

N°24

**International
Migration
Law**

**RIGHTS, RESIDENCE,
REHABILITATION:
A COMPARATIVE STUDY
ASSESSING RESIDENCE
OPTIONS FOR
TRAFFICKED PERSONS**



IOM International Organization for Migration

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S. Craggs and R. Martens



IOM International Organization for Migration



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Sarah Craggs and Ruzayda Martens²
Geneva, 2010

¹ The individual country reports provide a detailed analysis of the right to residence for trafficked persons within the legal framework of the four countries studied, including the transposition of regional and international legal instruments into the respective national laws, and an assessment of how the legal norms pertaining to the granting of residence permits are being translated into practice. The individual country reports are not annexed to this report, but they will be made available in the future.

² Sarah Craggs is a Researcher and Programme Coordinator and Ruzayda Martens is a Legal Officer at the International Organization for Migration in Geneva. This study was a joint project between the Department of Migration Management, Migrant Assistance Division (formerly the Return Management and Counter-trafficking Division), and the International Migration Law and Legal Affairs Department.

Executive summary

Increased attention has been given to the issue of “reflection periods” and temporary residence permits as a means to both ensure the protection of trafficked persons and strengthen the investigation and prosecution of traffickers. This study aims to assess how legal norms pertaining to the right to residence are being translated into practice. It provides a comparative legal and practice-based assessment of the application of the right to residence in four countries, namely Austria, Belgium, Italy and the United States of America. Field work was undertaken in all four countries in July and August 2009. The findings are drawn from 46 interviews held with a diverse range of participants.

The research was conducted at the request of the donor, the Swiss Federal Department of Foreign Affairs, Directorate of Political Affairs, Political Affairs Division IV. The research process was guided by a number of key research questions with the aim to: assess the legal frameworks in each respective country; examine how the given regulations are applied in practice; assess whether there are any discrepancies with the literal text of the law; and document the experiences and developments that have been made in the four countries in terms of the pertinent frameworks.

The research findings reflect this focus; however, the authors acknowledge that the issues of residence and rehabilitation for trafficked persons – whether in the country of exploitation and/or identification, the home country, or a country of resettlement – demand continued attention.

The report demonstrates that one of the key barriers to the efficiency of the residence permit procedure remains the manner in which legislation is being translated into practice. There are gaps in existing laws and, in addition, these laws are not always fully implemented. On the other hand, practice by law-enforcement authorities and other actors often goes further than the provisions in the law. In short, there is little consistency and the treatment of victims can vary greatly, depending on the city where they are identified or which agency or individual conducts their interview.

Conformity to the international and regional framework

All four countries studied have ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (United Nations Protocol). The Council of Europe Convention on Action against Trafficking in Human Beings of 2005, which goes beyond the United Nations Protocol in its emphasis on victim protection, has been ratified by both Austria and Belgium. Italy has signed the Convention, but is yet to ratify it.

In addition, the European Union Council Directive 2004/81/EC (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) is binding on all European Union Member States. Therefore, Austria, Belgium and Italy have mandatory obligations to transpose the European Union Council Directive into national law. Interviewees noted that Belgian procedure and Italian law, which predate the enactment of the European legal instruments, were used as a guide to set the regional standards on the reflection period and the issuance of short-term temporary residence permits. The grounds for issuing residence permits are left to States' discretion. While the United States law differs significantly from the laws in the other countries studied, interviewees in the United States noted similar barriers to implementation as those encountered in the other three countries.

Identification

The study demonstrates that one of the key challenges in combating human trafficking remains the correct identification of victims. Formal identification is a prerequisite for the issuance of residence permits in all four countries studied, yet it was not uncommon for interviewees to mention that interpretation of the definition of human trafficking is a major barrier to the correct identification of trafficked persons and, consequently, access to the right to residence. At the centre of this stands the issue of biased treatment with regard to the gender of the victim and type of exploitation experienced. For example, men trafficked for forced labour are often not correctly identified. Another key issue is the variation between regions within a country as regards anti-trafficking structures, which results in inconsistency in identification.

In general, law-enforcement authorities are the first actors to come into contact with presumed trafficked persons. However, the role of non-governmental organizations (NGOs) is also important. In Austria, Belgium and Italy, government-approved NGOs also have a formal role at the identification phase.

Conditionality

The law in Austria, Belgium and the United States links the issuance of residence permits solely to cooperation with law-enforcement authorities. However, in Austria this is interpreted with flexibility. Italy is the only country to have a formal non-cooperation option initiated through the “social path”. Findings reveal that there is nevertheless a high degree of confusion in all four countries as to the degree of cooperation needed as the various stakeholders define cooperation differently.

The reflection period

Belgium is the only country to provide for a right to a reflection period. The law is silent on reflection periods in Austria, Italy and the United States. Findings demonstrate that the reflection period is often confused with temporary residence status. In fact, the purpose of the reflection period is quite unique: to take time to recover mental stability, to consider available options to regain autonomy, and to make an informed decision as to whether to cooperate with law-enforcement authorities without the risk of being removed from the country and while benefiting from social assistance or other available options. In practice, implementation of the reflection period varies significantly due to high degrees of discretion. In all four countries, regardless of the legal provisions, victims of trafficking can be provided with time to reflect when they are supported by a service provider.

The right to residence

The laws in all four countries formulate access to residence permits as a legal right once certain criteria have been met. The eligibility criteria vary from country to country, as do the authorities responsible for the issuance of residence permits. Austria is a model for setting a prescribed time limit for issuing residence permits.

The length of residence permits in the countries studied range from three months to an indefinite period that corresponds to the duration of legal proceedings or other immigration provisions. Italy is the only country to prioritize the recovery of the victim by offering participation in a rehabilitation and social integration programme that is not conditional on cooperation with law-enforcement authorities. The United States is the only country studied to recognize victims' fear of reprisal from the trafficker and their concern for family members, which has led to a provision in law to extend residence to family members.

Social and economic assistance

The research findings demonstrate that the right to residence cannot be separated from the right to immediate protection and longer-term assistance. Interviewees in all countries reiterated that only once the trafficked person has been able to access some form of social or economic assistance does their sense of stability and trust greatly improve. Findings reveal that the degree of support provided differs from country to country and also between regions within each country. In all four countries, trafficked persons have access to a broad package of assistance once they have received their temporary residence status. At a minimum, this includes the right to shelter, health care and psychosocial counselling and access to employment. Some countries provide more holistic packages than others, including the right to legal counsel, the right to education and language training, and the right to family reunification. Access to employment was, however, cited as being particularly problematic in all four countries. Barriers to obtaining work included the skill set of the victim, lack of knowledge of the local language, and restrictive employment law.

At the same time, the opportunity to access residence in the country of exploitation and/or identification is only one of the many options that should be made available to trafficked persons. Possible assistance options may also need to include the right to seek asylum, return to the home country or move to a country of resettlement. Where a trafficked person decides to leave the country of exploitation and/or identification, his or her decision should be voluntary and assistance should be offered to ensure that the return home or move to a country of resettlement is safe, dignified and free of risks.

List of acronyms

EC	European Commission
ECRE	European Council on Refugees and Exiles
EMN	European Migration Network
EU	European Union
ILO	International Labour Organization
IOM	International Organization for Migration
KSMM	Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants
LSHTM	London School of Hygiene and Tropical Medicine
NGO	Non-governmental organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
OSCE	Organization for Security and Co-operation in Europe
TVPA	Victims of Trafficking and Violence Protection Act of 2000
UN	United Nations
UNGIFT	United Nations Global Initiative to Fight Human Trafficking
UNHCR	United Nations High Commissioner for Refugees (Office of)
UNODC	United Nations Office on Drugs and Crime
USCIS	United States Citizenship and Immigration Services

PART 1: Introduction

1.1 Background

The last decade has witnessed an increase in legal and policy debate on the rights of trafficked persons. Should such rights extend to the right to residence in the host country? For the trafficked person, the option of residence signifies a new beginning, the possibility to regain dignity and identity – restoration to a normal life – without the stigma of having been trafficked.

The most important thing for them [the trafficked persons] was a paper that mentioned this is me, that is my name, because when you have nothing, when you are illegal, you are nothing. You do not exist. And the residence permit was for them a paper to freedom.

(interviewee response)

Trafficking in persons is a human rights violation involving severe exploitation, with the use of threats, debt bondage, coercion and deception being common tactics of traffickers to keep an individual in a situation of control. Anti-trafficking action must be framed within a sound human-rights based approach so as to protect trafficked persons, prosecute traffickers and prevent the phenomenon from occurring. With regard to human rights, the Office of the United Nations High Commissioner for Human Rights (OHCHR) states the following:

The primacy of human rights

1. The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.
2. States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.
3. Anti-trafficking measures shall not adversely affect the human rights and dignity of persons, in particular the rights of those who have been trafficked, and of migrants, internally displaced persons, refugees and asylum-seekers.

Source: OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

In recent years, increased attention has been given to the issue of “reflection periods” and temporary (and even permanent) residence permits as a means to ensure the protection of trafficked persons in countries of destination or transit, and to prevent trafficking through the investigation and prosecution of traffickers. This has been demonstrated through the incorporation of provisions related to the granting of temporary or permanent stay for trafficked persons in international and regional instruments, and the national legislation of a number of States.

As mentioned in *The IOM Handbook on Direct Assistance for Victims of Trafficking*, the possibility to access residence options can form a central part of the rehabilitation and reintegration process. In this regard, the right to residence cannot be separated from the process of identification and assistance, as will be demonstrated in this report. From the outset, formal identification of trafficked status is a prerequisite for the issuance of residence permits. Trafficked persons are also likely to have immediate and acute direct assistance needs that can be addressed during the reflection and residence periods, where the individual voluntarily decides to remain in the country of exploitation or identification.

