

9-1-2006

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Recommended Citation

Alexandra Amiel, *Integrating a Human Rights Perspective into the European Approach to Combating the Trafficking of Women for Sexual Exploitation*, 12 Buff. Hum. Rts. L. Rev. 5 (2006).

Available at: <https://digitalcommons.law.buffalo.edu/bhrlr/vol12/iss1/2>

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INTEGRATING A HUMAN RIGHTS PERSPECTIVE INTO THE EUROPEAN APPROACH TO COMBATING THE TRAFFICKING OF WOMEN FOR SEXUAL EXPLOITATION

Alexandra Amiel

INTRODUCTION

The United States (U.S.) government estimates that between 600,000 and 800,000 people are trafficked across international borders annually.¹ Eighty percent of the victims who are trafficked into some form of commercial sexual exploitation are women.² The majority of these women are physically and emotionally abused and are at the mercy of their traffickers who often confiscate or destroy their travel and identification documents.

Human trafficking is a complex, multi-faceted problem that intertwines issues of law enforcement, border control, gender, crime, security and human rights. It is a lucrative business that generates an estimated nine and a half billion dollars annually.³ Trafficking is often linked to organized crime groups and other illegal activities such as money laundering, drug trafficking, arms dealing and document forgery. In addition to being profitable, traffickers operate with impunity because of the lack of anti-trafficking legislation and the corruption of government officials and law enforcement institutions. Trafficking activities continue to thrive and take on new forms and dimensions with the advent of technologies such as the Internet, accessible transportation methods and the globalization of the sex industry.

The opening of European borders in the late 1980s and early 1990s sparked a dramatic increase in human trafficking within Europe which was further exacerbated by failing economies and a weakened rule of law. Sub-standard living conditions in the poor, war-torn and politically unstable

¹ See U.S. DEP'T OF STATE TRAFFICKING IN PERSONS REPORT, ch. I (2005), available at <http://www.state.gov/documents/organization/47255.pdf> [hereinafter TIP REPORT].

² *Id.* Human trafficking is manifested in different forms, including sexual exploitation, labor exploitation, begging, juvenile delinquency and domestic servitude. This paper will focus solely on the trafficking of women for sexual exploitation or prostitution.

³ *Id.*

countries of Eastern, Southeastern and Central Europe have generated a pool of susceptible trafficking victims in search of the proverbial “better life” in neighboring Western countries, in particular those of the European Union (E.U.).

International trafficking in human beings is a phenomenon that has garnered much public awareness and concern in recent years. The response to the trafficking problem, at both the international and regional levels, has been to adopt punitive strategies aimed at suppressing organized crime, illegal migration and human smuggling. Trafficking has traditionally been viewed as a problem of law and order, and anti-trafficking strategies have focused on the prosecution and punishment of traffickers. The human rights of trafficked victims have received marginal treatment, if any, in the existing body of documents.

Yet, trafficking is above all a human rights issue because it denies its victims virtually all rights protected by international human rights law. By failing to protect trafficking victims and provide them with effective remedies, states are violating their international obligations to investigate, prevent and punish human rights violations. To effectively eradicate the trafficking problem, states must adopt a multi-disciplinary, integrated, holistic and coordinated approach that focuses on (i) preventing trafficking, (ii) punishing the perpetrators and (iii) protecting, rehabilitating and reintegrating the victims. States must follow the lead of the Council of Europe in integrating a human rights perspective into their current counter-trafficking strategies. These counter-trafficking measures should also aim to improve the economic, social and cultural rights of susceptible individuals rather than affording victims minimal civil and political rights.

This article explores the European approach to combating trafficking, with a particular focus on trafficking women into and within the E.U. It presents a detailed overview of all the existing E.U. and international agreements regarding trafficking. Part I introduces the problem of the trafficking of women into and within the E.U. by examining the root causes of trafficking, patterns of legal and illegal migration, and the need for effective legislation on trafficking. Part II presents the strategies of criminal law developed at the regional and international levels to combat trafficking and underlines the limitations of these methodologies. Part III discusses the need to develop a human rights based approach to the trafficking problem. Part IV analyzes the recent Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Convention)⁴ to determine whether or not it strikes a balance between the criminalization

⁴ Council of Europe Convention on Action against Trafficking in Human Beings, May 3, 2005, C.E.T.S. 197 [hereinafter Council of Europe Convention].

and prosecution of trafficking activities on the one hand, and the protection and empowerment of trafficking victims on the other. This section also emphasizes the advantages of expanding a human rights convention on trafficking within a regional human rights system. Part V concludes that an integrated approach focusing on both criminalizing trafficking and promoting victims' human rights is critical in preventing future trafficking. The article concludes that the pan-European framework developed in the Council of Europe Convention which focuses heavily on victims' human rights serves as an excellent model for all nations in need of effective anti-trafficking legislation and policies.

I. TRAFFICKING OF WOMEN IN THE E.U.: A PROBLEM OF GROWING CONCERN

A. *Background*

1. Root Causes

Trafficking can be analogized to a marketplace with elements of supply and demand, as well as "push" and "pull" factors. The supply side is fueled by poverty, war, natural catastrophes, gender inequalities, domestic violence, sex discrimination, economic transition and sexual abuse.⁵ Such "push" factors render women particularly susceptible to trafficking crimes because of the feminization of poverty and socio-economic gender imbalances.⁶ The demand from male sex buyers and the growing need for cheap labor are "pull" factors, fueled by the globalization of economy and politics, accessible transportation, and the growth of the commercial sex industry.⁷

⁵ See United Nations Division for the Advancement of Women & United Nations Office on Drugs and Crime [hereinafter UNODC], *Trafficking in Women and Girls, Report of the Expert Group Meeting*, 8, U.N. Doc. EGM/TRAF/2002/Rep.1 (Nov. 18-22, 2002), available at <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/Finalreport.PDF>.

⁶ See Gulnara Shahinian, *Trafficking in Women and Girls*, delivered to the Expert Group Meeting on Trafficking in Women and Girls, 1, U.N. Doc. EGM/TRAF/2002/EP.1 (Nov. 8, 2002), available at <http://www.un.org/womenwatch/daw/egm/trafficking2002/reports/EP-Shahinian.PDF>.

⁷ See ELIZABETH KELLY, INTERNATIONAL ORGANIZATION FOR MIGRATION [hereinafter IOM], *JOURNEYS OF JEOPARDY: A REVIEW OF RESEARCH ON TRAFFICKING IN WOMEN AND CHILDREN IN EUROPE* (2002).

In the E.U., there has been a dramatic increase in the number of persons trafficked into the region over the past two decades.⁸ This is due in part to the fall of the former Soviet Union and to the conflicts in the former Yugoslavia which granted citizens of Eastern Europe, Southeastern Europe and Central Asia freedom of movement. Economic crises, decreased standards of living and severe unemployment have intensified many people's desire to seek a better life in neighboring Western countries.⁹ The flow of trafficking tends to be directed from the poorer countries of the East toward the richer countries of the West, in particular to those with large sex industries.¹⁰ Recent studies indicate that the countries of Eastern Europe and Central Asia, in particular Moldova, Ukraine, Belarus and Russia, are major sources of origin and transit for human trafficking.¹¹ The countries of the Southeastern region of Europe, most notably Albania, Bulgaria, Bosnia-Herzegovina, Croatia, Macedonia, Romania and the Republic of Yugoslavia (Serbia, Montenegro and Kosovo), are other major sources of trafficking.¹²

According to the U.S. annual trafficking report,¹³ elaborated within the framework of the U.S. Trafficking Victims Protection Act of 2000 (TVPA),¹⁴ the majority of Eastern European, Southeastern European, and Central Asian countries are considered Tier 2 on the government's rating scale.¹⁵ This means that they fail to comply with the minimum standards against trafficking set forth in the TVPA. In 2005, Armenia, Azerbaijan, Russia, Ukraine and Uzbekistan were named on the "Special Watch List"

⁸ See Sema Erder & Selmin Kaska, *IRREGULAR MIGRATION AND TRAFFICKING IN WOMEN: THE CASE OF TURKEY* 10 (2003).

⁹ *Id.*

¹⁰ See KELLY, *supra* note 7, at 20.

¹¹ See IOM, *ANALYSIS OF INSTITUTIONAL AND LEGAL FRAMEWORKS AND OVERVIEW OF COOPERATION PATTERNS IN THE FIELD OF COUNTER-TRAFFICKING IN EASTERN EUROPE AND CENTRAL ASIA* 2.1 (2003).

¹² See generally BARBARA LIMANOWSKA, UNITED NATIONS CHILDREN'S FUND/OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS/ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *TRAFFICKING IN HUMAN BEINGS IN SOUTH EASTERN EUROPE: CURRENT SITUATION AND RESPONSES TO TRAFFICKING IN HUMAN BEINGS IN ALBANIA, BOSNIA AND HERZEGOVINA, BULGARIA, CROATIA, THE FEDERAL REPUBLIC OF YUGOSLAVIA, THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA, MOLDOVA AND ROMANIA* (2002).

¹³ TIP REPORT, *supra* note 1.

¹⁴ Trafficking Victims Protection Act, Pub. L. No. 106-386 (2000) [hereinafter TVPA].

¹⁵ TIP REPORT, *supra* note 1, at 51-230.

which groups countries where “[t]he absolute number of victims of severe forms of trafficking is very significant or is significantly increasing or . . . [t]here is a failure to provide evidence of increasing efforts to combat severe forms in trafficking in persons from the previous year.”¹⁶ The lack of anti-trafficking legislation or lack of enforcement of the rule of law in these countries is another factor that contributes to the increase in trafficking activities.¹⁷

Common recruiting tactics employed by traffickers include the following: coercion through abduction or kidnapping; buying individuals from family members, other traffickers or a boyfriend; deceptive offers of employment in the sex industry or in other industries; false promises of marriage; and misrepresentations regarding prospective work as a prostitute.¹⁸ Most commonly, young women with the hopes of improving their lives fall prey to misleading offers of work abroad as nannies, maids or dancers.¹⁹ These women are generally unaware that once they reach their country of destination, they will be forced into prostitution or sexual exploitation through the use of threats, violence or debt bondage. The traffickers exert control over their victims by threatening harm to their family and friends and by confiscating their papers and money, which forces them to repay a debt owed to the person who “paid” for them.²⁰

Trafficking activities are often orchestrated by transnational organized crime networks which provide traffickers access to fraudulent documents, “safe routes” and names of officials to bribe.²¹ The criminal networks are often organized in a hierarchical structure in which the organizers are members of the criminal networks who employ middle-men to recruit, transport and sell the women. The managers are owners of clubs and brothels, pimps, or individuals who work in the sex industry. Lastly, aides are corrupt members of the government or law enforcement personnel who provide legal documents and otherwise enable the criminal network to exist by failing to prosecute or by destroying evidence.²²

¹⁶ *Id.* at 26.

¹⁷ See LIMANOWSKA, *supra* note 12, ¶ 4.

¹⁸ See KELLY, *supra* note 7, at 30.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See EUROPOL, TRAFFICKING IN HUMAN BEINGS FOR SEXUAL EXPLOITATION IN THE EU: A EUROPOL PERSPECTIVE (Jan. 2004), available at www.europol.eu.int/publications/seriouscrimeoverviews/2004/THB.pdf [hereinafter EUROPOL PERSPECTIVE].

²² See KELLY, *supra* note 7, at 43 (describing the findings of a Croatian study on the operational layers of crime networks).

2. Legal and Illegal Immigration

Trafficking is also closely linked to both legal and illegal immigration. For example, illegal immigration into the E.U. is facilitated by middle-men who provide forged travel documents, shelter, and transport. These services are costly and when the women cannot pay for the service, they are forced into some form of servitude to reimburse the cost of their trip.²³ In addition, the visa waiver programs in most E.U. countries enable an individual to stay in a country for up to three months without a visa. This facilitates entry from neighboring countries into Western Europe.²⁴

Entry into the E.U. can also be secured with a temporary visa or a residence permit. Misconceptions about employment opportunities in the West and the glamorization of the Western lifestyle as depicted in the media, prompt some women to immigrate legally to the E.U. to seek legitimate work.²⁵ Immigrant women may apply for a work permit or entertainment visa and obtain legal employment as table dancers, telephone sex operators or performers in peep shows.²⁶ However, traffickers often control the sex industry and women eventually fall into their hands.²⁷ As one scholar notes, "it is an open ended question as to how women from one side of Europe are able to find their way into prostitution at the other, with no third-party facilitation, not to mention recruitment, in between."²⁸

²³ See Proposal for a Comprehensive Plan to Combat Illegal Immigration and Trafficking of Human Beings in the European Union, 2002 O.J. (C 142) 6, *available at* www.ecre.org/eu_developments/controls/actionplan.pdf [hereinafter Trafficking Proposal].

²⁴ See KRISTIINA KANGASPUNTA, UNODC, MAPPING THE INHUMAN TRADE: PRELIMINARY FINDINGS OF THE DATABASE ON TRAFFICKING IN HUMAN BEINGS (2003), *available at* www.unodc.org/pdf/crime/forum/forum3_note1.pdf.

²⁵ See LIMANOWSKA, *supra* note 12, ¶ 6.

²⁶ See REPORT OF THE DIRECTOR GENERAL, INTERNATIONAL LABOR ORGANIZATION, A GLOBAL ALLIANCE AGAINST FORCED LABOUR: GLOBAL REPORT UNDER THE FOLLOW-UP TO THE ILO DECLARATION ON FUNDAMENTAL PRINCIPLES AND RIGHTS AT WORK, 51-52 (2005), *available at* <http://yaleglobal.yale.edu/display.article?id=5715> [hereinafter ILO REPORT].

