction over trafficking and related offences set out within the Convention when the offence is committed: in its territory; on board a ship flying a flag of the state; on board an aircraft registered under the state's laws; by one of its nationals or a person with habitual residence in the territory, if the offence is punishable in the state where the crime was committed or if the offence was committed outside the territorial jurisdiction of any state.

Significantly, it does not expressly require a state to take measures as may be necessary to establish jurisdiction over such offences which are committed in a territory outside of the state which is under the effective control of a state Party.

Recommendation:

Given the fact that trafficking in human beings has thrived and even become characteristic in situations of internal and international armed conflict as well as in post-conflict situations, including notably those involving an international presence (such as peacekeepers, peace-builders, civilian policing), and that international law acknowledges state responsibility to ensure respect for human rights of those on territory within the effective control of the state,¹⁴ Amnesty International and Anti-Slavery International urge the CAHTEH to ensure that Article 33 (1) of the draft European Convention against Trafficking is amended to require each Party take measures to ensure that they establish jurisdiction over offences committed on territory outside of the state which is within the effective control of the state Party.

The organizations recommend, for example, that Article 33(1) be amended as follows:

1. Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed :

(a) in its territory; or

¹⁴ See Judgments of the European Court of Human Rights in the cases of *Loizidou v. Turkey* and *Cyprus v. Turkey*, and the Human Rights Committee's General Comment 31 on Article 2 of the International Covenant on Civil and Political Rights UN Doc CCPR/C/74/CPR.4/Rev.6 of 21 April 2004, at para 10.

- (b) on board a ship flying the flag of that Party; or
- (c) on board an aircraft registered under the laws of that Party; or
- (d) by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State.
- (e) *on persons or territory otherwise within its power or effective control*

Articles 42 and 43: Monitoring Mechanism

Amnesty International and Anti-Slavery International welcome the proposal, to create a treaty monitoring body which is multi-disciplinary group of independent experts, composed of people who are of high moral character and known for their recognized competence in the field of action against trafficking.

The organizations welcome the fact that, in addition to receiving information about the implementation of the Convention from state Parties directly, Article 43 of the draft European Convention against Trafficking makes provision for the monitoring body to request information from civil society, and to make country visits.

Recommendation

Amnesty International and Anti-Slavery International urge the CAHTEH to ensure that Article 42, which establishes the treaty monitoring body known as “GRETA”, be amended to expressly include provisions that ensure that:

- among the members of GRETA are people who have recognized expertise in the protection of the rights of trafficked persons, from countries of origin, transit and destination within the Council of Europe region;
- the members of GRETA are nominated and chosen in an open and transparent process which involves input from civil society.

The organizations welcome the intention, expressed in draft Article 43 to ensure that the reports of the GRETA will be made public. We urge that the reports be made public upon their adoption, and welcome the draft provisions which require that the eventual comments of the parties and the

conclusions and recommendations of the Committee of Ministers on the reports of GRETA also be made public. Amnesty International and Anti-Slavery International urge CAHTEH to

ensure that the GRETA will have competence to receive and consider collective complaints alleging a failure by a state party to implement a provision of the Convention. We suggest that the collective complaint mechanism within the European Social Charter be used as a model. The organizations consider that adopting these approaches will be conducive to ensuring a transparent monitoring process, which aims at ensuring better implementation of the Convention by each state Party.

Consultation

Recommendation

In view of the Council of Europe's commitment to cooperate with civil society and the key work carried out by members of civil society in the protection and respect for the rights of trafficked persons, Amnesty International and Anti-Slavery International call on the Council of Europe and each of the 45 member states of the Council of Europe to ensure that the drafts of the text of the European Convention against Trafficking are made widely available and disseminated to members of civil society, including NGOs and other experts who work with and on behalf trafficked persons.

In addition, the organizations call on the Council of Europe and each of the 45 member States to hold consultations with such members of civil society throughout the treaty drafting process. We call on States to inform their views on the provisions of the draft Convention in the light of such consultations.