The debate on residence measures nevertheless remains a heated one, with discussions centring around the role and enactment of the reflection period; the conditions attached to temporary residence status, that is, whether there should be an obligation to cooperate with law-enforcement authorities; the length of the reflection period and temporary residence; the degree of discretion given to the competent authorities within a country; the forms of assistance consequently provided to trafficked persons during their stay in the country of destination; the right to access permanent stay; the right to access other forms of protection, such as asylum; and the right to return to the home country or to move to a country of resettlement. At the same time, there has been limited focus on the impact of such measures on trafficked persons, and their recovery, rehabilitation and reintegration.

This study aimed to assess the legal norms pertaining to the right to residence and how they are being translated into practice. It provides a comparative legal and practice-based assessment of the application of the right to residence in four countries, namely Austria, Belgium, Italy and the United States. The research findings throughout the report specifically reflect upon the experiences faced by the authorities,

civil society and trafficked persons themselves with regard to the implementation of the right to residence.

Part 2 provides an overview of relevant international instruments and focuses not only on relevant anti-trafficking legislation, but on human rights law in general. Part 3 gives an analysis of relevant regional instruments. Part 4 focuses on the four national frameworks and provides a comparative overview, particularly conformity to international and regional instruments. Part 5 is divided into three sections. The first section examines in particular the procedure for obtaining a residence permit and consequently assesses the practical application of relevant legislation, while providing a detailed assessment of key issues, including: identification, cooperation with law-enforcement authorities, the victim's personal situation, the reflection period and assistance provided. The second section focuses on the specific protection measures and rights granted to the trafficked person during the procedure for obtaining the residence permit. The third section aims to draw together Part 5 and provides an overview of practical challenges faced during the regime of stay. Key issues covered include temporary stay, permanent stay and access to social and economic rights. Part 6 offers some concluding remarks and a list of good practices. Individual country reports formed the basis of this comparative report. They additionally assessed the transposition of the regional legal instruments into the relevant national legislation, as well as compliance with regional legal norms and standards.

The overall aim of the study was to provide technical support to the Government of Switzerland to facilitate discussions on the residence options for victims of human trafficking in Switzerland. In this regard, the research process was guided by a number of key research questions intended to assess the legal frameworks in each country; examine how the given regulations are applied in practice, assessing whether there are discrepancies with the literal text of the law; and document the experiences gained in the four countries in terms of the pertinent regulations.

Although the findings reflect this focus, the authors acknowledge that the issues of residence and rehabilitation for trafficked persons – whether in the country of exploitation, the home country, or a country of resettlement – demand continued attention. This will also require

the increased engagement of trafficked persons so that their voices are heard.

1.2 The Swiss context

While it is not the intention to focus on the specific anti-trafficking measures in Switzerland, by way of background, it is important to outline the national situation.

Switzerland takes a proactive approach in the fight against human trafficking, having ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (United Nations Protocol) on 27 October 2006. On 8 September 2008, Switzerland signed the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series No. 197). As mentioned in a fact sheet prepared by the Swiss Coordination Unit against the Trafficking in Persons and Smuggling of Migrants (KSMM): “Since 1 December 2006, human trafficking has been a punishable act in Switzerland under Article 182 of the Swiss Criminal Code (SCC). This paragraph has replaced Article 196 SCC, which only provided for human trafficking for the purpose of sexual exploitation. Under the new article, all forms of human trafficking according to the internationally agreed definition above have become punishable offences. Even a single instance of trafficking only one person is now punishable under Article 182 SCC” (DFJP, 2010). However, minor aspects of Swiss legislation, particularly in the area of extra-procedural witness protection, will have to be adapted before the Convention can be ratified. The Federal Department of Justice and Police is currently legislating accordingly. In November 2010, the Federal Council adopted a dispatch to the Federal Assembly on the ratification of the Convention and a new legislation on extra-procedural witness protection.

In 2003, the Swiss Federal Office of Police established the KSMM. This unit comprises all the federal and cantonal³ agencies involved in fighting and preventing human trafficking and smuggling. Furthermore, the unit coordinates measures in the field of prevention, prosecution and

³ There are 26 cantons in Switzerland which are constituents of the Swiss Federation and have individual administrative powers. Each canton is regarded as a sovereign member of the Federate State.

victim assistance. In 2004, the Coordination Division of the Federal Criminal Police was reinforced by the Paedophilia, Human Trafficking and Smuggling Investigation Unit. In 2007, this unit was divided into two new units: the Pornography and Paedophilia Investigation Unit and the Human Trafficking and Migrant Smuggling Investigation Unit, with the latter receiving additional human resources and assisting the cantonal police authorities in inter-cantonal and international investigations. From civil society, the most important national partner is FIZ (Advocacy and Support for Migrant Women and Victims of Trafficking), which is an NGO that provides support to trafficked persons by providing shelter, medical and psychosocial assistance, legal counselling and financial assistance.

In 2009, the Swiss police registered 50 cases of “human trafficking” (Article 182 SCC) and 104 cases of “encouraging prostitution” (Article 195 SCC). Between 2000 and 2009, there were between 2 and 12 convictions for human trafficking annually, and between 7 and 26 convictions for encouraging prostitution (DFJP, 2010). Concerning victims of trafficking, two thirds are said to be citizens of Bulgaria, Brazil, Hungary or Romania. However, in 2009, there was a strong increase in the number of women victims of forced prostitution from Hungary. The women were mostly employed in prostitution in the Zurich region, and increasingly in western Switzerland, especially in the canton of Vaud (DFJP, 2010). In addition, in 2009, FIZ counselled 183 female victims of trafficking and 1 male victim.⁴ Assisted trafficking victims are usually women trafficked for sexual or labour exploitation, and are from Eastern and South-Eastern Europe (Hungary, Romania and Bulgaria), Africa (Nigeria, Côte d’Ivoire and Cameroon), Latin America (Brazil and Dominican Republic) and Asia (Thailand) (see also DFJP, 2010).⁵ The majority of trafficked persons are exploited and identified in Zurich. IOM Bern, under its return and reintegration project for victims of trafficking and cabaret dancers who have been exploited in Switzerland, assisted 27 victims from 2008 to 2010.

⁴ This includes 128 new cases for 2009, and 56 cases from the previous year. Out of the 128 new cases, 69 people agreed to report a crime against a perpetrator; 19 worked together with the authorities; and 41 individuals decided against collaboration and/or had no proceedings (FIZ, 2009). At the time of writing this report, figures were not available for 2010.

⁵ Indeed, in December 2010, the Swiss courts in Zurich passed judgments on four perpetrators involved in the trafficking of females – some of them minors – from Hungary and Romania to Switzerland. The involved victims had been sexually exploited and severely abused. Sentences ranged from 10 years (with preventive detention) to an 18-month conditional jail sentence. See also: http://www.swissinfo.ch/eng/swiss_news/Zurich_takes_aim_at_human_trafficking.html?cid=27040094

Regarding protection measures in general and the residence permit in particular, under the Swiss Victim Assistance Act of 23 March 2007, anyone whose sexual, physical or psychological integrity has been violated in Switzerland is entitled to counselling and support. This law does not explicitly refer to trafficked persons, but it places an obligation on each canton to consider the special needs of various groups of victims – including trafficked persons – when offering counselling (KSMM, 2007; DFJP, 2010). It also applies regardless of the individual’s nationality or residential status. The legislation, together with cantonal criminal procedure ordinances, also provides for the protection of victims and witnesses who give evidence in criminal proceedings (such as anonymity in written acts and the right to be interviewed in separate rooms, and so on). The Swiss Code of Criminal Procedure, set to come into force in 2011, will standardize these procedural regulations. Furthermore, trafficked persons are legally entitled to request assistance from the State and private victim assistance agencies; furthermore, according to the Act, the cantons are obliged to fund victim service providers. In addition, all cantonal staff working with trafficking victims are obliged to attend to the particular needs of victims of gender-specific violence. The Act also calls for particular attention to be paid to the special needs of victims: in particular, it stipulates that trafficked persons with special needs should be granted access to specialized institutions.

Concerning the residence permit for trafficked persons, the new Foreign Nationals Act and its regulatory statute, which entered into force on 1 January 2008, make provisions for victims and witnesses to remain in Switzerland during a reflection period, during criminal proceedings and if the personal situation of the victim so requires. The Act also provides for return and reintegration assistance measures. It should be noted that these provisions apply to victims of human trafficking. Thus, trafficked persons may be granted a reflection period of at least 30 days, during which they can decide whether to participate in the criminal proceedings against the accused. Where the trafficked person agrees to participate in criminal proceedings, a residence permit will be granted for the duration of proceedings.⁶ A work permit may also be granted for the duration of residence. According to the law, national

⁶ In 2009, 32 reflection permits were granted in Switzerland; 53 short-term residence permits were granted for the duration of a police investigation or legal proceedings; 3 residence permits were granted in the context of “difficult cases”; and 128 persons (figures provided by FIZ) received victim assistance as victims of trafficking in human beings or forced prostitution.

authorities issue residence permits on the grounds of “serious personal hardship or for other compelling reasons.” In cases of serious personal hardship, a victim may be granted a residence permit regardless of his or her willingness to cooperate (DFJP, 2010).