²⁷ *Id.*

²⁸ KELLY, *supra* note 7, at 29.

Pursuant to the Schengen Agreement,²⁹ most of the twenty-five E.U. Member States have agreed to remove their internal border controls.³⁰ The lifting on travel restrictions and the opening up of borders have made it easier to enter the E.U. and move freely within it. The lack of checks at the border facilitates illegal transit between Member States and reinforces trafficking networks.³¹ Open borders make it difficult for police to monitor and count the women who enter and exit countries that are party to the Schengen Agreement.³² For example, reports from 2003 indicate a significant rise in the number of victims trafficked from Romania and Bulgaria since the lifting of the visa restriction in Schengen states.³³ Many women are continuously resold from one network to another, and transported from country to country without law enforcement authorities taking notice.³⁴

3. The Need for Reform

The absence of anti-trafficking legislation and the failure of governments to prioritize the prosecution of traffickers have caused trafficking operations to flourish. The organized crime networks tend to operate with impunity since efforts to enforce trafficking laws are insufficient.³⁵ The complex transnational nature of trafficking poses a challenge to law enforcement agencies that do not have the competency to fight organized crime networks that travel across borders. The authorities have little information to guide them in the pursuit of the traffickers because of the reluctance on the part of the victims to report their experiences to the authorities.

The women who have been trafficked often remain silent about their experiences for several reasons. First, the women fear retaliation by the traffickers either directly against them or against their families in their countries of origin. Second, the women feel ashamed and humiliated be-

²⁹ See Schengen Agreement on the Gradual Abolition of Checks at Their Common Borders and the Convention Applying the Agreement, June 14, 1985, Belg.-Fr.-F.D.R.-Lux.-Neth., 30 I.L.M. 68 (1991) (the United Kingdom and Ireland are not part of the Schengen Agreement).

³⁰ *Id.*

³¹ See Trafficking Proposal, *supra* note 23, at 30.

³² Jacqueline Klosek, *The Development of International Police Cooperation within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of Such Cooperation and the Problems and Promises Resulting Thereof*, 14 AM. U. INT'L L. REV. 599, 619 (1999).

³³ See EUROPOL PERSPECTIVE, *supra* note 21.

³⁴ See KELLY, *supra* note 7, at 27.

³⁵ *Id.* at 45.

cause of what they have endured at the hands of the traffickers.³⁶ Rape and torture are some of the unspeakable cruelties that women are subjected to both en route and upon arrival to the country of destination.³⁷ Third, language barriers and an illegal immigrant status are additional factors which keep women from coming forward to law enforcement personnel.³⁸

Lastly, sexually exploited women are often “re-victimized” and perceived as criminals instead of victims because they have entered the country illegally. They are prosecuted as undocumented workers or illegal aliens instead of being recognized as crime victims.³⁹ Consequently, the victims are afraid to denounce their traffickers since they do not want to be jailed or deported. Without any real guarantees against deportation or exclusion, the victims are reticent to aid authorities in dismantling the trafficking networks.

As awareness and concern over trafficking has grown, there have been numerous conventions, resolutions and agreements both at the international and regional level aimed at combating the trafficking problem. The current body of international and regional anti-trafficking legislation has tackled the problem by treating it as a criminal law issue instead of as a human rights concern. Many states, however, have failed to enforce such agreements leaving trafficking victims with little or no protection. A more comprehensive, multi-disciplinary and coordinated policy is needed at both the European and international levels to protect the human rights of victims and prevent trafficking by implementing sustainable strategies which eliminate root causes and protect victims.

II. A CRIMINAL LAW APPROACH

Traditionally, at both the international and regional levels, trafficking activities have been categorized as crimes and tackled with law enforcement strategies focused on deterrence and punishment. The goal has been to persuade as many countries as possible to criminalize trafficking in their domestic laws and to prosecute perpetrators.

³⁶ See *id.* at 36.

³⁷ See EUROPOL PERSPECTIVE, *supra* note 21.

³⁸ *Id.*

³⁹ See U.N. Econ. & Soc. Council, Comm. on Human Rights, *Integration of the Human Rights of Women and the Gender Perspective: Report of the Special Rapporteur on Trafficking in Persons, Especially Women and Children*, U.N. Doc E/CN.4/2005/71 (Dec. 22, 2004) [hereinafter Report of the Special Rapporteur].

A. *E.U. Law*

The E.U. has adopted a two-part strategy to combat the problem of trafficking in women. Part one of the strategy focuses on criminalizing human trafficking and ensures that the domestic criminal laws of each Member State do the same. Part two outlines additional measures that can be taken by Member States to provide assistance and protection to the victims of trafficking.

The first relevant document in the developing body of E.U. legislation concerning trafficking is the Council Framework Decision on the Standing of Victims in Criminal Proceedings of 2001 (2001 Council Framework Decision).⁴⁰ The 2001 Council Framework Decision defines a victim as “a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation of the criminal law of a Member State.”⁴¹ This document also calls on Member States to ensure that all crime victims are treated with dignity and respect. Special treatment is required of a particularly vulnerable victim, although that term is not defined.⁴² In addition, the 2001 Council Framework Decision provides that victims have a right to provide and receive information, to understand and participate in the legal process, and to be protected during criminal proceedings.⁴³

Under the 2001 Council Framework Decision, Member States are required to protect trafficking victims and their families “where the competent authorities consider that there is a serious risk of reprisals or firm evidence of serious intent to intrude upon their privacy.”⁴⁴ Member States must also limit contact between victims and their offenders during criminal proceedings and provide special waiting areas for victims on court premises.⁴⁵ Moreover, in situations where a vulnerable victim must be protected from testifying in open court, the victim, if granted permission by the court, may testify in an alternative manner.⁴⁶ A crime victim also has the right to

⁴⁰ See Council Framework Decision of 15 Mar. 2001 on the Standing of Victims in Criminal Proceedings, 2001 O.J. (L 82) 1 [hereinafter 2001 Council Framework Decision].

⁴¹ *Id.* at art. 1.

⁴² *Id.* at art. 2.

⁴³ *Id.* at arts. 3-5.

⁴⁴ *Id.* at art. 8.

⁴⁵ *Id.*

⁴⁶ See 2001 Council Framework Decision, *supra* note 40, at art. 8.

claim compensation from the offender in the course of the criminal proceeding.⁴⁷

In addition, the 2001 Council Framework Decision requires Member States to create conditions “to prevent secondary victimization”⁴⁸ and to avoid “placing victims under unnecessary pressure” during criminal or other proceedings.⁴⁹ Member States must also promote the involvement of victim support networks which are specially trained to assist victims.⁵⁰ Lastly, the 2001 Council Framework Decision provides that victims receive free advice regarding their role in any criminal proceedings, and reimbursement for expenses incurred while serving as a party or witness in a proceeding.⁵¹

In 2002, the E.U. issued a Council Framework Decision on Combating Trafficking in Human Beings (2002 Council Framework Decision).⁵² The 2002 Council Framework Decision supersedes the Council Joint Action of February 24, 1997, which proposed action to combat trafficking in persons and children for sexual exploitation. The 2002 Council Framework Decision provides a definition of trafficking for the purposes of sexual and labor exploitation and labels it as a criminal activity.⁵³ The provisions of the 2002 Council Framework Decision were to be incorporated into the national laws of the Member States by August of 2004.

Article 1 of the 2002 Council Framework Decision defines trafficking as an offense taking three forms:

the recruitment, transportation, transfer, harbouring, subsequent reception of a person, including exchange or transfer of control over that person where

- (a) use is made of coercion, force or threat, including abduction, or
- (b) use is made of deceit or fraud, or
- (c) there is an abuse of authority or of a position of vulnerability, which is such that the person has

⁴⁷ *Id.* at art. 9.

⁴⁸ *Id.* at art. 15.

⁴⁹ *Id.*

⁵⁰ *Id.* at art. 13.

⁵¹ *Id.* at arts. 6-7.

⁵² *See generally* Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, 2002 O.J. (L 203) 1 [hereinafter 2002 Council Framework Decision].

⁵³ *Id.*

no real and acceptable alternative but to submit to the abuse involved, or

- (d) payments or benefits are given or received to achieve the consent of a person having control over another person

for the purpose of exploitation of that person's labour or services, including at least forced or compulsory labour or services, slavery or practices similar to slavery or servitude, or

for the purpose of the exploitation of the prostitution of others or other forms of sexual exploitation, including in pornography.⁵⁴

The consent of the victim of trafficking to the exploitation is irrelevant.⁵⁵ In addition, the instigating, aiding, abetting or attempting to commit trafficking as defined in Article 1 is also considered a punishable offense.⁵⁶

Each individual Member State must take the appropriate measures to ensure that the trafficking offense is punishable by "effective, proportionate and dissuasive criminal penalties, which may entail extradition."⁵⁷ Pursuant to the 2002 Council Framework Decision, a trafficking offense is punishable by a maximum imprisonment sentence of no less than eight years if it was committed: (i) deliberately or by gross negligence endangering the life of the victim; (ii) against a particularly vulnerable victim; (iii) with the use of serious violence or resulting in serious harm to the victim or; (iv) within the framework of a criminal organization.⁵⁸ A victim is defined as vulnerable if the victim is under the age of sexual majority provided under national law, and the offense was committed for the purpose of prostitution or sexual exploitation.⁵⁹ The term "criminal organization" is referenced in the instrument adopted by the Council's Joint Action of December 21, 1998, which makes it unlawful to participate in a criminal organization in the Member States of the E.U.⁶⁰

⁵⁴ *Id.* at art. 1.1.

⁵⁵ *Id.* at art. 1.2.

⁵⁶ *Id.* at art. 2.

⁵⁷ *Id.* at art. 3.1.

⁵⁸ 2002 Council Framework Decision, *supra* note 52, at art. 3.2.

⁵⁹ *Id.*

⁶⁰ Council Joint Action of 21 Dec. 1998 Adopted by the Council on the Basis of Article K.3 of the Treaty on European Union, on Making it a Criminal Offence to Participate in a Criminal Organization in the Member States of the European Union, 1998 O.J. (L 351) 2.

Pursuant to the 2002 Council Framework Decision, both legal and natural persons are liable for trafficking offenses. A legal person does not include states, public bodies exercising state authority, or public international organizations.⁶¹ Liability is imposed on legal persons for trafficking offenses committed for their benefit, or by a person acting individually or as part of an entity of the legal person, who either exercises control over the legal person, has power of representation over the legal person, or has the authority to act on behalf of the legal person.⁶² The liability of a legal person does not preclude instituting criminal proceedings against natural persons who perpetrate, instigate or are accessories to the trafficking offenses.⁶³ To punish the legal persons, the Member States must apply both criminal and civil sanctions such as exclusion from entitlement to public benefits or aid, judicial dissolution, ban on commercial activities, judicial supervision, or closing down establishments used to commit the offense.⁶⁴

The 2002 Council Framework Decision enables each Member State to prosecute both the natural and legal persons who have committed a trafficking offense provided that they have jurisdiction over them. A Member State may assert jurisdiction by meeting one of the following three requirements: “(a) the offence is committed in whole or in part within its territory, or (b) the offender is one of its nationals, or (c) the offence is committed for the benefit of a legal person established in the territory of that Member State.”⁶⁵ When a Member State’s internal laws do not provide for extradition of its nationals, the State must seek to establish jurisdiction and prosecute a trafficking offense if it is committed by one of its own nationals outside of its territory.⁶⁶ Lastly, when the trafficking offense is committed within the territory of a Member State, the prosecution or investigation into the trafficking offense cannot rely solely on the report or accusation made by the victim.⁶⁷

As a result of the close link between trafficking and illegal immigration, the E.U. also issued in 2002 a Council Framework Decision on the Strengthening of the Penal Framework to Prevent the Facilitation of Unau-

⁶¹ 2002 Council Framework Decision, *supra* note 52, at art. 4.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.* at art. 5.

⁶⁵ *Id.* at art. 6.

⁶⁶ *Id.*

⁶⁷ 2002 Council Framework Decision, *supra* note 52, at art. 7.

thorized Entry, Transit and Residence (Decision on Unauthorized Entry)⁶⁸ and a Council Directive (2002 Council Directive) defining the terms “facilitation of unauthorized entry, transit and residence.”⁶⁹ The goal of the Decision on Unauthorized Entry is to criminally sanction the facilitation of illegal immigration both for the unauthorized crossing of borders and for aiding networks which traffic and exploit human beings. Member States are to impose sanctions for any offenses defined as follows:

- (i) any person who intentionally assists a person who is not a national of a Member State to enter, or transit across, the territory of a Member State in breach of the laws of the State concerned on the entry or transit of aliens;
- (ii) any person who, for financial gain, intentionally assists a person who is not a national of a Member State to reside within the territory of a Member State in breach of the laws of the State concerned on the residence of aliens.⁷⁰

Moreover, the sanctions also apply to any person who attempts to commit, or is an instigator or accomplice of the offenses set forth above.⁷¹

Pursuant to the Decision on Unauthorized Entry, the applicable standard for sanctions or criminal penalties is that they be effective, proportionate and dissuasive.⁷² Such sanctions can include, for example, extradition, deportation or confiscation of the means of transport used to commit the offense in question.⁷³ If the offense is committed for financial profit, it is punishable by a sentence carrying a term of no less than eight years, provided that the offense is committed as part of an activity of a criminal organization or the offense is committed while imperiling the lives of the victims of the offense.⁷⁴ Legal persons are also liable under the Decision on Unauthorized Entry, and are punishable by criminal and non-criminal sanctions, such as a ban from public benefits or aid, a prohibition against exer-

⁶⁸ Council Framework Decision of 28 Nov. 2002 on the Strengthening of the Penal Framework to Prevent the Facilitation of Unauthorized Entry, Transit and Residence, 2002 O.J. (L 328) 1 [hereinafter Decision on Unauthorized Entry].

⁶⁹ Council Directive of 28 Nov. 2002 Defining the Facilitation of Unauthorized Entry, Transit and Residence, 2002 O.J. (L 328) 17.

⁷⁰ *Id.* at art. 1.1.

⁷¹ *Id.* at art. 2.

⁷² Decision on Unauthorized Entry, *supra* note 68, at art. 1.

⁷³ *Id.*

⁷⁴ *Id.*

cising commercial activities, a judicial winding-up order, or a placement under judicial supervision.⁷⁵

Additionally, a Member State must establish jurisdiction over the offenses if committed within its territory, by one of its nationals, or for the benefit of a legal person located within its territory.⁷⁶ Furthermore, when an infringement is committed by a national of a Member State outside of its territory, the Member State is obligated either to extradite the individual or take the appropriate measures to enable that individual's prosecution.⁷⁷

More recently, the E.U. issued a Council Directive (2004 Council Directive) relating to the compensation of crime victims in cross-border situations.⁷⁸ The goal of the 2004 Council Directive is to ensure adequate compensation to the victim of a violent, intentional crime committed within the E.U. The 2004 Council Directive recognizes that victims do not always receive compensation from their offender because the latter is unidentified or cannot be prosecuted. For this reason, the 2004 Council Directive creates a system of cooperation to enable victims of cross-border crimes to access compensation based on state funded compensation schemes. Thirteen Member States already have such schemes in place, and the 2004 Council Directive requires all States to establish one.⁷⁹ The proposed system provides for cooperation between the relevant authorities of all the Member States. Therefore, a victim can access information regarding the application for compensation in a country other than that of the victim's residence, which minimizes practical and linguistic hurdles.⁸⁰ This is achieved by publishing a manual on the Internet in several languages which provides a list of the competent authorities, information on the application for compensation, and the application forms.⁸¹

The 2004 Council Directive is of particular relevance to trafficking victims for the following reasons. Trafficking is a cross-border crime and

⁷⁵ *Id.* at art. 3.

⁷⁶ *Id.* at art. 4.

⁷⁷ *Id.* at art. 5.

⁷⁸ Council Directive of 29 Apr. 2004 Relating to Compensation to Crime Victims, 2004 O.J. (L 261) 15 [hereinafter 2004 Council Directive] (relating to the compensation of crime victims in cross-border situations).

⁷⁹ Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Portugal, Spain, Sweden and the United Kingdom have such schemes in place. See *Proposal for a Council Directive on Compensation to Crime Victims*, COM (2003) 562 (Oct. 16, 2002); see also 2004 Council Directive, *supra* note 78, at art. 12.

⁸⁰ See 2004 Council Directive, *supra* note 78, at arts. 4-5.

⁸¹ *Id.* at arts. 11, 13.

identifying the offenders can be difficult in light of the potential number of persons involved in the illegal activity. Often, the victim is too afraid to identify the offenders, which makes receiving compensation from the offender impossible. Moreover, the system of cooperation is intended to facilitate access to compensation when a crime is committed in a Member State that is not the victim's residence, which is generally the case in trafficking situations.⁸² This system of cooperation minimizes cultural and linguistic barriers present in cross-border situations such as trafficking, and eases the process of obtaining compensation, which otherwise would be too complicated both technically and linguistically for the trafficking victim.

Lastly, trafficking is a violation of the Charter of Fundamental Rights of the E.U., which states that "[t]rafficking in human beings is prohibited."⁸³ The Charter of Fundamental Rights of the E.U. is incorporated into the second part of the European Constitution, which would become binding European Law if the Constitution is accepted and ratified by the Member States.⁸⁴ The text of the European Constitution also refers to trafficking. Article 267 of Part III states: "[t]he Union shall develop a common immigration policy aimed at ensuring, at all stages, the efficient management of migration flows, fair treatment of third-country nationals residing legally in Member States, and the prevention of, and enhanced measures to combat, illegal immigration and trafficking in human beings."⁸⁵ This Article also requires European laws or frameworks to establish measures in "combating trafficking in persons, in particular women and children."⁸⁶ Moreover, Article 274 provides for the creation of a European Public Prosecutor's Office whose purpose would be to investigate and prosecute "serious crimes having a cross-border dimension," among other crimes.⁸⁷

B. *Soft Law*

The E.U. conventions and instruments discussed above are vital in the fight against trafficking; however, policies that are aimed at the rehabilitation and reintegration of the victims are equally as important. In 2003, the E.U. issued a Council Resolution on Initiatives to Combat Trafficking in

⁸² *Id.* at art. 1.

⁸³ Charter of Fundamental Rights of the European Union, 2000 O.J. (C 364) 1, at art. 5.3.

⁸⁴ *See* Treaty Establishing a Constitution for Europe, 2004 O.J. (C 310) 1.

⁸⁵ *Id.* at art. III-267(1).

⁸⁶ *Id.* at art. III-267(2)(d).

⁸⁷ *Id.* at art. III-274(4).

Human Beings, in Particular Women (Council Resolution).⁸⁸ The Council Resolution encourages Member States to continue their efforts at combating trafficking at a national, regional and international level, and to strengthen their support of non-governmental organizations (NGOs). Member States are encouraged to ratify and implement all international conventions on trafficking, and to appoint National Rapporteurs on Trafficking in Women. Additionally, Member States are encouraged to increase their cooperation at an international level in the areas of prevention and assistance to trafficking victims, and to develop best practices in the field. Lastly, Member States should continue to protect victims while they are in the host country, and assist them in their return to their countries of origin.⁸⁹

The 2003 Brussels Declaration on Preventing and Combating Trafficking in Human Beings (Brussels Declaration),⁹⁰ a document generated from the European Conference on Preventing and Combating Trafficking in Human Beings – A Global Challenge for the 21st Century, recognizes the need to support and assist trafficking victims.⁹¹ The Conference brought together Member States, international organizations, intergovernmental organizations, NGOs, and the institutions of the E.U.⁹² The Brussels Declaration invited the international and European communities to take further steps towards developing an unambiguous, comprehensive, and coordinated European policy that involves all factions concerned with the fight against trafficking.⁹³ The coalition of governments, international organizations and NGOs was called upon to multiply the cooperative efforts for the prevention of trafficking, victim protection and assistance, in addition to police and judicial cooperation.⁹⁴

The goal of the Brussels Declaration is to develop recommendations, concrete measures, standards, and best practices to improve the cooperation and coordination of the European and international communities.⁹⁵ The best practices present a comprehensive European approach to combating trafficking and the Brussels Declaration invites the actors from all con-

⁸⁸ Council Resolution on Initiatives to Combat Trafficking in Human Beings, in Particular Women, 2003 O.J. (C 260) 3.

⁸⁹ *Id.*

⁹⁰ Brussels Declaration on Preventing and Combating Trafficking in Human Beings, 2003 O.J. (C 137) [hereinafter Brussels Declaration].

⁹¹ *See id.* ¶ 1.

⁹² *Id.*

⁹³ *Id.* ¶ 6.

⁹⁴ *Id.*

⁹⁵ *Id.* ¶ 8.

cerned fields to implement them. These recommendations, standards and best practices can be divided into four broad categories.

The first category outlines mechanisms for cooperation and coordination. This includes exchanging information between governments and international bodies, developing a European Experts Group to review anti-trafficking policy, and continuing the efforts made by the European Forum on Prevention of Organized Crime in the field of trafficking. Other suggestions include strengthening the network of organizations available to assist victims such as governmental and non-governmental facilities and safe houses, creating a European database of missing persons, and mobilizing E.U. instruments in countries of origin, transit and destination to create programs and information campaigns.⁹⁶

The second category addresses the prevention of trafficking and suggests the following strategies: (i) attacking the root causes of trafficking; (ii) improving the data, research, and analysis on trafficking; and (iii) studying the exploitation methods used by organized crime rings. Additional efforts include training the police, military, governmental and non-governmental personnel to identify and assist trafficking victims, as well as raising awareness through information campaigns aimed at potential victims, policy makers, law enforcement personnel, and public officials. Further recommendations include monitoring agencies that are inclined to mask trafficking activities such as bridal, tourist, and escort agencies.⁹⁷

The third category provides for victim assistance and protection. Immediate victim assistance involves creating support structures for victims by providing shelter and health care, facilitating communication between victim assistance NGOs from countries of origin, transit and destination, and granting asylum or short-term residence permits to victims. Another part of the assistance strategy is to develop programs aimed at reintegrating the victim into society, while recognizing that trafficking victims are victims of serious crimes and therefore should not be held in detention centers or further criminalized and prosecuted. A further step suggested in the Brussels Declaration is to provide shelter, a change of identity with documentation, funding and security equipment to the victim when she can contribute to an investigation against her traffickers.⁹⁸

Lastly, the fourth category discusses police and judicial cooperation. This category of the Brussels Declaration provides a variety of legislative and investigative measures aimed at targeting the trafficking problem. Suggestions may include enacting laws that protect victims and witnesses,

⁹⁶ See generally, Brussels Declaration, *supra* note 90, at Annex.

⁹⁷ *Id.*

⁹⁸ *Id.*

prohibiting prostitution and the exploitation of the prostitution of others, ensuring the swift ratification and implementation of international and regional agreements, and identifying any shortcomings or information gaps that occur during the implementation of such agreements. Moreover, Member States should draft national legislation that provides a range of penalties for trafficking crimes, including offenses related to living off the proceeds earned from prostitution. The Brussels Declaration also recommends creating specialized teams of investigators and prosecutors in each country and establishing a European Center of Excellence with experts who can be summoned as advisors in complex trafficking cases. Finally, Member States should implement legislative and regulatory measures to combat corruption, which is another contributing factor to the trafficking offense.

Although the Brussels Declaration is not binding E.U. law, it is recognized by European institutions as an important achievement. The Council of the E.U. adopted Conclusions regarding the Brussels Declaration, wherein it “welcomes the general approach that is given in the document to the prevention and combating of the scourge of trafficking in human beings.”⁹⁹ Furthermore, the E.U. has already begun to implement two of the recommendations of the Brussels Declaration. The first is the development of an Experts Groups on Trafficking in Human Beings (Experts Groups).¹⁰⁰ The Experts Group is a consultative body of the E.U. whose purpose is to review, consolidate and develop anti-trafficking strategies and policies.¹⁰¹ In addition, the Experts Group will propose concrete plans for the implementation of the Brussels Declaration through legislation and policy initiatives.¹⁰²

The Experts Group released its first report in December of 2004, which aims at strengthening the efforts undertaken by the E.U. to combat trafficking.¹⁰³ The report follows the format of the Brussels Declaration and focuses on three parts: (i) prevention; (ii) victim assistance and protection; and (iii) law enforcement.¹⁰⁴ The report emphasizes the need for a

⁹⁹ Council Conclusions of 8 May 2003, Brussels Declaration on Preventing and Combating Trafficking in Human Beings, 2003 O.J. (C 137) 2.

¹⁰⁰ See Commission Decision of 25 Mar. 2003 Setting Up a Consultative Group, to be Known as the “Experts Group on Trafficking in Human Beings,” 2003 O.J. (L 79) 25.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ See generally European Commission, Directorate-General Justice, Freedom and Security, *Report of the Experts Group on Trafficking in Human Beings* (Dec. 22, 2004) [hereinafter Report of the Experts Group].

¹⁰⁴ *Id.*

human rights approach to the counter-trafficking strategy as well as the importance of addressing children's needs. The report also elaborates upon some guiding "principles and cross-cutting themes"¹⁰⁵ and suggests tackling the trafficking problem in Europe with a multi-disciplinary and integrated approach. The Experts Group proposes some mechanisms for cooperation and coordination, such as developing a European Anti-Trafficking Network and National Referral Mechanisms.¹⁰⁶

The second recommendation of the Brussels Declaration already in effect concerns the provision of a short-term residence permit to trafficking victims. In 2004, the Council of the E.U. handed down a Council Directive (Permit Directive)¹⁰⁷ on the residence permit issued to third-country nationals who are trafficking victims, or who have been the subject of an action to facilitate illegal immigration and wish to cooperate with the authorities.¹⁰⁸ A special residence permit will be granted to victims under conditions intended to facilitate cooperation with the authorities. The permit will be issued only to adult third-country nationals who are victims of trafficking, or have been the subject of an action to facilitate illegal immigration.¹⁰⁹ The Permit Directive also applies to trafficking victims who have entered a Member State illegally.¹¹⁰ Although the Permit Directive applies primarily to adults, Member States may apply it to minors in accordance with the provisions of their national law.¹¹¹ The Permit Directive is a floor and not a ceiling for Member States who may adopt more favorable provisions than those provided for in the document.¹¹²

Pursuant to the Permit Directive, when the relevant authorities or specifically appointed organizations come into contact with the victims, they should inform them of the existence of a temporary residence permit and grant them a reflection period in which to decide whether or not they will cooperate with the police and judicial authorities.¹¹³ The duration of

¹⁰⁵ *Id.* at ch. 3.

¹⁰⁶ *Id.*

¹⁰⁷ Council Directive of 29 Apr. 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 O.J. (L 261) 19 [hereinafter Permit Directive].

¹⁰⁸ *See id.*

¹⁰⁹ *Id.* at art. 1

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.* at art. 4.