It should be noted that few residence permits have been issued to trafficked persons to date, and there are discrepancies among the cantons, with some having granted this form of protection more often than others. Yet, having access to the residence permit on the grounds of having been trafficked (on the grounds of serious personal hardship or other compelling reasons) is a fundamental means by which to safeguard the rights and interests of those trafficked to and within Switzerland.⁷

1.3 Methodology and ethics

As outlined previously, the focus of the study was to undertake a legal analysis of relevant international, regional and national instruments (in Austria, Belgium, Italy and the United States) relating to the right to residence for victims of human trafficking, and to provide a detailed assessment on how such regulations are translated and applied in practice.

The research methods employed were threefold:

1. A comparative and analytical assessment of international, regional and national instruments (in Austria, Belgium, Italy and the United States) on the right to residence.
2. A comparative literature review of relevant secondary resources.
3. The undertaking of field work in all four countries in Vienna, Brussels, Rome, Washington, D.C., and New York.

The same researcher travelled to all four country field sites to ensure and uphold consistency.⁸ Additional interviews were also undertaken by the legal researcher. In total, 36 interviews were conducted with

⁷ In addition, in April 2010 – after a two-year trial period – a project aiming to assist victims of human trafficking to return home and to reintegrate was definitively implemented by the Federal Office for Migration.

⁸ The research team significantly benefitted from the IOM Field Office network, in particular the counter-trafficking focal points at IOM Rome, IOM Vienna, IOM Brussels, IOM Washington, IOM New York and IOM Bern.

46 interviewees in July and August 2009.⁹ Interviews were conducted with key respondents and professionals working in the anti-trafficking field. A total of 11 interviews were conducted in Austria with academics and researchers, immigration and asylum officials, lawyers, NGO representatives and service providers, and representatives of relevant governmental structures.¹⁰ In Belgium, a total of seven interviews were conducted with NGO representatives and service providers and representatives of relevant governmental structures.¹¹ In addition, nine interviews were conducted in Italy with academics and researchers, law-enforcement officers, lawyers, NGO representatives and service providers, and prosecutors.¹² In the United States, research was conducted at two field sites and thus the total number of interviews is slightly higher. In total, 17 respondents were interviewed and these included former trafficked persons, lawyers, NGO representatives and service providers, prosecutors and representatives of relevant governmental structures. At the same time, a number of general interviews were conducted with independent consultants, IOM trafficking focal points, and representatives from international organizations. Participant-driven sampling was also used as a means to ensure inclusiveness.

Concerning issues of ethics and confidentiality, the research process was governed by the IOM Data Protection Principles and all staff members were required to uphold the ethical and security standards outlined therein. All interviews remained confidential and the information used has not been attributed to an individual or specific organization.

Limitations

While it was the authors' intention to interview approximately the same number of interviewees in each country, with a similar breakdown of interviewee profiles, this, in practice, did not prove to be feasible. Significantly more interviews were conducted in the United States compared with the three European countries included in this study.

⁹ Some interviews involved more than one interviewee.

¹⁰ The research team was due to interview a former trafficked person in Austria. The female involved found employment two days before the scheduled date of the interview and thus the interview was cancelled. Given that access to the labour market is very difficult for trafficked persons, the research team was very pleased by this news.

¹¹ The research team attempted to gain access to former trafficked persons in Belgium, but this did not prove feasible due to the timing of the research and the unavailability of suitable interviewees.

¹² The research team encountered the same problem in Italy as the one described above in the previous footnote.

While this is somewhat understandable due to the geographical scope of the United States, the authors are aware that this may present a number of unintended biases. In addition, some potential interviewees were unavailable for interview or declined to take part in the study. Furthermore, although the research team attempted to gain access to former trafficked persons in all four countries, this was achieved only in one country. The main reason for this was the timing of the research and the unavailability of suitable interviewees. The implementation phase for conducting the field work coincided with the summer holiday period (the months of July and August) and many potential respondents were not available.

Note on terminology

The authors use the terms “victim of human trafficking” and “trafficked person” interchangeably. The term “victim” has generated much debate in the context of violence against women; many argue that it implies powerlessness, rather than the resilience of the victim and therefore prefer to use the term “survivor”. Others prefer the term “trafficked person.” In the area of human rights and protection, the term “victim” is used to refer to someone experiencing injustice for which the perpetrator is responsible. It indicates that the person or persons experiencing human rights violations have the right to protection and assistance. In the context of this report – which focuses on protection and assistance – the authors use the terms “victim” and “trafficked person” with the above clarification to highlight the rights of the victim to protection, as well as the responsibilities of government and civil society to afford this protection (IOM, 2007).

The term “interviewee” refers to an individual who agreed to participate in the study and was subsequently interviewed during the undertaking of the field work. The authors have used the generic term interviewee to ensure the confidentiality of responses.

The term “reintegration” is used to denote a victim’s safe, dignified and sustainable reinsertion into society and a normalized life. This interpretation of the term is broader than the legal definition provided in the glossary (see annex) where reintegration refers only to a person’s country of origin (IOM, 2007). Surtees (2008a) also notes that re/integration refers to:

... the process of recovery and economic and social inclusion following a trafficking experience. This inclusion is multifaceted and must take place in social, cultural and economic arenas. It includes settlement in a safe and secure environment, access to a reasonable standard of living, mental and physical well-being, opportunities for personal, social and economic development and access to social and emotional support. In many cases, re/integration will involve return to the victim's family and/or community of origin. However, it may also involve integration in a new community and even in a new country, depending on the needs and interests of the trafficked person. A central aspect of successful re/integration is that of empowerment, supporting victims to develop skills toward independence and self sufficiency and to be actively involved in their recovery and re/integration.

In this regard, reintegration can also be seen as a central step towards the rehabilitation of the trafficked person.

PART 2: Universal instruments

This part of the report provides an overview of the international framework¹³ on residence options for victims of human trafficking. It outlines the most prominent international anti-trafficking legislation, as well as international standards and relevant international human rights law.

2.1 United Nations Protocol of 2000

At the international level, the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (United Nations Protocol),¹⁴ represents a comprehensive legal approach to trafficking in persons. However, from a human rights perspective, it falls short in terms of the provisions pertaining to protection and assistance. Moreover, there is no reference to immigration or labour laws.¹⁵

Consequently, a central paradox exists: although trafficking in persons impairs the enjoyment of human rights and fundamental freedoms, it is viewed through a criminal lens (Danziger et al., 2009). While the criminal justice provisions are mandatory, the language of the protection and assistance provisions is tentative and left to the discretion of State Parties. All four countries in the scope of this study have ratified the United Nations Protocol¹⁶ and have adopted legislative measures to protect and assist victims.¹⁷

¹³ “Framework” refers to both binding and non-binding legal instruments.

¹⁴ The Protocol was adopted on 15 November 2000 and entered into force on 25 December 2003.

¹⁵ These shortfalls can be attributed to the fact that the United Nations Protocol was developed within the United Nations Crime Commission, which is a law-enforcement body, not a human rights body. See the Global Rights publication, *Annotated Guide to The Complete UN Trafficking Protocol*, http://www.globalrights.org/site/DocServer/Annotated_Protocol.pdf?docID=2723

¹⁶ It should be noted that Switzerland has also ratified the United Nations Protocol. See the Swiss context in Part I above.

¹⁷ In accordance with the purpose of Article 6, all four countries (Austria, Belgium, Italy and the United States) have adopted the “3-P approach”, namely: (1) Prevention of trafficking in persons; (2) Protection of victims of human trafficking; and (3) Prosecution of traffickers.

Article 7 of the United Nations Protocol¹⁸ sets the framework for the issuance of residence permits. It specifically encourages State Parties to adopt legislative and other appropriate measures that permit trafficked persons to stay in a country, either temporarily or permanently. While States are under no obligation to incorporate the right to residence into national legislation, they are encouraged to do so.¹⁹ Although the provision is silent on the criteria for implementing legislative measures, it does require States to give due consideration to humanitarian and compassionate factors. Although “humanitarian and compassionate factors” are not defined, it is clear that the specific situation of the victim should be taken into account, before making a decision on whether the victim should remain in the country (UNGIFT, 2008). This implies that legislative measures should be centred on the victim.

It should be noted that the United Nations Protocol does not establish a link between the granting of residence permits and cooperation with law-enforcement authorities. However, the language used in Article 7 – “shall consider”²⁰ and “in appropriate cases” – gives States the discretion to set criteria for the issuance of residence permits. Consequently, many countries have adopted one common criterion: victims must make a statement to the police or testify as a witness during legal proceedings in exchange for residence permits.²¹ This precondition focuses on law-enforcement objectives, rather than on the needs of the trafficked person.

Human rights bodies have called upon States to prevent further exploitation and secondary victimization by placing human rights at

¹⁸ Article 7 provides: “(1) In addition to taking measures pursuant to article 6 of this Protocol, each State Party *shall consider* adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, *temporarily or permanently*, in appropriate cases; (2) In implementing the provision contained in paragraph 1 of this article, each State Party *shall give appropriate consideration* to humanitarian and compassionate factors.”

¹⁹ Although there is no explicit right to residence at the international level, States are encouraged to enforce residence options, either temporarily or permanently, when providing assistance and protection to trafficked persons.

²⁰ The words “shall consider” should be interpreted to mean that States are asked to seriously consider certain measures and make an effort to determine whether such measures are compatible with their national legal systems (UNODC, 2004).

²¹ It should be noted that all four countries involved in this study to some extent link the issuance of residence permits to cooperation with law-enforcement authorities. Italy is the only country to provide two options, one linked to cooperation and the other based on the personal situation of the victim. See part 4.

the centre of all efforts to investigate and prosecute trafficking.²² The OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking establishes a framework for good practice on the basis of human rights standards. It emphasizes that victim protection and victim assistance should be unconditional, and not dependent on the capacity or willingness of the victim to cooperate with law-enforcement authorities.