¹¹³ *Id.* at arts. 5-6.

the reflection period is determined according to the Member State's national law.¹¹⁴ During this reflection period, the victims should be provided assistance such as housing, medical and psychological care, and social assistance.¹¹⁵ The relevant authorities are to determine whether or not the victim in question meets the following three conditions: (i) the victim's extended stay is valuable to the prosecution or investigation of suspects; (ii) the victim is prepared to cooperate; and (iii) the victim has genuinely disengaged from a relationship with the suspects.¹¹⁶

The Permit Directive provides victims with temporary protection from immediate deportation. The proposed residence permit would initially be issued for six months and can be renewed if the conditions under which it was originally granted are still in effect at the time of the renewal.¹¹⁷ The residence permit allows the victim to enter the labor market and receive educational or vocational training. In addition, the victim may receive emergency medical care and psychological assistance.¹¹⁸ The permit may be withdrawn from victims in the following circumstances: (i) the victims have renewed their contacts with the suspects; (ii) the authorities believe that the victim's cooperation is fraudulent or wrongful; (iii) the victim ceases to cooperate with the authorities; (iv) the authorities decide to terminate the proceedings; or (v) for public policy or national security reasons.¹¹⁹

C. *International Legal Framework*

The first international legal instrument pertaining to the subject of trafficking in women is the International Agreement for the Suppression of the "White Slave Traffic" of 1904.¹²⁰ The agreement calls on state parties to "establish or name some authority charged with the coordination of all information relative to the procuring of women or girls for immoral purposes abroad."¹²¹ The agreement refers to "victims of a criminal traffic,"¹²² although it does not define this term, and requests that state parties entrust

¹¹⁴ See Permit Directive, *supra* note 107, at art. 6.

¹¹⁵ *Id.* at art. 7.

¹¹⁶ *Id.* at art. 8.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at art. 7.

¹¹⁹ *Id.* at art. 14.

¹²⁰ See International Agreement for the Suppression of the "White Slave Traffic," May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83.

¹²¹ *Id.* at art. 1.

¹²² *Id.* at art. 3.

the victims to “public or private charitable institutions, or to private individuals offering the necessary security” prior to their repatriation.¹²³

In 1949, the United Nations (U.N.) General Assembly adopted the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949 Convention),¹²⁴ which focuses on trafficking for the purpose of prostitution. The 1949 Convention does not specifically define trafficking, exploitation or forced prostitution, but it criminalizes the actions of third parties involved in prostitution activities. For example, the 1949 Convention calls on state parties “to punish any person who, to gratify the passions of another: (1) [p]rocures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; [or] (2) [e]xploits the prostitution of another person, even with the consent of that person.”¹²⁵ State parties must also punish a person who does the following: “(1) [k]eeps or manages, or knowingly finances or takes part in the financing of a brothel; [or] (2) [k]nowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others.”¹²⁶ The 1949 Convention also briefly addresses the needs of the victims of prostitution and calls on states to encourage the “rehabilitation and social adjustment”¹²⁷ of the victims, and to take measures aimed at the prevention of prostitution through social, educational and health related programs.¹²⁸

The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention against Transnational Organized Crime (Palermo Protocol),¹²⁹ adopted by the U.N. General Assembly, is the first instrument to adopt an internationally agreed upon definition of trafficking.¹³⁰ The Palermo Protocol’s definition of trafficking in persons contains three prongs: (i) the recruitment, transportation, transfer, harboring or receipt of persons; (ii) the use or threat of force, coercion, abduction, fraud, deception or abuse of

¹²³ *Id.*

¹²⁴ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 U.N.T.S. 271, 282.

¹²⁵ *Id.* at art. 1.

¹²⁶ *Id.* at art. 2.

¹²⁷ *Id.* at art. 16.

¹²⁸ *Id.*

¹²⁹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, 55 U.N. GAOR Supp. (No. 49), U.N. Doc. A/45/49 (Vol. I) (2001) [hereinafter the Palermo Protocol].

¹³⁰ *Id.*

power; (iii) the purpose of exploitation for sex, prostitution, forced labor, slavery, servitude or organ removal.¹³¹ The Palermo Protocol sets forth that the consent of the victim to the exploitation is irrelevant.¹³²

The Palermo Protocol requires state parties to enact domestic legislation making trafficking activities a criminal offense.¹³³ Moreover, state parties to the Palermo Protocol must undertake to provide assistance and protection to the victims of trafficking.¹³⁴ This includes protecting the privacy and identity of the victims of trafficking and keeping legal proceedings confidential. The Palermo Protocol suggests that state parties consider offering housing, social services, medical assistance, employment, education and training to trafficking victims as additional measures.¹³⁵

The Palermo Protocol also obligates states to adopt domestic laws enabling trafficking victims to obtain civil compensation for damage suffered.¹³⁶ As well, it calls on states to consider adopting domestic legislation, which would allow victims of trafficking to acquire temporary or permanent legal status in the country of destination.¹³⁷ Lastly, the Palermo Protocol seeks to promote cooperation among state parties through the exchange of information and the training of law enforcement and immigration authorities in order to prevent the growth of trafficking activities.

International consideration of trafficking is further illustrated by the inclusion of trafficking as a crime against humanity in the Rome Statute of the International Criminal Court (ICC).¹³⁸ Trafficking is considered a crime against humanity “when committed as part of a widespread or systematic attack directed against a civilian population, with knowledge of the attack.”¹³⁹ Pursuant to the Rome Statute, enslavement which occurs “in the course of trafficking in persons, in particular women and children,”¹⁴⁰ and “enforced prostitution,”¹⁴¹ are considered crimes against humanity within this context.

¹³¹ *Id.* at art. 3.

¹³² *Id.*

¹³³ *Id.* at art. 5.

¹³⁴ *Id.* at art. 6.

¹³⁵ Palermo Protocol, *supra* note 129, at art 6(3).

¹³⁶ *Id.* at art. 6(6).

¹³⁷ *Id.* at art. 7.

¹³⁸ Rome Statute of the International Criminal Court, U.N. Doc. A/CONF 183/9 (1998), at art. 7.

¹³⁹ *Id.* at art. 7(1).

¹⁴⁰ *Id.* at art. 7(2)(c).

¹⁴¹ *Id.* at art. 7(1)(g).

With respect to international soft-law pertaining to trafficking in a criminal law context, the U.N. General Assembly adopted a Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (Declaration of Basic Principles of Justice) in 1985.¹⁴² This document seeks to protect victims of crime by ensuring that they receive access to justice and fair treatment during legal proceedings. The Declaration of Basic Principles of Justice defines a victim as an individual who “suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”¹⁴³ The Declaration of Basic Principles of Justice provides that national judicial and administrative mechanisms should be created to ensure that crime victims can seek redress through prompt and efficient procedures. Pursuant to this Declaration, victims should be entitled to seek restitution from their offenders, and if compensation is unavailable, Member States should provide financial compensation to victims who sustained bodily harm as a result of a serious crime and to family members of victims who have died or become incapacitated. Lastly, the Declaration of Basic Principles of Justice suggests that victims receive access to health and social services, and psychological and medical assistance through government or other programs.

D. Limitations of the Criminal Law Approach

The majority of the international and regional documents described above indicate that trafficking in women is defined as a problem pertaining to the realm of criminal law, and strategies aimed at combating the problem focus on changing legislation, imposing punishments on offenders, strengthening police cooperation and improving the number of prosecutions and convictions of traffickers. By labeling trafficking as a criminal offense, it becomes associated with, and sometimes limited to, the prosecution of organized crime. With this approach, efforts at combating trafficking can get confused with other strategies directed towards suppressing migration, border control or the criminalization of prostitution and sex crimes. The criminal approach is not victim-centered; the interests of the prosecutors dominate, while those of the victims are sidelined. While the criminaliza-

¹⁴² Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, G.A. Res. 40/34 (1985) [hereinafter Declaration of Basic Principles of Justice].

¹⁴³ *Id.* at Annex A(1).

tion and prosecution approach to trafficking is essential, it is not without its limitations.

1. Scope of Coverage

A significant downside of the attempt to criminalize trafficking at the regional level, as with the E.U.'s efforts, is that the body of directives and decisions bind only a limited number of Member States. The majority of source states from the neighboring countries of Eastern, Southeastern and Central Europe are unaffected by the provisions of the E.U. documents. Therefore, the E.U. policy is triggered only once the trafficking act has occurred within its borders and does not target any of the root causes or sources of the problem. The majority of the E.U. documents pertaining to trafficking were adopted before the ten new Member States were admitted to the E.U. These new states are now among the main sources for trafficking. For this reason, the E.U. framework of documents tends to address the "pull" factors associated with trafficking such as cracking down on crime, illegal migration or the sex industry, but not the "push" factors which originate in the source countries.

The E.U. documents are also limited in the breadth of their coverage. For example, the 2002 Council Framework Decision covers accomplice liability in general terms; however, it does not impose any criminal sanctions on accomplices.¹⁴⁴ Corrupt state officials, law enforcement officials and customs agents in the countries of origin, transit and destination are the actors who facilitate and encourage trafficking activities to spread. The corruption of state agents makes it difficult for trafficking victims to come forward to the authorities. The criminal sanctions set forth in the 2002 Council Framework Decision should therefore also be applied to these "aides." National laws and policies on trafficking should criminalize corruption as well. Moreover, the 2002 Council Framework Decision does not impose any civil sanctions on the offenders such as the confiscation of the traffickers' assets. Trafficking is a lucrative business and traffickers derive large profits from the work of their victims. The 2002 Council Framework Decision should require states to freeze traffickers' assets and make them available to the victims as compensation for the damages they have suffered.

Similarly, at the international level, the scope of the Palermo Protocol is too limited. It does not apply to all trafficking situations that may arise. Rather, the Palermo Protocol only applies to those situations that are

¹⁴⁴ 2002 Council Framework Decision, *supra* note 52, at art. 2 (stating that those who aid and abet a trafficking crime are also punishable).

associated with an organized criminal group since the Protocol is intended to supplement the U.N. Convention against Organized Crime.¹⁴⁵ Its coverage is also limited to situations involving trafficking across borders and does not apply to trafficking at a national level.¹⁴⁶

2. Legislative and Prosecutorial Problems

Another problem associated with the criminal approach to trafficking is that most states are hesitant to consider trafficking a serious crime. For example, the 2002 Council Framework Decision calls for a term of imprisonment that is not less than eight years.¹⁴⁷ It sets the standard at eight years, although Member States are free to impose a lengthier term in their domestic laws. This prison term is relatively short in light of the complex and serious nature of the crime and is not severe enough to serve as a deterrent. For example, Switzerland recently convicted twelve perpetrators of trafficking and forced prostitution offenses; however, five of the convicted individuals received sentences of less than a year.¹⁴⁸ In 2003, Spain's average sentence for trafficking offenses was 5.7 years, despite adopting a new law with longer sentences for trafficking.¹⁴⁹ Moreover, Sweden convicted two traffickers under its anti-trafficking laws in 2005; however, both offenders received sentences of only four to five years.¹⁵⁰ In certain source countries such as Bosnia and Herzegovina, sentences for convicted traffickers were imposed for one year or less.¹⁵¹ With such weak sentences, it is not surprising that trafficking activities are able to flourish within the region. In contrast, the U.S. may impose penalties of 20 years of imprisonment for crimes of trafficking with respect to peonage, slavery, involuntary servitude or forced labor.¹⁵² If the trafficking violation results in death or involves kidnapping, sexual abuse or an attempt to kill, the penalty can be increased up to a life sentence.¹⁵³

¹⁴⁵ U.N. Convention Against Transnational Organized Crime, G.A. Res. 55/25, U.N. Doc. A/Res/55/25 (Jan. 8, 2001).

¹⁴⁶ Palermo Protocol, *supra* note 129, at art. 5 (“This Protocol shall apply . . . to the prevention, investigation and prosecution of the offences . . . where those offenses are transnational in nature and involve an organized criminal group, as well as to the protection of the victims of such offences.”).

¹⁴⁷ See 2002 Council Framework Decision, *supra* note 52, at art. 3.

¹⁴⁸ See TIP REPORT, *supra* note 1, at ch. V.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See TVPA, *supra* note 14, § 112.

¹⁵³ *Id.*

Similarly, the rates of prosecution for trafficking offenses are very low. In Croatia, a transit and source country for women trafficked for sexual exploitation into Western Europe, only four of the seventeen trafficking investigations initiated last year resulted in convictions.¹⁵⁴ In Slovenia, a transit and source country for women trafficked from Slovenia and other Eastern and Southeastern countries into Western Europe for sexual exploitation, nine trafficking investigations were ongoing during 2004, of which only one prosecution resulted and no convictions were obtained.¹⁵⁵ Even in developed countries with adequate resources, prosecution rates are surprisingly low. In Finland, for example, a destination country for women trafficked mainly from Russia for sexual exploitation, no prosecutions or convictions for trafficking crimes were reported, despite having enacted a new anti-trafficking law in 2004.¹⁵⁶ Greece, another popular destination country for women trafficked for sexual exploitation and forced labor, prosecuted only 94 suspects of the 352 perpetrators charged with trafficking offenses, and reported only a few convictions during 2004.¹⁵⁷

3. Disparate Views Regarding the Legality of Prostitution

Another problem associated with the criminal approach to trafficking is the disparate views taken by countries with respect to the criminalization or legalization of prostitution. Certain scholars suggest that the demand for sexual services is greater in countries with legalized prostitution, yet the governments of some countries believe that legalizing prostitution is a way to reduce the trafficking problem.¹⁵⁸ One school of thought encourages prostitution to be seen as a legitimate profession and any notion to the contrary should be viewed as “legally sanctioned sex discrimination that denies women equal pay.”¹⁵⁹ This view advocates that women should have the freedom to choose to work in the sex industry, including the ability to migrate across borders to engage in sex work. The supporters of this viewpoint argue that a woman should be able to consent to trafficking and encourages trafficking laws that “acknowledge female autonomy and avoid

¹⁵⁴ See TIP Report, *supra* note 1, at ch. V.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ See Linda Smith & Mohamed Mattar, *Creating International Consensus on Combating Trafficking in Persons: U.S. Policy, the Role of the UN, and Global Responses and Challenges*, 28 Fletcher Forum of World Affairs 155, 170 (2004).

¹⁵⁹ Kara Abramson, *Beyond Consent, Toward Safeguarding Human Rights: Implementing the United Nations Trafficking Protocol*, 44 HARV. INT'L L.J. 473, 483 (2003).

preferencing the free will of some women over others.”¹⁶⁰ Both the U.N.’s Palermo Protocol and the E.U.’s Council Framework Decision provide that the consent of the victim to the exploitation is irrelevant.¹⁶¹ The liberal prostitution approach suggests that trafficking laws should enable women to consent to the trafficking act in order to maintain a woman’s right to migrate for greater income earning potential, career opportunities, and/or to preserve certain cultural practices and traditions.¹⁶²

In contrast, anti-prostitution advocates maintain that the provisions rendering consent to the trafficking act irrelevant should be preserved in trafficking laws. This view argues that prostitution in the trafficking context prohibits female independence and empowerment because the trafficked woman is under the control of her trafficker and vulnerable to abuse and exploitation.¹⁶³ The traffickers generally confiscate their victims’ identification and travel papers. The victims therefore become dependant on their traffickers and fear deportation or jail time if they seek assistance from the authorities. The proponents of this view argue that the vulnerability of the trafficked victim forces her to obey her traffickers, which differs greatly from a situation wherein a prostitute’s choice of work is of her own volition.¹⁶⁴

In most of Western Europe, prostitution is legalized, although some prostitution related activities are considered criminal. In France for example, prostitution is legal but pimping, aiding, assisting, facilitating and protecting the prostitution of others is illegal.¹⁶⁵ Hiring, attracting, or pressuring a person to practice prostitution is a crime. Receiving subsidies from a person engaged in prostitution, or the inability to justify a source of income incompatible with an individual’s lifestyle while living with a person habitually engaged in prostitution is also a crime.¹⁶⁶ These offenses are punishable by five years imprisonment and a fine of 150,000 euros. The sanction increases to ten years and a 1,500,000 euros fine if the offense is committed against “a minor, a person who is particularly vulnerable, several persons, a person who was incited to engage in prostitution either outside the territory of the French Republic, or upon arrival into the terri-

¹⁶⁰ *Id.* at 485.

¹⁶¹ See Palermo Protocol, *supra* note 129, at art. 3; see also 2002 Council Framework Decision, *supra* note 52, at art. 1.

¹⁶² Abramson, *supra* note 159, at 484-86.

¹⁶³ *Id.* at 489-90.

¹⁶⁴ *Id.*

¹⁶⁵ See C. PÉN, art. 225-5 (Fr.).

¹⁶⁶ *Id.* at arts. 225-6.

tory.”¹⁶⁷ The sanction will also increase if the offense is committed by a person “who is engaged in the fight against trafficking or keeping the public peace, by a person carrying a weapon, or by several persons acting together as accomplices.”¹⁶⁸ In addition, operating, financing or managing a place of prostitution is a crime punishable by ten years imprisonment and a fine of 75,000 euros.¹⁶⁹

In sum, the lack of conformity among lawmakers with respect to the treatment of prostitution is another obstacle which contributes to difficulties in eradicating the trafficking problem from a criminal standpoint.

4. Lack of Victim Assistance and Protection

Another major limitation of the criminal approach to trafficking is the lack of protection and aid afforded to the victims in the majority of the anti-trafficking documents. The criminal justice system, by its nature, focuses on the prosecution of a perpetrator and on obtaining a conviction, rather than on the needs of the victim. The 2002 Council Framework Decision, for example, does not provide for any assistance or protection for victims. Only children are considered particularly vulnerable and therefore qualify for assistance.¹⁷⁰ The 2002 Council Framework Decision fails to provide special provisions for women, even though they represent the majority of the victims and currently are not protected or assisted.¹⁷¹ The instrument neglects these trafficking victims entirely and is purely a criminal law enforcement guideline for Member States. It does not attempt to protect any human rights of the victims, nor does it require Member States to provide victims access to housing, medical care, or social services. The rights of the victim to seek asylum, apply for a temporary visa or permanent residency in the host country, or to repatriate to the victim’s country of origin are also neglected in the provisions. Finally, the 2002 Council Framework Decision fails to provide for any social or reintegration programs for the victims.¹⁷²

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at arts. 225-7.

¹⁶⁹ *Id.* at arts. 227-10.

¹⁷⁰ See 2002 Council Framework Decision, *supra* note 52, at art. 7.

¹⁷¹ See TIP REPORT, *supra* note 1, at ch. I (noting that 80 percent of trafficking victims are female).

¹⁷² See generally Recommended Principles and Guidelines on Human Rights and Human Trafficking, *Report of the United Nations High Commissioner for Human Rights to the Economic and Social Council*, U.N. Doc. E/2002/68/Add.1 (May 20, 2002) [hereinafter Recommended Principles and Guidelines] (listing elements necessary to assist victims).

The criminal approach to trafficking does not serve the interests of the victim. Trafficked women are often re-victimized because they are illegal residents or illegal workers in the country of destination. The Council of the E.U. attempted to provide for moderate victim protection in a parallel instrument regarding temporary residence permits.¹⁷³ However, permits are granted only to victims who cooperate with the authorities and can assist them with their investigation.¹⁷⁴ The permit should not be conditioned upon a victim's willingness or ability to cooperate with the authorities. The Permit Directive also fails to require the competent state authorities to inform the victim of her right to seek asylum if she will be persecuted or subjected to torture, cruel or inhumane treatment upon return to her home country.

Pursuant to the terms of the Permit Directive, the victim is granted a reflection period in which to determine if she will cooperate with the competent authorities and to escape the grips of her offenders.¹⁷⁵ The instrument does not set forth a length of time for the reflection period; rather, that period is determined by each Member State's national laws.¹⁷⁶ The Experts Group on trafficking suggests that the reflection period should be for a minimum of three months because "[a] period of three months is a minimum time frame in which to ensure that the presumed trafficked person receives appropriate assistance and support, such as secure housing, psychological counseling, medical and social services, and legal consultation."¹⁷⁷ Another limitation of the residence permit is that it can only be renewed if the victim is still cooperating with the authorities or if she is still of use to the investigation.¹⁷⁸ After the residence permit expires, it should be renewable under conditions similar to those granted for traditional residence permits under the national laws of Member States or it should be granted for humanitarian purposes.¹⁷⁹

The Permit Directive does not offer any real guarantees to the victims. The stay granted by the temporary residence permit is for a period of six months after which the victim is left with no further protection. A six-month period is too brief to demand full cooperation from a victim. Dismantling a sophisticated criminal organization can be a lengthy process requiring the victim's input throughout the entire operation. Furthermore, it

¹⁷³ See generally, Permit Directive, *supra* note 107.

¹⁷⁴ See *id.* at art. 1.

¹⁷⁵ *Id.* at art. 6.

¹⁷⁶ *Id.*

¹⁷⁷ Report of the Experts Group, *Opinion on Reflection Period and Residence Permit for Victims on Trafficking in Human Beings*, *supra* note 103, at Annex 2.

¹⁷⁸ See Permit Directive, *supra* note 107, at art. 8.

¹⁷⁹ *Id.*

may take a victim more than six months to sever ties with her trafficking offenders. If the victim is an illegal immigrant, she is deportable once her permit expires and she fulfills her obligations to cooperate with authorities. In comparison, the U.S. offers a "T" visa to individuals who have been the victim of a severe form of trafficking and who would suffer extreme hardship if removed from the U.S.¹⁸⁰ All that is required of the victim is that she "has complied with any reasonable request for assistance in the investigation or prosecution of acts of trafficking."¹⁸¹ The specialized visa also carries the right to employment in the U.S. during the period of residence.¹⁸² Furthermore, after three years of residence within the U.S., the victim may adjust her status to become a lawful permanent resident.¹⁸³ The provisions of the U.S. code offer significantly more protection to the victim than its counterpart.

The Permit Directive also lacks provisions for social services, programs or rehabilitation for the victims. If a victim decides to serve as a witness in a legal proceeding, the Permit Directive fails to offer any form of witness protection. It does not afford a victim the right to retain legal counsel or a translator during legal proceedings. Those rights are provided for in another document, the 2001 Council Framework Decision, but they are not specifically tailored to the needs of trafficking victims since they apply to all crime victims as a whole.¹⁸⁴ A full understanding of the rights afforded to trafficking victims in the E.U. involves descending into a world of chaos, where provisions are scattered among a multitude of documents. An effective strategy would involve grouping together all the rights of trafficking victims as well as the obligations of states into one comprehensive document.

Despite being an essential part of the efforts aimed at eradicating trafficking, the criminal approach undertaken today by the majority of anti-trafficking laws is not without significant limitations. As some scholars note, the best approach to combating the trafficking problem is to strike a balance between a system wherein traffickers are criminalized and prosecuted, and a system where victims are decriminalized and protected.¹⁸⁵ The following section will explore a human rights based approach to the trafficking problem.

¹⁸⁰ See TVPA, *supra* note 14, § 107.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ See generally, 2001 Council Framework Decision, *supra* note 40.

¹⁸⁵ See Smith & Mattar, *supra* note 158, at 161-62.

III. SHIFTING THE PARADIGM TO A RIGHTS BASED PERSPECTIVE

Despite the efforts of the international and European communities to tackle the trafficking problem with crime prevention strategies, trafficking is first and foremost a human rights problem because it denies almost every human right protected by the body of international human rights treaties.¹⁸⁶

A. *International Human Rights Framework*

Pursuant to international law, states have an international obligation to investigate, punish and prevent human rights violations, and to provide remedies to victims of human rights violations.¹⁸⁷ Trafficking violates a woman's right to liberty and security of person, self-determination, education, family life, safe housing, privacy and the highest attainable standard of health. It also violates a woman's right to be free from slavery, torture, cruel, inhumane or degrading treatment, and the right to be free from discrimination. These rights are protected in the Universal Declaration of Human Rights and in the six core U.N. international human rights treaties.

In particular, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)¹⁸⁸ adopted by the U.N. General Assembly in 1979 refers to the prohibition against the trafficking of women.¹⁸⁹ CEDAW calls on state parties to "take all appropriate measures,

¹⁸⁶ See generally Universal Declaration of Human Rights, G.A. Res. 217A, U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200, at 49, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966); International Covenant on Civil and Political Rights, G.A. Res. 2200, at 52, U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966) [hereinafter ICCPR]; International Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 212 (Dec. 21, 1965) [hereinafter CERD]; Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (Dec. 18, 1979) [hereinafter CEDAW]; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 46, at 197, U.N. GAOR, 39th Sess., Supp. No. 51, U.N. Doc. A/39/51 (Dec. 10, 1984); Convention on the Rights of the Child, G.A. Res. 25, at 171, U.N. GAOR, 44th Sess., Supp. No. 49, U.N. Doc. A/44/49 (Nov. 20, 1989). The Universal Declaration of Human Rights is a declaration and not a treaty, therefore its provisions are not binding. Most states and scholars, however, consider it to have attained the status of customary international law and as such it is legally binding.

¹⁸⁷ See ICCPR, *supra* note 186, at art. 2.

¹⁸⁸ CEDAW, *supra* note 186.

¹⁸⁹ *Id.*

including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.”¹⁹⁰ Scholars have criticized this provision for being vague and unclear because its language fails to indicate what measures are appropriate to suppress trafficking, or what forms of trafficking and exploitation are covered by the provision.¹⁹¹ In its General Recommendation No. 19, however, the Committee on the Elimination of All Forms of Discrimination Against Women commented that trafficking impairs women’s enjoyment of human rights and fundamental freedoms and subjects women to gender-based violence and abuse.¹⁹²

Another human rights based international convention relevant to trafficking is the 1930 Convention Concerning Forced or Compulsory Labor (Labor Convention)¹⁹³ elaborated under the International Labor Organization (ILO), which seeks to protect the human rights of workers.¹⁹⁴ The ILO recognizes that trafficking in human beings has dimensions of forced labor. For example, forced prostitution and coercive sexual exploitation are forms of forced labor. Moreover, trafficking is akin to slavery-like practice which is prohibited by the Labor Convention. State parties to the Labor Convention undertake to suppress the use of forced or compulsory labor. The definition of forced or compulsory labor¹⁹⁵ has two parts: (i) work or service obtained under the menace of a penalty; and (ii) work or service that is undertaken involuntarily.¹⁹⁶ The ILO includes physical abduction or kidnapping, deception or false promises about types and terms of work, and the withholding of identity documents or possessions as among the elements constituting a lack of consent to work.¹⁹⁷ The accompanying presence or threat of penalty includes physical and sexual violence, denunciation to the authorities and confinement.¹⁹⁸ The elements set forth above are generally present in trafficking scenarios.

¹⁹⁰ *Id.* at art 6.

¹⁹¹ Susan Jeanne Toepfer & Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Legal Prohibitions Regarding Trafficking in Women*, 2 MICH. J. GENDER & L. 83, 101 (1994).

¹⁹² See Committee on the Elimination of Discrimination against Women, General Recommendation 19, Violence against Women, 11th Sess., U.N. Doc. A/47/38 at 1 (1993).

¹⁹³ Convention Concerning Forced or Compulsory Labour (ILO No. 29), May 1, 1932, 39 U.N.T.S. 55.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ See *id.* at art. 2.