Equally, the direct assistance measures envisaged in Article 6 of the United Nations Protocol are not contingent on the immigration status of victims.²³ Article 6 recommends a wide range of measures, including appropriate housing, medical, psychological and material assistance, counselling, information on victim rights and employment, and educational and training opportunities. Moreover, as outlined in Articles 6 and 8, protecting the identity, privacy and physical safety of the victim, as well as considering the special needs and the personal situation of victims and especially children, is equally important.

Although there is no provision on witness protection, Articles 6, 7 and 8 should be read together with Article 24 of the United Nations Convention against Transnational Organized Crime of 2000 (UNODC, 2004). If victims decide to testify against the perpetrators, they should be protected from threat, retaliation or intimidation. Articles 8 and 9 oblige States to ensure safe return and to prevent secondary victimization; these provisions complement Article 7 and refer to the universal principle of non-refoulement²⁴ and the prohibition of inhumane or degrading treatment as guaranteed under international law and as stated in the International Covenant on Civil and Political Rights of 1966 (see section 2.2 below).

²² United Nations General Assembly resolution 63/194: Improving the coordination of Efforts against Trafficking in Persons (23 January 2009), wherein governments are called upon to respect the human rights of victims in their efforts to investigate, prosecute, condemn and penalize traffickers; and OHCHR (2009) (note the reference to the Committee against Torture which emphasizes the importance of providing assistance to victims of trafficking on the sole basis of their needs, and regardless of whether they collaborate with investigators (CAT/C/AUS/CO/3)).

²³ Article 7 states that temporary residence should be considered “in addition” to Article 6.

²⁴ Non-refoulement refers to the principle laid down in the Geneva Convention relating to the Status of Refugees of 1951, Article 33(1), according to which “no Contracting State shall expel or return (“*refouler*”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

Article 9 envisages a multiagency approach to protect the physical, psychological and social recovery of trafficked persons, which includes NGOs and stakeholders from civil society. NGOs, in particular, have a crucial role to play; they provide psychological support and help victims to regain autonomy and reintegrate back into society.²⁵ The voice of the victim is also crucial to the fight against trafficking. As stated in a keynote address to the United Nations General Assembly:

... if we are ever to eliminate trafficking in persons, we will have to free victims from the fear of telling their stories. The only way we will be able to free victims from fear is to ensure that they are protected.²⁶

An effective criminal justice system requires not only the prosecution aspect of trafficking, but also the protection of the human rights and dignity of victims at all stages of the law-enforcement process.²⁷ A human rights-based approach could be achieved if States reinforced their commitment under the United Nations Protocol and gave full statutory basis to victim protection and victim assistance.

2.2 International human rights law

If I knew I had rights, I would never have allowed myself to be exploited!

(former trafficked person, 2009)²⁸

The protection of the victim's human rights and interests is defined by international norms, principles and standards. States' obligations under international law not only include refraining from violating human rights, but also taking positive steps to ensure that rights are not infringed upon by other individuals.²⁹ To this end, national anti-trafficking

²⁵ The interviewees pointed out that, as more and more NGOs have to rely on government funding to be able to conduct their work, there is a risk of compromising their independence. It is important to have government-mandated NGOs, but they should have a clear mandate with a clear description, and have experienced professionals whose task is to uphold the human rights of trafficked persons under their care.

²⁶ Taken from the keynote address made by the former IOM Deputy Director General, Mrs Ndioro Ndiaye, in 2008 at the United Nations thematic debate on human trafficking.

²⁷ OHCHR (2009) (note the reference to the Committee against Torture which emphasizes the importance of providing assistance to victims of trafficking on the sole basis of their needs, and regardless of whether they collaborate with investigators (CAT/C/AUS/CO/3)).

²⁸ Taken from a former trafficked person's speech at the IOM International Dialogue on Migration (2009) Workshop on Trafficking in Persons and Exploitation of Migrants: Ensuring Protection of Human Rights.

²⁹ Note that, under international law, universal human rights have horizontal application.

legislation and immigration policies should not adversely affect the human rights of victims.³⁰

The saving clause in the United Nations Protocol seeks to ensure that efforts to combat trafficking do not undermine rights, obligations and responsibilities under international law, in particular human rights and the right to seek asylum.³¹

The Universal Declaration of Human Rights of 1948³² and binding international treaties³³ afford inalienable and inviolable rights to victims, regardless of nationality or immigration status. Similarly, the Convention on the Rights of the Child of 1989³⁴ and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography of 2000 guarantee protection to all child victims under 18 years of age. According to the United Nations Committee on the Rights of the Child, States need to ensure “by all appropriate means” that the provisions of the Convention on the Rights of the Child are given legal effect in national legislation.³⁵

States have international obligations to protect all persons within the jurisdiction of their territory. Hence, States are not allowed to expel victims if there is a real risk of harm upon return to the country of

³⁰ See Principles 1 and 3 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

³¹ See the preamble and Article 14. Note that, according to UNODC (2004), this implies, for example, that residence permit procedures should be applied jointly with asylum procedures.

³² See in particular Articles 2 and 4. Note that the Universal Declaration of Human Rights has acquired force as customary international law and is binding on all States. Note also OHCHR (2009), wherein the Human Rights Committee identifies human trafficking as constituting a potential violation of Articles 3, 8, 24 and 26 of the International Covenant on Civil and Political Rights of 1966.

³³ See the *Compendium of International Migration Law Instruments* (compiled and edited by R. Perruchoud and K. Tomalova, 2007) outlining the relevant international treaties, namely: the International Covenant on Civil and Political Rights (1966); the International Convention on the Elimination of All Forms of Racial Discrimination (1965); the International Covenant on Economic, Social and Cultural Rights (1966); the Convention on the Rights of the Child (1989) and the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography (2000); the Convention on the Elimination of All Forms of Discrimination against Women (1979); the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); the Convention relating to the Status of Refugees (1951); and the Protocol relating to the Status of Refugees (1967).

³⁴ In terms of Article 3, the best interests of the child are paramount in all legislative reform and policy. Article 35 requires measures to prevent trafficking in children for any purpose and in any form, and Article 19 sets out protective measures and requires States to take a variety of measures, including legislative, administrative, social and educational measures, to protect children from all forms of violence.

³⁵ Committee on the Rights of the Child, General Comment No. 5 (2003) (CRC/GC/2003/5).

origin or if the victim would likely suffer inhumane and degrading treatment. The prohibition of expulsion and the issuance of temporary residence to irregular migrants stem from the International Covenant on Civil and Political Rights of 1966 and the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990.³⁶ Article 7 of the International Covenant on Civil and Political Rights prohibits expulsion of a victim if there is evidence of a real risk upon return to the country of origin or if the victim is likely to be subjected to inhumane and degrading treatment. Moreover, Article 69 of the Migrant Workers Convention obliges States to take appropriate steps to address the undocumented status of victims and, whenever possible, to legalize their stay with due regard to circumstances of entry, duration of stay and family situation.

The Human Rights Council recently called upon governments to integrate a human rights-based approach into the formulation, review and implementation of national legislation and policy.³⁷ According to the United Nations Office on Drugs and Crime (UNODC) *Toolkit to Combat Trafficking in Persons*:

A reflection period and a temporary resident permit would ideally be granted regardless of ability or willingness to give evidence as a witness. Such protection measures serve to raise confidence in the State, and once recovered, the victim is more likely to make an informed decision to cooperate in investigations and prosecution (UNODC, 2008).

While law-enforcement objectives lie at the heart of combating trafficking, the criminal justice system cannot be seen in isolation. Providing legal residence to victims is a means by which to achieve victim participation in the criminal justice system. According to the existing international legal framework, this can be achieved by including the following measures in national legislation: primacy of human rights; best interests of the child; right to residence; protection and assistance measures; free movement; right to seek asylum;

³⁶ See Article 7 of both legal instruments. Note that all four countries have ratified the International Covenant on Civil and Political Rights; however, none of the countries has ratified the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

³⁷ Human Rights Council resolution 11/3: Trafficking in persons, especially women and children, adopted at the 27th meeting, 17 June 2009 (without a vote).

principles of non-refoulement and non-discrimination; asset forfeiture to the benefit of victims; access to legal redress; and safe return.³⁸

To ensure that human rights are fully respected, efforts to investigate and prosecute traffickers should be balanced with protecting victims' human rights and interests. Institutionalizing reflection periods and the right to residence permits is a means by which to reinforce States' commitment under the United Nations Protocol. The report's focus will now turn to providing an analysis of the residence provisions upheld through relevant regional instruments.

³⁸ See OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking (E/2002/68/Add.1).

PART 3: Regional instruments: European Union law and Council of Europe standards

This part of the report provides an analysis of the European legal framework on the right to a reflection period and the right to temporary residence, including the necessary measures to protect the human rights and interests of victims.

At the European level, a number of Council of Europe and European Union legal instruments address trafficking in persons. The European Union policy on trafficking in persons generally includes a human rights-based approach, placing the rights of the victim at the centre of the issue and taking into account the additional challenges for specific groups, such as women and children and individuals discriminated against on any grounds, such as members of minorities and indigenous groups (Council of the European Union, 2010).