¹⁹⁷ See ILO REPORT, *supra* note 26, at 6.

¹⁹⁸ *Id.*

In addition to the international conventions set forth above, the U.N. system has developed numerous non-binding documents and resolutions relating to the human rights of trafficking victims, especially in women and girls.¹⁹⁹ Furthermore, in 2002, the Report of the U.N. High Commissioner for Human Rights to the Economic and Social Council presented the Recommended Principles and Guidelines on Human Rights and Human Trafficking (Recommended Principles).²⁰⁰ The Recommended Principles highlight the importance of protecting the human rights of trafficking victims when attempting to prevent trafficking, prosecute traffickers and protect the victims.

There are eleven guidelines which address the promotion and protection of human rights, the identification of trafficked persons and traffickers, research, analysis, evaluation and dissemination, ensuring an adequate legal framework, ensuring an adequate law enforcement response, protection and support for trafficked persons, preventing trafficking, special measures for the protection and support of child victims of trafficking, access to remedies, obligations of peacekeepers, civilian police and humanitarian and diplomatic personnel, and cooperation and coordination between states and regions.²⁰¹ The Recommended Principles can be used to provide guidance and a uniform set of standards and rules for U.N. Member States when drafting domestic legislation, policies and programs on the subject of trafficking.

Lastly, the Commission on Human Rights appointed for a three-year period a Special Rapporteur on trafficking in persons, especially women and children, whose mandate focuses on the human rights concerns of the victims of trafficking.²⁰² The main role of the Special Rapporteur is three-fold: (i) to prepare annual reports for the Commission with recommendations and conclusions on the measures to be undertaken to protect the human rights of trafficking victims; (ii) to conduct on-site country visits to

¹⁹⁹ See e.g., Trafficking in Women and Girls, G.A. Res. 57/176, U.N. GAOR, 57th Sess., Agenda Item 102, U.N. Doc A/57/176 (Jan. 30, 2003); Strengthening International Cooperation in Preventing and Combating Trafficking in Persons and Protecting Victims of Such Trafficking, G.A. Res. A/RES/58/137, U.N. GAOR, 58th Sess., Agenda Item 108, U.N. Doc. A/RES/58/137 (Feb. 4, 2004); Trafficking in Women and Girls, G.A. Res. A/59/185, U.N. GAOR, 59th Sess., Provisional Agenda Item 100, U.N. Doc A/59/185 (Oct. 4, 2004).

²⁰⁰ See generally Recommended Principles and Guidelines, *supra* note 172.

²⁰¹ *Id.*

²⁰² See Commission on Human Rights, Special Rapporteur on Trafficking in Persons, Especially in Women and Children, 60th Sess., E/CN.4/2004/L62 (Apr. 19, 2004).

evaluate the human rights situation in specific countries or regions, and to study the policies and programs already in place in order to assess their benefits and limitations; and (iii) to address the communications received, whether individual or group complaints, concerning trafficking and to take action against human rights violations committed within the context of trafficking.²⁰³ The goal of the Special Rapporteur is to ensure that the human rights of trafficked persons are at the core of any laws, policies and programs to combat trafficking.²⁰⁴

B. A Human Rights Based Approach to Trafficking

By neglecting the areas of victim assistance and protection, states are violating their obligations under international law to prevent, investigate and punish human rights violations and to provide victims with appropriate remedies. Repressive strategies aimed at criminalizing activities connected with organized crime, illegal migration and prostitution are essential but have been prioritized to the detriment of measures that empower and protect the victims. The trafficking problem can be effectively tackled only when the gap between the penal approach and the human rights perspective is closed.

Trafficking is a complex and multi-faceted problem affecting various areas such as labor, organized crime, gender, violence, poverty and migration. A human rights approach requires a multi-disciplinary and coordinated policy between all actors involved, including governments, NGOs, judicial and law enforcement personnel, civil society groups, and labor organizations. Trafficking experts, advocates, NGOs and intergovernmental organizations should unite to share information and identify problems and shortcomings in domestic law structures. A cooperative framework can foster the development of anti-trafficking legislation, policies and public-education programs, which are still lacking or inadequately enforced. Cooperation between governments, their agencies and NGOs is essential for creating a knowledge base of information. The cooperation is also essential to ensure that trafficking victims are properly identified and assisted. Joining the forces of a variety of civil society, public service and governmental groups can raise public awareness and concern about the human rights of trafficked persons and assist in developing educational materials on the subject.

²⁰³ See generally Report of the Special Rapporteur, *supra* note 39.

²⁰⁴ *Id.* ¶ 15.

A major problem in the current fight against trafficking is the lack of consistent and reliable data.²⁰⁵ Accurate data is needed to identify problems, recent trends, techniques used by traffickers, and to foster international cooperation. However, the traditional methods for collecting data are inapplicable to new crimes such as trafficking in human beings.²⁰⁶ Some of the problems with a comparative analysis of the data that currently exists on trafficking have been identified as follows: (i) "lack of specific legislation on trafficking in persons resulting in the absence of official criminal justice statistics on cases involving trafficking in persons;"²⁰⁷ (ii) failure to distinguish "between cases involving trafficking in humans and those involving smuggling of migrants"²⁰⁸ in official statistics; and (iii) limited availability of official statistics on human trafficking in most countries.²⁰⁹ The resources of the various organizations involved in the fight against trafficking should be pooled together to exchange information and develop reliable data, first at a regional level and then at an international level. One idea suggested by the European Experts Group is to establish National Rapporteurs to collect and analyze data.²¹⁰ The role of each National Rapporteur would be to gather information from a variety of agencies, intergovernmental organizations and NGOs in order to identify gaps in the information and to develop policy and/or other measures.²¹¹

Moreover, a human rights approach needs to be integrated into anti-trafficking laws and policies with a normative value. The standards and principles of the existing international human rights treaties need to be integrated into new legislation, programs and policies on trafficking. Trafficking victims must be viewed as individuals protected by the rights and principles established in the international human right treaties such as the principles of non-discrimination and non-refoulement. Anti-trafficking policies and programs should be specifically tailored so as not to conflict with the freedoms set forth in the body of international human rights treaties such as the freedom of movement and of self-determination. Further, anti-trafficking legislation must not discriminate against women or other vulnerable groups.

At the U.N. level, human rights provisions that address human trafficking are housed in non-binding resolutions, declarations and principles.

²⁰⁵ See KANGASPUNTA, *supra* note 24, at 83-84.

²⁰⁶ *Id.* at 84.

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 85-86.

²¹⁰ See Report of the Experts Group, *supra* note 103, at ch. 3.8.1.

²¹¹ *Id.*

As soft-law, these rules, standards and scattered provisions do not have the binding legal force of an international human rights convention. The international community could benefit from a universally accepted definition of trafficking which would expand and modernize the limited definition provided in the Palermo Protocol of 2001.²¹² As a first step, states must take the necessary measures to ensure, on a national level, that local legislation and policies conform to international human rights standards. Anti-trafficking legislation with an integrated human rights approach should create a set of common standards for states to abide by with respect to the treatment of trafficked persons that would not hinge on the victim's ability or willingness to assist law enforcement personnel. The relevant legislation, policies and measures would recognize victims as holders of rights, guarantee a list of protected human rights, and ensure that victims are not re-criminalized due to the fact that they were trafficked. Furthermore, such measures would create legal government accountability to prevent trafficking and to protect the victims, establish concrete rules of government conduct and impose binding legal obligations. In the area of victim assistance and protection, victims should be entitled to equal protection of the law including the right to pursue legal action against their traffickers, procedural protections, legal counsel, witness protection, compensation for damages incurred, access to safe houses, shelter, counseling, psychological and medical care, temporary or permanent resident status, and safe, voluntary return to the country of origin.²¹³

In addition, a human rights approach must be complemented by strong enforcement mechanisms. Presently, a variety of complaint mechanisms exist at the international and regional level that could be invoked in the trafficking context. For example, the Human Rights Committee, CEDAW and the Committee on the Elimination of Racial Discrimination may receive individual complaints or petitions against states that have accepted optional provisions allowing such complaints for violations of the rights protected in their respective conventions.²¹⁴ The ILO has set up mechanisms for monitoring via its Committee of Experts and has developed several complaint procedures. At the European level, an individual can file a complaint with the European Court of Human Rights for a violation of the

²¹² See generally Palermo Protocol, *supra* note 129.

²¹³ *Id.* at 141.

²¹⁴ See e.g., Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), 21 UN GAOR Supp. No. 16 at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302 (1976); Optional Protocol to the Convention on the Elimination of Discrimination Against Women, G.A. Res. 54/4, U.N. Doc. A/54/4 (Oct. 15, 1999); CERD, *supra* note 186, at art. 14.

rights enshrined in the European Convention, and certain cases can also be brought to the European Court of Justice for violations of E.U. law.²¹⁵ None of these mechanisms, however, were particularly designed to address trafficking violations. Further, none of the international conventions for which these mechanisms were designed specifically refer to trafficking, with the exception of CEDAW. To effectively administer a human rights approach to trafficking, an enforcement mechanism must be put into place that would monitor a state's compliance with its obligations under the various international and national anti-trafficking laws and policies, and enable victims to file individual complaints. An individual complaint mechanism would enable victims to seek redress either directly or through an organization for a violation of their human rights. Such a mechanism would encourage the legal accountability of states and ensure compliance with their international obligations. One option would be to establish National Rapporteurs to receive individual complaints from trafficking victims and to monitor a state's compliance with its human rights obligations.

Lastly, a human rights approach to trafficking would focus on preventing trafficking. Preventive strategies must target potential victims through media campaigns, educational resources and programs. To eradicate trafficking, states must shift their priorities to second generation human rights such as economic, social and cultural rights, in order to target the root causes of trafficking. Economic factors such as poverty and unemployment render individuals more susceptible to being trafficked. The social and cultural practices which disfavor women, encourage violence and discrimination against women, and increase a woman's vulnerability to being trafficked, must be abolished. Measures should be aimed at empowering women and enabling them to access education, employment and other means of sustaining a livelihood. National legislation must also prohibit all discriminatory practices.

Counter-trafficking strategies to date have focused on law enforcement, national security, organized crime and illegal migration. Appropriate legislation in those areas must be fused with development strategies aimed at eradicating root causes of trafficking and empowering women. A more holistic approach which combines punishment, prevention, participation of governments, advocates, civil society and NGOs with a human rights and gender based perspective is necessary to effectively combat trafficking. The following section will analyze the first regional convention on trafficking to integrate a human rights perspective into its provisions, and deter-

²¹⁵ See Convention for the Protection of Human Rights and Fundamental Freedoms, Sept. 3, 1953, 213 U.N.T.S 222, at arts. 34-35; Treaty on European Union, 2002 O.J. (C 325) 5, at art. 35.

mine whether it achieves a delicate balance between criminal enforcement and victim protection.

IV. COUNCIL OF EUROPE CONVENTION ON ACTION AGAINST TRAFFICKING IN HUMAN BEINGS

A. *Introduction to the Convention*

The Council of Europe, a regional inter-governmental organization composed of 46 European Member States, oversees the protection and promotion of human rights within the European system. As a result of the growing problem of trafficking in Europe, and because trafficking violates human rights and personal dignity, the Council deemed it necessary to “draft a legally binding instrument which goes beyond recommendations or specific actions.”²¹⁶ In February of 2003, representatives of the Council of Europe, the Organization for Security and Cooperation in Europe and the U.N. met to discuss a Council of Europe convention on trafficking in human beings which would focus on protecting the victims.²¹⁷ The convention’s aim would be to protect human rights and victims’ rights, and to strike a balance between human rights and prosecution.²¹⁸ The regional convention would complement international instruments on trafficking while improving the protections and standards contained therein.²¹⁹ The Council of Europe’s Committee of Ministers established the Ad Hoc Committee on Action against Trafficking in Human Beings to draft a convention focusing on both the protection of the human rights of trafficking victims and on the prosecution of traffickers. The Committee of Ministers presented a final version in May 2005.

The Council of Europe Convention (Convention)²²⁰ is the first instrument of its kind to focus both on a criminal and human rights approach to combating trafficking. The Convention is divided into a Preamble and the following ten chapters: Chapter I sets forth the scope of the Convention, definitions and the principle of non-discrimination; Chapter II focuses on prevention and cooperation; Chapter III presents measures to protect and promote the rights of the victims and guarantees gender equality; Chapters IV and V deal with criminal law, investigation and prosecution; Chapter VI

²¹⁶ Council of Europe Convention on Action against Trafficking in Human Beings, Explanatory Report, CM (2005), ¶ 29 [hereinafter Council of Europe Explanatory Report].

²¹⁷ *Id.* ¶ 31.

²¹⁸ *Id.* ¶ 32.

²¹⁹ *Id.* ¶ 30.

²²⁰ Council of Europe Convention, *supra* note 4.

promotes international cooperation and cooperation with civil society; Chapter VII details a monitoring mechanism; finally, Chapters VIII, IX and X specify the relationship between the Convention and other international instruments, amendments to the Convention and final clauses.