The European Union Council Framework Decision 2002/629/JHA³⁹ identifies trafficking in human beings as a serious violation of fundamental human rights and human dignity.⁴⁰ This is reiterated in all the regional instruments relating to anti-trafficking. It should be noted that there was a proposal to repeal the Council Framework Decision and to introduce a new framework with, inter alia, stronger protection measures that include risk assessments and access to witness protection.⁴¹ The European Parliament adopted a legislative resolution on “the proposal for a directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA”. The agreed text adopts an integrated human rights approach

³⁹ See Council Framework Decision 2002/629/JHA on combating trafficking in human beings (19 July 2002). The Council Framework Decision aims to harmonize the laws and regulations of European Union Member States and is binding on all Member States.

⁴⁰ See Article 7(1), which states that investigations or prosecution “shall not be dependent on the report or accusation made by the person subjected to the offence.” Note also Opinion No. 4/2009 of the European Commission Group of Experts on Trafficking in Human Beings on a possible revision of Council Directive 2004/81/EC of 29 April 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.

⁴¹ See the Proposal for a Council Framework Decision on preventing trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, submitted by the European Commission to the Council on 26 March 2009, COM(2009) 136 final. The European Commission tabled the Proposal on 29 March 2010. For further details, see the Proposal for a Directive on preventing and combating trafficking in human beings and protecting victims, repealing Framework Decision 2002/629/JHA.

and it specifically states that assistance and support to victims should not be conditional on their willingness to cooperate in the criminal investigation, prosecution and trial, without prejudice to Directive 2004/81/EC.⁴²

In addition to their international obligations, States in Europe are bound by the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 and the Charter of Fundamental Rights of the European Union of 2000 which apply to all victims found within the European territory, regardless of whether they are in a regular or irregular situation.⁴³ The reinforcement of the principle of non-discrimination and non-refoulement at the regional level obliges States not to return victims if there is a real risk of re-trafficking.

According to the Brussels Declaration on Preventing and Combating Trafficking in Human Beings of 2002,⁴⁴ law-enforcement officers have a duty to conduct risk assessments at every stage of the investigation and judicial process; they must also respect human rights and protect the safety of victims and their families. Testimonies of victims are vital to criminal investigations and prosecution. According to the European Commission's findings (EC, 2008):

... figures show that in countries where there are a significant number of assisted victims, statistics on criminal proceedings are higher. This implies that a human rights-centred approach is needed not only to protect victims' rights, but also in the interest of justice.

The Council of Europe Convention on Action against Trafficking in Human Beings of 2005⁴⁵ and the European Union Council Directive 2004/81/EC⁴⁶ provide the regional framework for the issuance of residence permits. The saving clauses in both instruments seek to

⁴² For further detail see: <http://www.europarl.europa.eu/oeil/file.jsp?id=5849482>

⁴³ Note that the fundamental rights and freedoms in these instruments stem from the Universal Declaration of Human Rights (1948). Both legal instruments are binding on Austria, Belgium and Italy.

⁴⁴ See Article 13 of the Brussels Declaration. The Declaration has generated a number of follow-up actions, including the establishment of the European Commission Group of Experts on Trafficking in Human Beings, which was established by European Commission Decision 2007/675/EC.

⁴⁵ Adopted on 16 May 2005 and entered into force on 1 February 2008.

⁴⁶ Council Directive 2004/81/EC of 29 April 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.

ensure that obligations under international and other regional laws are upheld.⁴⁷ It should be noted that both refer only to short-term temporary residence permits, with the possibility of issuing permanent residence permits being left to the discretion of States.

3.1 Council of Europe Convention of 2005

It is apparent from the protection and assistance provisions that the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 aims to strike a balance between the human rights of victims and the interests of States. This is evident in the purpose of the Council of Europe Convention which emphasizes the protection of human rights through a comprehensive framework that protects victims and witnesses, while equally ensuring effective investigations and prosecution.⁴⁸ The achievement of this purpose has been the subject of much debate. The written text does, however, promote a rights-based approach. Both Austria and Belgium have ratified the Council of Europe Convention, whereas Italy has only signed and is yet to ratify the Convention.⁴⁹

Article 13 stipulates that national legislation must provide for a minimum 30-day recovery and reflection period if there are reasonable grounds to believe that the person is a victim. The standard of “reasonableness” takes into account delays in the formal identification procedure and broadens the scope to include presumed victims.⁵⁰ It should be noted that, during the drafting phase of the Council of Europe Convention, the European Commission Group of Experts on Trafficking in Human Beings advocated for a three-month reflection period as the minimum time needed to provide support measures to victims and to conduct

⁴⁷ See Article 40 of the Council of Europe Convention which adopts the same provision enshrined in the United Nations Protocol and the preamble to the European Union Council Directive, which states that it is without prejudice to refugee and subsidiary protection provided under international law, as well as other international human rights instruments.

⁴⁸ Article 1 provides: “The purpose of the Convention is: (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; and (c) to promote international cooperation on action against trafficking in human beings.”

⁴⁹ Note that Switzerland, although not a European Union Member State, has also signed the Council of Europe Convention.

⁵⁰ See the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

risk assessments.⁵¹ In 2009, the Group of Experts reinforced its recommendation by stating that unconditional assistance should be granted to victims irrespective of their willingness or ability to provide evidence.⁵²

Article 10 emphasizes that proper identification is the first step to accessing protection, and, as front line services, all competent authorities should be adequately trained to identify and help victims, including children, to ensure that different authorities collaborate with each other and with service providers, and to issue residence permits in appropriate cases. It should be noted that the reflection period is not subject to the victim cooperating with investigations or prosecution. Hence, States should not confuse the recovery and reflection period with the issuance of residence permits.⁵³

The purpose of the reflection period is twofold: first, to allow the victim to recover and escape from the influence of the trafficker; and, second, so that the victim can make an informed decision on whether to cooperate with law-enforcement authorities.⁵⁴ The European Commission Group of Experts notes that formal identification of victims is an additional purpose of the reflection period.⁵⁵ During the reflection period, victims should be entitled to the protection and assistance measures enshrined in Article 12 of the Convention, and the competent authorities are prohibited from expelling the victim from the country.

Article 12(6) stipulates that the direct assistance measures are not contingent on the willingness or ability to cooperate with law-enforcement authorities. States are obliged to take positive steps to protect victims and to address their needs; the minimum measures

⁵¹ European Commission Group of Experts on Trafficking in Human Beings 2004 Opinion on reflection period and resident permit for victims of trafficking in human beings.

⁵² Group of Experts on Trafficking in Human Beings Opinion No. 4/2009 on a possible revision of Council Directive 2004/81/EC of 29 April 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.

⁵³ See the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

⁵⁴ See Article 13(1) of the Council of Europe Convention.

⁵⁵ European Commission Group of Experts on Trafficking in Human Beings 2004 Opinion on reflection period and resident permit for victims of trafficking in human beings; and Opinion No. 4/2009 on a possible revision of Council Directive 2004/81/EC of 29 April 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.

include: emergency medical treatment, secure accommodation, psychological and material assistance, counselling and information on legal rights, and access to education for children. Moreover, once issued with a residence permit, victims may be entitled to work and receive vocational training and education. While this provision seeks to assist victims to regain autonomy and take steps towards social integration, it does not create an obligation on the State. States have the discretion to establish appropriate rules on access to the labour market in accordance with national legislation.

Article 14 outlines the grounds for the issuance of residence permits to victims. States are obliged to issue renewable residence permits based on two criteria: first, the victim's personal situation; and, second, cooperation with the competent authorities in investigations or criminal proceedings. States have the discretion to grant residence permits on the basis of either grounds, or they may choose both. Moreover, States may refuse to grant residence permits in the interests of public order or if claims are fraudulent. The law in Belgium explicitly links residence options to cooperation with law-enforcement authorities, whereas the law in Italy includes both criteria with an emphasis on the personal situation of the victim. In Austria, the law links residence options to the institution of legal proceedings (see section 4.3.3).⁵⁶ It should be noted that victims do not have an automatic right to residence. The granting of residence permits is determined by the competent authorities on a case-by-case basis according to the conditions set out in national law. The intention underlying the link to cooperation with law-enforcement authorities is to encourage victims to contact authorities without the fear of being deported.⁵⁷ Granting residence permits to victims serves the dual purpose of protecting the needs of the victim and combating trafficking. Article 14 establishes a regional standard that supports delinking the granting of residence permits and cooperation with law-enforcement authorities. The personal circumstances of the victim, including fear of reprisals carried out by traffickers against victims and/or their families in the country of origin, are equally important factors to be taken into account throughout the residence permit issuance process.

⁵⁶ Note that the issuance of residence permits in the United States is also based on the link to cooperation with law-enforcement authorities.

⁵⁷ See the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

The European Commission Group of Experts notes that victims should not be treated merely as instruments in prosecution; moreover, providing reflection periods and residence permits regardless of the ability or willingness to give evidence helps to uphold States' obligation to protect the human rights of victims.⁵⁸ This supports the view that legal measures should seek to ensure that assistance and protection is not rendered on the basis of the "usefulness" of the victim (Konrad, 2006).

The Council of Europe Convention is silent on the length of residence permits. However, while States have the discretion to determine the duration of the permit, it must be compatible with European Union Council Directive 2004/81/EC, which stipulates a minimum period of six months. The conditions of renewal and withdrawal are, however, left to the discretion of States.