1. Purpose, Scope of Application and Definitions

The Convention sets forth three purposes:

- (a) to prevent and combat trafficking in human beings, while guaranteeing gender equality;
- (b) to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;
- (c) to promote international cooperation on action against trafficking in human beings.²²¹

The Convention is the first document to recognize that measures to prevent and combat trafficking must respect gender equality. As noted above, trafficking is a phenomenon that primarily affects women and subjects them to physical and sexual abuse, torture and other inhumane or degrading treatment. For this reason, it is important that the Convention recognizes the special needs of female victims and ensures their empowerment and equal treatment in society. The Convention specifies that the programs for protection and assistance to victims must ensure gender equality, thereby promoting specific policies for women. The Convention also contains a separate provision on gender equality to guarantee that state parties “aim to promote gender equality, and use gender mainstreaming in the development, implementation and assessment of the measures” provided for in the Convention.²²²

In addition, the Convention is the only trafficking instrument to include the principle of non-discrimination in its provisions. Article 3 provides that the provisions of the Convention must be applied without discrimination on the ground of sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.²²³ Pursuant to Article 3, the measures undertaken by the parties to the Convention to protect and promote the

²²¹ *See id.* at art. 1.

²²² *Id.* at art. 17.

²²³ *Id.* at art. 3.

rights of victims must be applied without discrimination; this requirement is lacking in other trafficking instruments.

The Council of Europe Convention targets a large pool of potential signatories. The 46 Member States of the Council of Europe include countries of origin, transit and destination for trafficking victims. Most importantly, the Convention is open for signature and ratification by the source countries of Central, Eastern and Southeastern Europe, which have been excluded from the reach of the E.U. documents. Moreover, accession to the Convention is also open to signatories other than Member States of the Council of Europe.²²⁴ This substantial advantage enables countries with a history of human rights violations and a weak record of human rights treaty ratification to take on binding legal obligations to combat trafficking. The Convention also specifies that it applies to all forms of trafficking at both the national and transnational levels regardless of whether or not the trafficking is associated with organized crime.²²⁵ Therefore, the Convention's scope is significantly wider than that of the Palermo Protocol, whose provisions apply only to "the prevention, investigation and prosecution of the offences . . . where the offences are transnational in nature and involve an organized criminal group."²²⁶

The definition of trafficking provided in the Convention is identical to the definition contained in the Palermo Protocol. This definition also includes a provision indicating that the consent of the trafficking victim is irrelevant.²²⁷ The inclusion of the consent provision is likely to be the subject of much criticism from feminist organizations which view the ability to consent to being trafficked as an exercise of a woman's free choice to consent to sex work.²²⁸ To justify the insertion of this provision, the drafters suggest that the European Court of Human Rights assert that a victim's consent to the forms of exploitation contained in the definition is irrelevant if any of the means set forth in the definition have been used.²²⁹

Like the Palermo Protocol, the Convention does not define the terms forced labor, forced services or slavery, nor does it expand upon the definition to include illegal adoption or mail-order brides which are also common forms of trafficking. The Convention does, however, provide a definition for the term "victim," which is generally lacking in other traffick-

²²⁴ *Id.* at Preamble.

²²⁵ *Id.* at art. 2.

²²⁶ Palermo Protocol, *supra* note 129, at art. 4.

²²⁷ See Council of Europe Convention, *supra* note 4, at art. 4(b).

²²⁸ Abramson, *supra* note 159, at 484 (presenting the autonomists' view that a woman has a right to consent to sex work).

²²⁹ See Council of Europe Explanatory Report, *supra* note 216, ¶ 91.

ing instruments, as “any natural person who is subject to trafficking in human beings.”²³⁰

2. Prevention and Cooperation

The Convention recognizes the importance of adopting a multi-disciplinary and coordinated policy to preventing trafficking. The document calls on states to establish or strengthen national coordination between all sectors involved in preventing and combating trafficking. This includes formulating policies and programs through research, information, awareness raising, education campaigns, social and economic initiatives, and training programs.²³¹ Such policies and programs must be developed using a human rights approach based on gender mainstreaming and children’s rights.²³² This provision ensures that the perspective of equality among the sexes is infused into the development of any preventive measures. The Convention also recognizes the important participation of NGOs and civil society groups in the prevention of trafficking as well as in the area of victim protection and assistance.²³³

Moreover, the Convention calls on states to take legislative, social, cultural, administrative and educational measures to discourage the demand for sexual or labor exploitation. Article 6 places positive obligations on states to research best practices, create educational programs and information campaigns, and use the media as a tool in identifying demand as a root cause of trafficking.²³⁴ To effectively combat trafficking, it is essential to address the “pull” factors such as the demand for cheap labor or sexual services which enable trafficking activities to grow.

3. Victim Rights and Victim Assistance

An important provision of the Convention, absent from the Palermo Protocol and other trafficking instruments, is the requirement of proper victim identification. Trafficking victims are often confused with illegal workers, migrants or prostitutes because their identity papers have been confiscated or destroyed by traffickers. The Convention calls on states to provide the competent authorities with trained professionals who are able to correctly identify and assist trafficking victims.²³⁵ Further, states have an

²³⁰ Council of Europe Convention, *supra* note 4, at art. 4(e).

²³¹ *Id.* at art. 5(2).

²³² *Id.* at art. 5(3).

²³³ *Id.* at art. 5(6).

²³⁴ *Id.* at art. 6.

²³⁵ *See* Council of Europe Convention, *supra* note 4, at art. 10(1).

obligation not to remove a potential victim from their territory until the identification process is complete if there are “reasonable grounds”²³⁶ to believe that an individual is the victim of trafficking. During the time of the identification process, states must provide the victim with assistance.

Article 12 of the Convention provides the most detailed provision for victim assistance of any trafficking instrument to date. First, the Convention is instrumental in properly referring to the victims as such. Second, Article 12 requires state parties to adopt legislative or other measures to aid victims in their physical, psychological and social rehabilitation.²³⁷ This provision differs greatly from other documents where victim assistance is discretionary or only available for child victims. For example, the Palermo Protocol suggests that state parties “consider implementing measures”²³⁸ for the physical, psychological and social recovery of victims, and limits protecting the privacy and identity of the victims to “appropriate cases and to the extent possible under its [i.e., the state parties’] domestic laws.”²³⁹ Similarly, the E.U.’s 2002 Council Framework Decision provides no victim assistance except in cases where the victim is a child.²⁴⁰ Third, Article 12 provides a list of minimum measures a state should provide victims including:

- (a) standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
- (b) access to emergency medical treatment;
- (c) translation and interpretation services, when appropriate;
- (d) counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
- (e) assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
- (f) access to education for children.²⁴¹

²³⁶ *Id.* at art. 10(2).

²³⁷ *Id.* at art. 12.

²³⁸ Palermo Protocol, *supra* note 129, at art. 6.

²³⁹ *Id.*

²⁴⁰ See 2002 Council Framework Decision, *supra* note 52, at art. 7(3).

²⁴¹ See Council of Europe Convention, *supra* note 4, at art. 12.

Therefore, all victims located in the territory of a state party should have access to the services set forth above.

In addition, the Convention provides special assistance for victims lawfully present in the territory of a state party. This includes access to the labor market, vocational training and education.²⁴² However, each party may adopt its own rules as to the conditions under which such access is allowed. The Convention specifies that the provision of assistance will not be conditioned upon the victim's willingness to act as a witness.²⁴³ Article 12 also imposes an obligation on state parties to cooperate with NGOs, civil society groups and other organizations that provide assistance to victims.²⁴⁴

Lastly, Article 11 provides that state parties must protect the private life and identity of the victims.²⁴⁵ Such a guarantee is essential since many victims fear reprisals from their traffickers and some feel shame or guilt as a result of the trafficking. Keeping the victim's identity secure further ensures her reintegration into society and avoids attaching any social stigmas or further marginalization. Though the Article fails to provide that any legal proceedings relating to trafficking should be kept confidential, the Convention does note that measures should be taken during court proceedings to protect the safety, private life and, "where appropriate,"²⁴⁶ the identify of the victim.²⁴⁷

The Convention grants a recovery and reflection period of 30 days to victims illegally present in the territory of a state party. A state's internal law must allow for a period of a minimum of 30 days so that the victim can "escape the influence of traffickers and/or take an informed decision on cooperating with the competent authorities."²⁴⁸ Cutting ties with traffickers, in particular those associated with an organized crime ring, can be a lengthy process. It is common for a victim to develop an emotional tie or dependency on her trafficker which must be gradually severed. The Experts Group of the E.U. recommends a reflection period of not less than three months.²⁴⁹ The Experts Group also stresses that the three month period is necessary for the victim to regain control of her life, decide whether or not to participate in criminal proceedings, or to return home and attempt to

²⁴² *Id.* at art. 12(4).

²⁴³ *Id.* at art. 12(6).

²⁴⁴ *Id.* at art. 12(5).

²⁴⁵ *Id.* at art. 11.

²⁴⁶ Council of Europe Convention, *supra* note 4, at art. 30.

²⁴⁷ *Id.*

²⁴⁸ *Id.* at art. 13.

²⁴⁹ See Report of the Experts Group, *supra* note 103, Explanatory Paper No. 10, *Reflection Period and Residence Status*, 173.

reintegrate into society.²⁵⁰ Therefore, the 30 day minimum period should be extended to allow a victim additional time to recover from her experiences and reflect on a future course of action.

During the time of the reflection period, the Convention provides that the victim cannot be removed from the territory in which she is located, and is entitled to receive assistance. The reflection period is not contingent upon a victim's ability or willingness to participate in investigations or proceedings, and is therefore afforded to all victims. In contrast, provisions for a residence permit for victims, set forth in Article 14 of the Convention, are conditioned upon the existence of one or both of the following scenarios: "(a) the competent authority considers that their stay is necessary owing to their personal situation; [or] (b) the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings."²⁵¹ The provision for a residence permit is an essential component of victim assistance because it can encourage a victim to come forward to the authorities without fear of immediate deportation. However, the terms upon which a permit can be granted pursuant to the Convention have several shortcomings. First, the Convention provides that the competent authorities determine if the victims are eligible to receive a residence permit "owing to their personal situation."²⁵² This term is vague and the Convention does not set forth what circumstances would need to exist in order for a victim to receive a permit based on this condition. Second, the Convention fails to indicate whether the permit is temporary or permanent in nature, and fails to specify the duration of the permit's validity. Third, the permit is renewable, but the conditions for renewal or withdrawal are unspecified, and are to be determined in accordance with a party's domestic law.²⁵³ Lastly, the Convention does not offer victims the possibility of receiving a residence permit based on humanitarian or refugee grounds. This type of permit is an important option for victims who fear retaliation by the trafficker against them or their families in their home country, or who may be prosecuted in their home country for activities associated with the trafficking such as crossing a border illegally, working illegally, or for engaging in prostitution and sex work. Further, a victim may have had children in the country of destination, begun legal employment or developed other ties therein, and thus should have the option of receiving a permanent or long-term residence permit in that country. Therefore, the Convention should be amended to

²⁵⁰ *Id.*

²⁵¹ Council of Europe Convention, *supra* note 4, at art. 14.

²⁵² *Id.*

²⁵³ *Id.* at art. 13.

specify the nature and duration of the permit, minimum standards for renewal and withdrawal, and allow for permanent or long-term permits in special circumstances.

The Convention also provides terms for victims' compensation and legal redress.²⁵⁴ State parties must enable victims to have access to information on judicial and administrative proceedings in a language they can understand. States must also provide victims the right to legal assistance and free legal aid pursuant to conditions established in each party's internal laws. State parties' internal laws must provide for the right of victims to compensation from the offenders, and this can be achieved by establishing a fund for victim compensation or by setting up social assistance programs funded by the assets confiscated from the offenders.²⁵⁵ This provision is reminiscent of the E.U.'s 2004 Council Directive relating to compensation to crime victims.²⁵⁶ As noted above, the 2004 Council Directive enables victims of a violent cross-border crime to receive compensation for their injuries, and calls on all E.U. Member States to establish national schemes on compensation. Similarly, the Convention requires states to establish a fund or social assistance program for the victims to ensure that they receive pecuniary compensation, which is not always readily achieved in trafficking situations because the traffickers cannot be located or are bankrupt. The Convention allows state parties flexibility in determining a compensation scheme because such a system is subject to national laws, procedures and administrative restraints.

Lastly, the Convention sets forth terms for the repatriation and return of victims. Article 16 provides for international cooperation between the host country and the country of the victim's residence. The state party, of which the victim is a national or permanent resident, must facilitate and accept the victim's return to that country, while preserving that person's rights, safety and dignity.²⁵⁷ The state party has a duty to verify whether an individual is a national or permanent resident of that country and, if so, to provide the appropriate documentation in order for the individual to travel and re-enter the country. The provisions of Article 16 echo those of Article 8 of the Palermo Protocol on the repatriation of trafficking victims, but goes a step further to require state parties to adopt repatriation programs geared towards avoiding re-victimization.²⁵⁸ Pursuant to the Convention, such programs should enable the reintegration of victims into the educational system

²⁵⁴ *Id.*

²⁵⁵ *Id.* at art. 15(4).

²⁵⁶ See generally 2004 Council Directive, *supra* note 78.

²⁵⁷ See Council of Europe Convention, *supra* note 4, at art. 16.

²⁵⁸ *Id.* at art. 16(5).

and labor market. State parties must also adopt legislative or additional measures to ensure that victims have access to social services and other organizations that can assist them upon their return.

4. Criminal Provisions

In addition to the special focus on victim assistance and protection, the Convention provides several articles on the criminalization, investigation and prosecution of trafficking activities. The Convention requires states to criminalize trafficking as that term is defined in the Convention.²⁵⁹ This requirement is analogous to similar provisions in Article 5 of the Palermo Protocol and Article 1 of the 2002 Council Framework Decision. The Convention extends the criminalization provisions beyond the scope of other trafficking documents, however, by requesting states to make it a criminal offense to knowingly use the services of a trafficking victim.²⁶⁰ Criminalizing the use of a trafficking victim's services in national laws could serve to deter the demand for exploitable individuals by targeting the buyer of sexual or labor services. The supporters of legalized prostitution are likely to challenge the inclusion of this provision in the Convention. The provision, however, does require a client to know that a prostitute is the victim of trafficking in order to be guilty of committing a criminal offense. Therefore, the provision is narrow in scope; it seeks to punish only those individuals perpetuating the exploitation of others by buying the services with the knowledge that the person being exploited is a trafficking victim.

The Convention requires states to treat certain acts relating to travel or identification documents as criminal offenses when committed intentionally and for the purpose of enabling trafficking in human beings. Such acts include forging documents, procuring or providing forged documents, and destroying or retaining another person's travel or identity documents.²⁶¹ False documents are often used to bring a victim into the country where she will be exploited. Confiscating or destroying a victim's original identity documents ensures that a victim will be dependent on her traffickers and reticent to approach the authorities for fear of being deported or jailed. Imposing criminal sanctions for document tampering may serve as a deterrent for traffickers.

Additionally, states must criminalize the intentional aiding and abetting of any of the trafficking offenses set forth above.²⁶² This provision

²⁵⁹ *Id.* at art. 18.

²⁶⁰ *Id.* at art. 19.

²⁶¹ *Id.* at art. 20.

²⁶² *Id.* at art. 21.

does not refer to criminalizing the complicity of government officials, state agents or law enforcement officials, which remains a serious omission on the part of the drafters. In many countries, trafficking activities are able to thrive because of the assistance of corrupt officials in the countries of origin, transit and destination. The actions of corrupt officials should be treated as a form of accomplice liability within the trafficking context and the Convention should require states to impose sanctions on such actors.

The Convention requires state parties to punish trafficking offenses by sanctions which are “effective, proportionate and dissuasive.”²⁶³ This general provision implies that the sanctions may be criminal, administrative or civil in nature, and allows each state to adapt the degree of punishment to their national laws. When determining penalties, states are to consider aggravating circumstances such as committing an offense with gross negligence or against a child.²⁶⁴ The relevant provision also obligates states to impose monetary sanctions on legal persons held liable for trafficking offenses.²⁶⁵ The Convention provides for the confiscation of the instrumentalities and proceeds of the trafficking offenses, and enables those proceeds to be used subsequently to compensate the victims.²⁶⁶ States are also required to shut down any establishments that may have been used to carry on trafficking activities.²⁶⁷ Many hotels, restaurants, bars, matrimonial agencies and escort services mask trafficking activities. This provision is essential to ensure that these establishments do not operate with impunity by closing down the facilities that promote trafficking activities.

With respect to the prosecution of traffickers, the Convention enables a state’s authorities to prosecute trafficking offenses without the need for a formal complaint from a victim when the offenses are committed within the territory of the state.²⁶⁸ This enables prosecutors to independently institute proceedings against an alleged trafficker. A victim may file a complaint in her state of residence for an offense committed outside that state. If the authorities determine that they do not have jurisdiction over the matter, the Convention requires the state to forward the complaint to the state where the offense was committed.²⁶⁹ The Convention aims to protect the victims both during and after the prosecution period. The Convention provides that victims (and in certain cases their families), witnesses and

²⁶³ Council of Europe Convention, *supra* note 4, at art. 23.

²⁶⁴ *Id.* at art. 24.

²⁶⁵ *Id.*

²⁶⁶ *Id.* at arts. 15, 23.

²⁶⁷ *Id.* at art. 23.

²⁶⁸ *Id.* at art. 27.

²⁶⁹ Council of Europe Convention, *supra* note 4, at art. 27.

collaborators must be provided with “effective and appropriate protection from potential retaliation or intimidation.”²⁷⁰ The protection may be physical, or involve relocation, a change in identity, and assistance in securing employment.²⁷¹

In order to avoid re-victimization, the Convention obliges state parties to adopt legislative measures that would prohibit punishing trafficking victims for their participation in unlawful activities when such an involvement resulted from compulsion.²⁷² Lastly, the Convention requires each state to have access to anti-trafficking specialists.²⁷³ The Convention’s Explanatory Report suggests that this specialization may be established through police officers, prosecutors, or agencies focused on combating trafficking.²⁷⁴ Each state party must also provide proper training for the public authorities in methods of prevention, prosecution and victim assistance, and include human rights training.²⁷⁵ State parties may also appoint National Rapporteurs or other mechanisms to monitor the implementation of anti-trafficking legislation into national law and to supervise anti-trafficking initiatives.

5. Monitoring Mechanisms

One of the greatest strengths of the Convention is the provision of a monitoring mechanism, which is absent from the other trafficking instruments that have taken a criminal approach instead of a rights based approach to the problem. First, the Convention sets up a group of experts on action against trafficking in human beings, known as GRETA, to monitor the implementation of the Convention by the parties.²⁷⁶ The experts group will be composed of a minimum of ten and a maximum of fifteen members, chosen among the state parties to the Convention. The members will be renowned experts in the field of human rights and knowledgeable in trafficking, victim assistance and protection.

The Convention provides that GRETA may submit a questionnaire to the state parties to evaluate their implementation of the Convention. GRETA may also request information from civil society groups and conduct country visits. GRETA will prepare a report highlighting the conclusions of its evaluation suggesting ways in which a state party may deal with

²⁷⁰ *Id.* at art. 28.

²⁷¹ *Id.*

²⁷² *Id.* at art. 26.

²⁷³ *Id.* at art. 29.

²⁷⁴ See Council of Europe Explanatory report, *supra* note 216, ¶ 293.

²⁷⁵ See Council of Europe Convention, *supra* note 4, at art. 29.

²⁷⁶ *Id.* at art. 36.

any implementation problems. The draft report will be submitted to the party in question for comments, which are to be taken into account when drafting the final report. The final report will be made available to the public.²⁷⁷ The public availability of reports is important because countries try to avoid being named and shamed for failing to comply with their obligations under a human rights treaty. Therefore, such reports can be a tool to ensure compliance.

While the provision of a monitoring mechanism is necessary, the Convention could benefit from a strengthening of the established mechanism. There is no requirement for state parties to submit reports to GRETA. The Committee on the Elimination of Discrimination Against Women, for example, receives an initial report from state parties within a year of that party's ratification, followed by additional reports every four years.²⁷⁸ The reporting requirement ensures that states are complying with their obligations under the treaty and highlights any problems or concerns with implementation. The Convention could benefit from a similar requirement. Further, the Convention does not indicate whether or not GRETA may receive individual petitions by aggrieved persons, or by an organization on behalf of an aggrieved individual, for a violation of the rights enshrined in the Convention. Regional human rights systems in Europe, the Americas and Africa have well established individual complaint mechanisms. It is therefore surprising that the drafters of the Convention did not include a complaint procedure in the document's provisions. As noted earlier, none of the pre-existing human rights treaties except for CEDAW specifically refer to trafficking. Therefore, their respective complaint procedures are not the best channel for effective redress of a trafficking violation. With the Convention's focus narrowly tailored to protecting the human rights of trafficking victims, the document could benefit from the addition of an individual complaint procedure.

B. The Council of Europe Convention: A Significant Contribution Towards Combating Trafficking

The Council of Europe Convention is the first document of its kind to protect the human rights of trafficking victims. Despite a multitude of pre-existing recommendations, principles and guidelines on human rights and trafficking in humans, the Convention is instrumental in assembling all such elements into a comprehensive, multi-disciplinary and binding instrument with normative value. The Convention reflects the importance of

²⁷⁷ *Id.* at art. 38.

²⁷⁸ *See* CEDAW, *supra* note 186, at art. 18.

state recognition of the international obligation to prevent, investigate and punish human rights violations as that obligation extends into the realm of trafficking.

The Convention's approach suggests that states integrate the recognized norms, standards and principles of international human rights law into their domestic legislation, policies and programs on trafficking. Victims are to be afforded rights and entitled to certain standards of treatment established in the Convention. While the Convention is intended to complement other international instruments on trafficking and does not affect the rights and obligations contained therein, the majority of those instruments are focused on law enforcement and prosecution.²⁷⁹ Conversely, the Convention stresses the need for prevention, victim assistance and protection, in addition to the investigation and prosecution of trafficking offenders. The Convention recognizes that trafficking in humans is a violation of human rights. It creates a legal framework of binding measures and specific rights with a perspective towards maintaining gender equality. The Convention is one of the only trafficking instruments to strongly emphasize the need to coordinate the efforts of civil society groups, NGOs and other organizations. Lastly, the Convention is unique among other trafficking instruments in that it sets up a committee to monitor state parties' implementation of the Convention's provisions.

The Convention does not focus at length on the economic, social and cultural rights of the victims or on development strategies that target the root causes of trafficking. Without strategies aimed at empowering the most vulnerable victims through development, education, improved living and working conditions, and greater economic choices, trafficking will continue to thrive. Development policies that address root causes and gender discrimination need to be implemented in the countries of origin. The Convention should place greater emphasis on the importance of allocating significant state resources towards developing social programs and towards gathering data on trafficking. Although the Convention does suggest using the media as a tool as well as expanding awareness raising and developing informational campaigns, those provisions need to be strengthened. In addition, the Convention could benefit from enhancing the protection afforded to victims through the residence permit to include the option of a permanent residence permit or special permit based on humanitarian or refugee grounds. Similarly, the provisions for a monitoring mechanism need to be expanded. Requiring state parties to submit reports detailing their implementation efforts, as opposed to the idea of having them complete a questionnaire, is a first step towards ensuring compliance. In addition, GRETA

²⁷⁹ See Council of Europe Convention, *supra* note 4, at art. 39.

should be able to receive individual petitions for violations of the Convention's provisions and should set up a procedure in which to receive and manage such complaints.

Despite a few areas in need of expansion and bolstering, the Council of Europe Convention is a significant contribution to the fight against trafficking. Elaborating a convention on trafficking in a regional system instead of in a global system has numerous advantages. First, experience dictates that regional instruments foster action at the global level and encourage compliance with international human rights law.²⁸⁰ The regional systems can enforce global human rights norms; the Council of Europe Convention, for example, guarantees many of the rights found in the international human rights treaties and mirrors the provisions of various U.N. treaties. Second, regional systems offer redress and compensation to individual victims. The international human rights system does not have the capacity to address individual complaints and is designed to address widespread, gross violations of human rights. In addition to the individual complaint procedures, regional systems may set up permanent institutions and specialized courts to monitor compliance with human rights obligations, as is the case of Europe. Moreover, many regional systems provide institutions with the ability to conduct on-site country visits to investigate the human rights situation in member countries, and may appoint Rapporteurs to study an area of specific concern to the region. Third, a regional treaty may be more effective in securing the participation of its member states than an international human rights treaty elaborated within the U.N. structure might be. As one scholar notes "treaty fatigue" and "treaty congestion" are challenges to overcome in order to secure universal participation in another international human rights treaty.²⁸¹ With some countries already struggling to fulfill their obligations and requirements undertaken in other U.N. treaties, participation in a regional treaty with less burdensome requirements may be a more feasible option.

Lastly, the positive developments of one regional institution may inspire similar developments within the region, with enhanced or expanded features. For example, the Council of Europe Convention is clearly influ-

²⁸⁰ For an overview of the advantages of regional human rights systems see Dinah Shelton. *The Promise of Regional Human Rights Systems*, in *THE FUTURE OF INTERNATIONAL HUMAN RIGHTS*, 351-98 (Burns H. Weston & Stephen P. Marks eds., 1999).

²⁸¹ See NATIONAL COUNCIL ON DISABILITY, *A WHITE PAPER: UNDERSTANDING THE ROLE OF AN INTERNATIONAL CONVENTION ON THE HUMAN RIGHTS OF PEOPLE WITH DISABILITIES*, ch. VI(C) (2002), available at http://www.ncd.gov/newsroom/publications/2002/unwhitepaper_05-23-02.htm.

enced by the work of the E.U. in combating trafficking. However, the Council of Europe's membership is nearly twice the size of the E.U. membership and, therefore, has a much larger reach and potential impact. Similarly, the work of the Council of Europe in generating the first convention to specifically deal with the human rights of trafficked victims can inspire parallel action at the international level.

In sum, the Council of Europe Convention is effective in striking a balance between criminalizing trafficking activities on the one hand and protecting and assisting the human rights of the victims on the other. The human rights guaranteed within the Convention, in addition to the insistence on gender equality, provides for both national and international cooperation and monitoring, creating an innovative document which may serve as a legislative and policy-building model.

V. CONCLUSION

Trafficking continues to be a significant challenge for the European region in the twenty-first century. Numerous instruments developed intra-regionally have attempted to address the problem by treating trafficking as a crime and by prosecuting and punishing its perpetrators. Harmonizing the internal laws of the E.U. and other European countries to criminalize trafficking and impose appropriate sanctions is a major step towards combating the problem. However, the majority of the trafficking instruments fail to focus on the victims. Despite being a violation of every major human right, trafficking is not traditionally treated as a human rights issue. The efforts of various civil society groups, experts groups, advocates and NGOs in recent years have highlighted the importance of affording protection, assistance and rights to the victims.

The Council of Europe Convention is the first regional document to specifically address the human rights of trafficking victims. It fuses both criminal and human rights law to create a comprehensive, integrated and coordinated system. The European framework suggested in the Convention requires states to take on binding legal obligations towards preventing and punishing trafficking within their borders, and such obligations are to be effectively monitored. The Convention could serve as a basis for other states outside the Council of Europe to model their national legislation, policies and programs.

Future strategies must also target socio-economic development in the source countries. For only when the root causes of trafficking are targeted and eradicated within their countries of origin, and victims are empowered through education and opportunities within their own countries, will the number of vulnerable victims be diminished. This will create an environment where trafficking can be successfully abolished.