The Council of Europe Convention clearly states that residence procedures should not detract from the victim's right to seek asylum. States are also obliged to uphold the principles of non-discrimination and non-refoulement (Articles 3, 14(5) and 40(4)). The best interests of the child and the physical safety of victims are paramount, and States are obliged to guarantee the victims' right to privacy, confidentiality, compensation, legal redress, safe return and witness protection during and after investigations and prosecution (Articles 14, 15, 16, 28 and 30). Moreover, victims should be provided with access to information on relevant judicial and administrative procedures from the first point of contact with competent authorities; this includes the right to appeal or review procedures on residence permits.⁵⁹

In contrast to the United Nations Protocol, the Council of Europe Convention goes beyond the minimum standards: human trafficking is defined as a human rights violation and the victim protection aspect of trafficking is also emphasized.⁶⁰

⁵⁸ Group of Experts on Trafficking in Human Beings 2004 Opinion on reflection period and resident permit for victims of trafficking in human beings; and Opinion No. 4/2009 on a possible revision of Council Directive 2004/81/EC of 29 April 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.

⁵⁹ See Article 15 and the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

⁶⁰ See the Explanatory Report on the Council of Europe Convention on Action against Trafficking in Human Beings.

3.2 European Union Council Directive 2004/81/EC

The European Union Council Directive 2004/81/EC⁶¹ is binding on all European Union Member States. It establishes the framework for a common immigration policy, regardless of immigration status.

One of the key objectives of the European Union Council Directive is to develop a harmonized response to identification and victim assistance through the establishment of reflection periods and residence options based on cooperation with law-enforcement authorities. As found in a recent study conducted by IOM Brussels, this objective has been met to a degree, but in practice there is a diverse range of approaches. Of particular importance is the concept of the “competent authority”⁶² and the lack of clarity as to which entity represents the competent authority. Even though the role of the competent authority is central in the application of the European Union Council Directive, in some countries it is clearly identified in the national law, whereas in other countries it appears that governmental authorities and/or NGOs may take up this role.⁶³ Although the IOM Brussels study differed in scope to this present study, some key trends emerged. The research findings demonstrated a consensus among practitioners that the protection and assistance provided by the European Union Council Directive should be applicable to all victims, irrespective of whether they are nationals of the country, European Union nationals or third-country nationals. It also reflected that no cases had been reported in which access to a reflection period or a residency permit was withdrawn because the victim failed to abide by the terms laid out in the European Union Council Directive.⁶⁴

⁶¹ Council Directive 2004/81/EC of 29 April 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.

⁶² Note that “competent authorities” are defined as police, prosecution and judicial authorities.

⁶³ The IOM Brussels study focused on the application of the European Union Council Directive in a number of European Union Member States, including Austria, Belgium and Italy, with a view to putting forward recommendations to the European Commission.

⁶⁴ Conclusions and Recommendations: Preventing and Combating Trafficking in Human Beings and Enhancing Victim Protection through Operational Networking, Cooperation and Joint Multi-disciplinary Trainings for Counter-trafficking Specialists in EU Member States, Candidate and Neighbouring Countries. This forthcoming IOM report was funded by the European Commission, with financial support being provided by the Ministry of Interior of Italy, the Ministry of Foreign Affairs of Greece and the Ministry for Justice and Home Affairs of Malta.

While the European Union Council Directive can be commended for being the first instrument to broadly cover irregular migrants in the European Union, it is not centred on protecting human rights (Cholewinski, 2006). Instead, the main objective is to use residence permits as incentives to prevent irregular immigration. Moreover, the European Union Council Directive applies only to third-country nationals who are over the age of majority: it excludes nationals of the country in question, European Union nationals and children. States may, however, by way of derogation, include minors in national legislation. The best interests of the child in accordance with international norms and principles, however, call for a clear statutory basis to ensure that full effect is given to the provisions in the Convention on the Rights of the Child of 1989. While the European Union Council Directive falls short in many respects, it allows States to adopt more favourable provisions (Article 4) and does not detract from the right to residence on the grounds of humanitarian factors. States are also obliged to uphold the principles of non-discrimination and non-refoulement (preamble).

All European Union countries are obliged to provide victims with a reflection period to help them to recover and escape from the perpetrators, and to allow victims to make an informed decision on whether to cooperate with the competent authorities. The European Union Council Directive adds another dimension to the reflection period: States are required to inform victims of the possibility to access residence permits on the basis of the criteria set out in Article 8. Moreover, if a reflection period is granted, expulsion orders cannot be enforced until the reflection period has expired. Article 6(3) stresses that the reflection period does not create a right to residence, thereby emphasizing that the reflection period and residence period are two different stages. States are left to determine the duration of the reflection period in accordance with national legislation.

Article 6(4) enables States to terminate the reflection period on three grounds: first, if victims renew contact with the perpetrators; second, for reasons relating to public policy; and third, if public order and national security are under threat. The requirement to sever all ties with the perpetrators, especially during the reflection period, is an unrealistic requirement as it does not take into account the complexities of the trafficking experience; in particular, the involvement of family members or persons previously known to the victim at the recruitment

or exploitation phase, the victim's fear of reprisal from the trafficker or the "Stockholm syndrome" phenomenon.⁶⁵

It should be noted that States are obliged to take the safety and protection needs of victims into account and to provide the following minimum direct assistance measures: sufficient standards of living, safety and protection in accordance with national law, emergency medical treatment, legal services and, where appropriate, translation and interpretation services (Article 7). Such assistance should be available to victims at both stages, during the reflection period and the residence permit period. In addition, victims should have access to social schemes that assist with the recovery process (Article 12).

Once the reflection period expires, a residence permit may be granted for a minimum six-month period for assisting with investigations or prosecution. The European Union Council Directive states that temporary residence permits should be renewable after the six-month period. It does not, however, specify the length of the renewal. Victims must meet two criteria to obtain temporary residence permits; first, there must be a clear intention to cooperate with law-enforcement authorities; and, second, the victim must sever all ties with the perpetrators (Article 8). The Directive also stipulates that a State may withdraw a residence permit at any time if the conditions on which it was granted cease to exist, for example, if the victim renews contact with the perpetrators; if the competent authorities believe that the victim's claim is fraudulent; if public policy and national security are under threat; if the victim no longer cooperates in the context of a criminal or judicial procedure; or if the competent authorities halt the investigation or prosecution (Articles 8 and 14).

During the residence period, which is linked to the duration of the investigation or prosecution, victims should be provided with access to the labour market, vocational training and education (Article 11). Similarly to the Council of Europe Convention, this provision does not create a legal right to access the labour market as States have the discretion to set conditions in national legislation. While Article 10 refers

⁶⁵ The Stockholm syndrome is a psychological response to an abduction or hostage situation, where victims show signs of misplaced loyalty to the trafficker, regardless of the danger or risk to their life.

to the best interests of the child, including assisting unaccompanied minors with family reunification, the preamble explicitly states that the European Union Council Directive does not apply to children under 18 years of age. Even though States may adopt more favourable provisions under national legislation to include children, there is no obligation to grant them residence permits. This is contrary to international obligations which require States to take positive legislative actions to protect the rights and interests of children.⁶⁶ As recommended by the European Commission Group of Experts, children should have an automatic right to stay in the country.⁶⁷ The European Parliament recently adopted a resolution⁶⁸ calling for protection and unconditional aid to victims of human trafficking, especially women and children. Accordingly:

... victims should receive all possible help from the moment they are identified as such, including access to at least a temporary residence permit, irrespective of their willingness to cooperate in criminal proceedings, and simplified access to the labour market, including the provision of training and other forms of upskilling. The European Parliament also asks for a simplified family reunification policy for victims, particularly where this is required for their protection, access to appropriate secure accommodation, including the provision of a food/subsistence allowance, to emergency medical treatment, to counselling services, translation and interpretation where appropriate, help contacting family and friends, and access to education for children.⁶⁹

From a human rights perspective, the grounds for issuing residence permits are limited to State objectives and fail to protect the rights and interests of victims as an explicit objective. There is a need to broaden

⁶⁶ See the Convention on the Rights of the Child of 1989.

⁶⁷ European Commission Group of Experts on Trafficking in Human Beings 2004 Opinion on reflection period and resident permit for victims of trafficking in human beings; and Opinion No. 4/2009 on a possible revision of Council Directive 2004/81/EC of 29 April 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.

⁶⁸ The European Parliament resolution of 10 February 2010 on preventing trafficking in human beings.

⁶⁹ Taken from an online article: EU Parliament calls for unconditional aid to victims of human trafficking (10 February 2010), http://europa-eu-un.com/articles/en/article_9487_en.htm

the scope to include presumed victims, as well as European Union nationals and third-country nationals who are legally in the country. Moreover, the European Union Council Directive is silent on the right to privacy, confidentiality, risk assessments, witness protection, legal redress, compensation and residence for children. It should be noted that the European Commission Group of Experts 2009 Opinion concerning the revision of the European Union Council Directive recommends a minimum three-month reflection period and a minimum one-year residence permit that is renewable and convertible to ordinary residence under national immigration laws.⁷⁰ Despite the shortfalls, the European Union Council Directive complements the Council of Europe Convention, and States are obliged to transpose the minimum provisions into national legislation (Article 17).

⁷⁰ Opinion No. 4/2009 mentioned in footnote 66.

PART 4: Overview of the national legal frameworks

This part of the report provides a comparative overview of the national legal frameworks in Austria, Belgium, Italy and the United States. It outlines the preconditions and eligibility criteria for acquiring residence status, including conformity to regional and international legal norms and standards, and also describes the procedural steps governing the issuance of a residence permit on the grounds of being a trafficked person, the discretionary powers of competent authorities, prohibition against expulsion, family reunification and residence for unaccompanied minors, as well as entitlements provided by the State and access to social and economic rights to assist with the rehabilitation and reintegration of trafficked persons back into society.

A detailed assessment of the transposition of the regional and international legal instruments into the respective national laws is included in the individual country reports which formed the basis of this comparative report. The country reports serve as a reference guide and further elaborate on the research findings.

4.1 Legal basis

Since all four countries have ratified the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000,⁷¹ their international obligations include implementing protection and assistance measures while affording full respect for the human rights and interests of victims. As stated in Part 2 of this report, Article 6 of the United Nations Protocol requires State Parties to consider implementing assistance measures to protect the physical, psychological and social recovery of victims. Moreover, Article 7 states that “each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently...” In addition, three of the countries have regional obligations under the European legal framework.⁷²

⁷¹ Austria, Belgium, Italy and the United States are State Parties to the United Nations Protocol, having ratified the instrument on 15 September 2005, 11 August 2004, 2 August 2006 and 3 November 2005, respectively.

⁷² See Part 3 for further details.

While Austria and Belgium have ratified the Council of Europe Convention on Action against Trafficking in Human Beings of 2005, Italy is only a signatory and is yet to ratify the Convention.⁷³ As European Union Member States, Austria, Belgium and Italy have mandatory obligations to transpose into national law the European Union Council Directive 2004/81/EC of 29 April 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.⁷⁴

As stated in Part 3, the Council of Europe Convention and the European Union Council Directive set the framework for the implementation of legislative measures that guarantee the right to a reflection period and the right to residence status under set conditions. Italy and Belgium were instrumental in the development of the European legal framework. Even though Italy is yet to ratify the Council of Europe Convention, one interviewee noted that: “The Italian law inspired European-level discussions which led to the enactment of the Council of Europe Convention.” (interviewee response, Italy). The procedure in Belgium, although without legal force until 2006, had been in place since 1994 in the form of a Ministerial Circular.⁷⁵ Interviewees noted that the Belgian procedure and Italian law, which predate the enactment of the European legal instruments, were used as a guide to set the regional standards on the reflection period and the issuance of short-term temporary residence permits.

In Belgium and Italy, civil society and the competent authorities continue in their efforts to shape law at the European level. NGOs in particular advocate for the primacy of the rights and the interests of the victim and are often involved in training to ensure that law-enforcement authorities are sensitive to the needs of the victim and that objectives to combat trafficking do not adversely affect the rights and interests of the victim. They are also involved at the policy level. For example, one government official noted: “One big discussion at the moment is shall we implement unconditional assistance or not? The European

⁷³ Austria and Belgium ratified the Council of Europe Convention on 12 October 2006 and 27 April 2009, respectively, and Italy signed the Convention on 8 June 2005.

⁷⁴ The Council Directive is binding on all European Union Member States. Article 17 provides that: “The Member States shall bring into force laws, regulations and administrative provisions necessary to comply with this Directive before 6 August 2006.”

⁷⁵ Ministerial Circular concerning the Granting of Residence Permits and Work Permits to Foreigners who are Victims of Trafficking (1994).

Commission recently proposed to adapt the European Union Council Directive to include two options: one is to maintain collaboration with law enforcement and the other would be unconditional assistance [without the link to cooperation].” (interviewee response, Belgium).

In Austria, the law recently changed following a decision of the Constitutional Court.⁷⁶ Previously, only *ex officio*⁷⁷ applications for residence on humanitarian grounds were granted. The Constitutional Court decision, however, found the old provision (Article 72 of the Settlement and Residence Act of 2006)⁷⁸ to be unconstitutional and stated that denial of the right to apply for residence permits was contrary to the rule of law and conflicted with the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. Consequently, Article 69(a) of the Act came into force as recently as 1 April 2009.⁷⁹ One lawyer who was interviewed noted that: “The new law has good and bad points: on the one hand, victims now have two opportunities to apply for residence status, individually and *ex officio*; on the other hand, there is lack of awareness, and training of law enforcement is needed.” (interviewee response, Austria).

The Austrian law is supplemented by commentary notes, which stipulate that the new provision transposes the European Union Council Directive. While the law states that six-month renewable residence permits should be granted,⁸⁰ it does not give legal effect to all the necessary victim protection and victim assistance measures as

⁷⁶ Constitutional Court (VfGH), Case No. G246/07 of 27 June 2008.

⁷⁷ The Latin term “*ex officio*” refers to the power conferred by virtue of one’s office. Previously, under the Article 72 provision, only authorities were allowed to request temporary residence permits on humanitarian grounds and victims had no right to make an application. Giving effect to the Constitutional Court decision, the new Article 69(a) allows for both *ex officio* applications and individual applications from the victim. The wording also changed from “humanitarian” to “special protection” to include all third-country nationals in need of protection.

⁷⁸ Federal Act concerning settlement and residence in Austria (Settlement and Residence Act), Federal Law Gazette No. 100/2005 in the version Federal Law Gazette No. 31/2006 (*Niederlassungs und Aufenthaltsgesetz – NAG*).

⁷⁹ It should be noted that the new Article 69(a) of the Settlement and Residence Act of 2006 was amended after the completion of this study. The amendment was adopted on 23 November 2009 by the Austrian Parliament. Substantial changes include the introduction of a “resident permit – special protection permit” to unaccompanied minors whose guardianship has been transferred to welfare authorities or foster parents. See EMN (2010).

⁸⁰ The commentary notes mention that the six-month duration is derived from the Directive on Victim Protection. This is, however, an internal ministerial directive. The researchers requested copies of the ministerial directives from interviewees during the field research, but copies were not available.

envisaged in the European Union Council Directive. It is silent on the right to a reflection period and does not include provisions on the physical, psychological and social recovery of the victim. Although Article 69(a) aims to be broad in scope, it is very brief, with the details and explanations on procedure being covered in the commentary notes and directives issued by ministries. Interviewees noted that Austria had very little experience in implementing the new law. Many interviewees noted the following: “The change in the law was a positive legal step, [but] it only remedied the unconstitutionality of the old provision ... the law remains vague and open to interpretation.” (interviewee response, Austria).

In Italy, Article 18 of Legislative Decree No. 286/1998⁸¹ provides for the issuance of six-month renewable residence permits in accordance with the European Union Council Directive. In addition, Act No. 228/2003⁸² broadened the scope of the application of Article 18 by amending the definition of the crime of trafficking in persons in the Italian Penal Code and the Code of Criminal Procedure in accordance with the definition in the United Nations Protocol. From a human rights perspective, the Italian law is the most comprehensive and encompassing of the rights and interests of victims. As one interviewee noted, in order to succeed in implementation, three elements are absolutely necessary: “good social services, good police forces and a good public prosecutor.” (interviewee response, Italy). The law is based on a protection framework that stems from the history of organized criminal syndicates in Italy. Consequently, the crime of trafficking in persons is investigated at the federal and local levels. As one interviewee noted: “... there are two branches of law enforcement: the ordinary prosecutor’s office and the anti-mafia prosecutors.” (interviewee response, Italy). Residence permits are granted in two ways: either the prosecutor requests a residence permit on the basis of the victim’s cooperation with law-enforcement authorities (“judicial path”), or a registered service provider requests a residence permit based on the victim’s enrolment in a rehabilitation and social integration programme (“social path”) (see section 4.3.2 below).

The Italian law predates regional and international standards. Many interviewees in the other countries studied commented on the need to adopt a more balanced approach as in Italy. One interviewee noted that:

⁸¹ Article 18 of Legislative Decree No. 286 of 25 July 1998: Consolidated Act on Provisions concerning Immigration and the Condition of Foreign Citizens.

⁸² Act No. 228 of 11 August 2003: Measures against Trafficking in Persons.

“Italian legislation envisages some provisions which go far beyond the average legal scenario.” (interviewee response, Italy). The law extends beyond the scope of the European Union Council Directive. It also applies to all third-country nationals and includes all European Union nationals in need of rehabilitation and social assistance. This complies with the European Union Council Directive, which allows for more favourable provisions in the interests of the victim.⁸³ Of the four countries studied, Italy is the one that provides residence options based on the personal situation of the trafficked person.

The Italian law is supplemented by a joint ministerial directive,⁸⁴ which explains the application of the law and emphasizes that, while Article 18 is a legal tool to combat trafficking, the focus is on the rehabilitation and recovery of the victim.⁸⁵ In addition, an inter-ministerial commission was established under the auspices of the Ministry of Equal Opportunities to oversee and implement the provisions of Article 18.⁸⁶ The inter-ministerial commission includes representatives of the relevant ministries whose activities include monitoring the execution of rehabilitation and social integration programmes, and requires local authorities involved in the issuance of residence permits to submit evaluation reports every six months. Providing a legal basis for monitoring and evaluation is an effective means by which to govern practical application of the law.

Belgium adopted the procedure outlined in the 1994 Ministerial Circular through the Act of 15 September 2006 amending the Act of 15 December 1980 concerning the Access to the Territory, the Stay, the Settlement and the Removal of Foreigners,⁸⁷ as a result of its mandatory obligations under the European Union Council Directive.

⁸³ Article 4 of the Council Directive provides that: “This Directive shall not prevent Member States from adopting or maintaining more favourable provisions for the persons covered by this Directive.”

⁸⁴ Decree of the President of the Republic No. 394 of 31 August 1999, and the amendments set forth in Decree of the President of the Republic No. 334 of 18 October 2004: Rules for the Implementation of the Consolidated Act on Provisions concerning Immigration and the Condition of Foreign Citizens, according to Article 1, paragraph 6, of Legislative Decree No. 286 of 25 July 1998.

⁸⁵ Trafficking in Human Beings: A Collection of Italian Legislative Provisions and Regulations. One of the interviewees provided the researchers with this document during the interviews.

⁸⁶ The inter-ministerial commission was established under Article 25 of Legislative Decree No. 394/1999.

⁸⁷ See Articles 64 to 68 of the Act of 15 September 2006 amending the Act of 15 December 1980 concerning the Access to the Territory, the Stay, the Settlement and the Removal of Foreigners, *Belgian Official Journal* of 6 October 2006.

It appears that the 1994 Ministerial Circular was directly transposed into the Act of 2006 with a few minor exceptions, notably the absence of a provision on employment and the additional requirement of proof of identity (Noll and Gunneflo, 2007). Unlike the laws of the other countries studied, the Belgian law explicitly provides for a 45-day reflection period which exceeds the minimum 30-day period as stipulated in the Council of Europe Convention.

The Belgian law is supplemented by the 2008 Ministerial Circular,⁸⁸ which aims to achieve a multidisciplinary approach to victim protection by enhancing cooperation between all actors, namely the relevant ministries, law-enforcement authorities, social inspection services, public prosecutors and victim-support centres. One interviewee noted that the Belgian law goes further than the regional legal standards: “It is more detailed than the European system. For example, permanent residence permits are not foreseen in the European Union Council Directive.” (interviewee response, Belgium). Implementing legislative measures that exceed the requirements of the European Union Council Directive is commendable. The law does not, however, comply with the minimum six-month period for issuing residence permits as required by the Directive. Instead, a two-tier approach is adopted: an initial three-month residence permit is issued under set conditions and, thereafter, if further conditions are met, a second three-month temporary permit is issued.

In contrast to the European legal framework, the United States law governs the issuance of two types of residence status: continued presence status and T nonimmigrant status. The Victims of Trafficking and Violence Protection Act of 2000 (TVPA), as amended by the Reauthorization Acts of 2003 and 2005, and more recently by the William Wilberforce Trafficking Victims Protection Reauthorization Act of 2008, outlines the eligibility criteria and procedure for acquiring T visas (residence permits). The TVPA is comprehensive and creates standards for the provision of protection and assistance measures in accordance with the United Nations Protocol. While the United States law differs significantly from the laws in the other countries

⁸⁸ Ministerial Circular of 26 September 2008 concerning the introduction of multidisciplinary cooperation in relation to victims of human trafficking and/or certain aggravated forms of human smuggling, *Belgian Official Journal* of 31 October 2008. It should be noted that the 2008 Ministerial Circular is currently under evaluation and the conclusions will be discussed in early 2011.

studied, interviewees in the United States noted similar barriers to implementation as those observed in the other three countries (See Part 5).

Significantly, and unlike the provisions of European legal instruments, the United States does not limit residence permits to temporary stay. T nonimmigrant status (temporary residence status) is granted for a period up to four years with a view to converting temporary residence status to permanent residence status. This complies with international human rights standards, focusing on the protection and reintegration of the victim into society (IOM, 2007). The TVPA sets a quota of 5,000 principal T visa applications and 5,000 adjustments of status⁸⁹ to be issued per year. It also obliges the Attorney General to submit an annual report that contains information on the number of T visas issued and successful requests for continued presence, and on training in the implementation of laws and regulations. Providing a legal basis for the large number of available residence permits reinforces the United States commitment to protecting victims. However, in practice, the quota has not been met since the TVPA entered into force in 2000. Interviewees primarily attributed this to identification challenges, the overly burdensome eligibility criteria and the availability of other protection mechanisms (see also Part 5).

4.2 Right to residence

To me it's an automatic right ... it's either a right or it is not.

(interviewee response)

The laws in all four countries formulate access to residence permits as a legal right once the criteria established in the national law have been met. It should be noted that the right to residence is not automatic and that the competent authorities in all four countries grant residence permits on a case-by-case basis. In practice, the competent authorities are given a measure of discretion to decide whether the victim meets the set criteria (see also section 4.3 below). The research findings reveal that victims are rarely seen as the holders of rights. They are instead seen as “instruments” in investigations or prosecution. This

⁸⁹ Adjustment of status refers to adjusting T nonimmigrant status to permanent residence status, through which the applicant obtains a United States permanent resident card (commonly referred to as a “green card” because of its colour).

approach is contrary to international and regional standards. It also has the potential to impede the physical, psychological and social recovery of the victim. Italy is the only country to focus on the recovery of and assistance for the victim in the first instance by requiring participation in a rehabilitation and social integration programme.

As stated in Parts 2 and 3, a human rights-based approach can be achieved if victim protection and victim protection measures are firmly embedded in the law. Similarly, the right to due process is intrinsic to any rights-based approach. Whether in a regular or irregular situation, victims should be afforded equal protection before the law. This includes appeal of administrative and judicial decisions.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁹⁰

Generally, administrative laws and procedures govern the appeal process in all four countries studied. In Italy, for example, the Central Administrative Tribunal heard an appeal claim against a decision to withdraw a temporary residence permit and stated that the residence permit should not be considered a reward for a testimony: it should not be linked to the outcome of a trial (Raffaelli, 2009). In contrast, the law in Belgium links conversion to permanent residence status with the outcome of a trial on condition that the statement or complaint made by the victim is seen to be “significant” in the successful conviction of the perpetrator.

In Austria, the Constitutional Court⁹¹ held that it was contrary to regional human rights standards to deny victims the right to apply for residence status, including the right to appeal the decisions of competent authorities. The Court also stated that unlimited discretion of the State is contrary to the rule of law. In a more recent decision,⁹²

⁹⁰ Article 26 of the International Covenant on Civil and Political Rights of 1966.

⁹¹ Constitutional Court (VfGH), Case No. G246/07 of 27 June 2008.

⁹² Administrative Court, Docket No. 2009/21/0149 (Decision) of 14 September 2009.

the Austrian Administrative Court held that it was unlawful practice to deport victims while their applications for residence on humanitarian grounds are pending. This case is particularly interesting given that the Austrian law is rather unique. Unlike the other countries studied, it specifies a time period for the issuance of residence permits: competent authorities must process applications within six weeks from the date of application. This requirement goes beyond regional and international standards. The adverse is evident in the United States, where the absence of regulations has resulted in backlogs which have a negative impact on the realization of acquired rights.

Many interviewees in Austria noted that the time period specified by the law will most likely result in more efficient processing of applications. The commentary notes to the Settlement and Residence Act of 2006 clarify that a shorter period was needed to ensure greater protection for the vulnerable individuals covered by the provision. While this is a positive legal step, it seems unrealistic at the current time as “processing generally takes 8 to 10 weeks” (interviewee response, independent consultant). Nonetheless, reasonable prescribed times can assist with expeditious issuance of residence permits and prevent backlogs, as is particularly evident in the United States, which is yet to meet the yearly T visa quota. Even though the law in Belgium is silent on the time period for issuing residence permits, in practice, residence permits are granted without delay (see Part 5 below). As one interviewee noted: “A request for a temporary permit is [often] submitted the moment the victim arrives at the shelter.” (interviewee response, Belgium). The expeditious processing of residence permits in Belgium is due to good cooperation between the competent authorities and the three official NGOs⁹³ (Payoke, Pag-Asa and Surya) funded by the Government and legally mandated to apply for residence permits on behalf of victims.

The international and regional legal instruments refer to access to legal assistance to ensure that rights are afforded to victims in vulnerable situations. Where NGOs are legally mandated by a government, they provide a wide range of services and, depending on their funding, provide legal services using either in-house expertise or in partnership with pro bono attorneys. In Italy, the law requires NGOs to register with the Ministry of Equal Opportunities, which sets criteria for the type of

⁹³ The term “official NGOs” refers to service providers that are legally mandated and funded by the Government to provide assistance to victims. For the purpose of this report, the word “official” does not relate to the registration of the NGO as a legal entity.

assistance that should be provided to victims through the rehabilitation and social integration programme, including legal assistance.

In the United States, NGOs use in-house legal advisors or partner with external service providers to provide legal advice and assist victims with T visa applications, which, as mentioned by the interviewees, are quite complex. In the United States in particular, many interviewees noted that: “The eligibility criteria are simply too burdensome – once you meet all the criteria your rights are protected – but it is often too difficult to access the system ... you need a lawyer.” (interviewee response, United States).

The T visa application appears to be even more burdensome than regular residence applications and the process does not take account of the time victims need to recuperate and gain confidence to relay their story. “That’s the biggest problem in the United States, legal advocates don’t get any funding from the Government to help trafficked persons ... the problem is also the timeframe ... the Government is not recognizing that it actually takes long to build trust with a client, to get the information that you need, have them cooperate as they need to, and then there are also social services that the victims need during this time frame.” (interviewee response, United States). In contrast, Austria has user-friendly application procedures; unlike in the United States, victims do not need a lawyer to assist in the application process. One interviewee, however, noted that: “Victims still need the legal in-house service of NGOs [to know their rights].” (interviewee response, Austria).

According to regional and international legal instruments, victims should be adequately informed of their right to apply for residence permits.⁹⁴ Only Belgian law complies with this requirement: police and inspection services are obliged to inform victims of the reflection period and the possibility to obtain a residence permit. In addition, the Centre for Equal Opportunities and Action against Racism distributes pamphlets on a nationwide basis to raise awareness of the three official NGOs (Payoke, Pag-Asa and Surya). In Austria, the law is silent on this point; however, in practice, the Criminal Intelligence

⁹⁴ See Article 6 of the United Nations Protocol, Article 12 of the Council of Europe Convention and the preamble to the Council Directive.

Service (Bundeskriminalamt) created a training manual to inform law-enforcement authorities about new developments in the law, including the right to apply for residence permits.

4.3 Preconditions for obtaining residence permits

This leads to the conditions for granting residence permits, the eligibility criteria and the measure of discretion exercised by the competent authorities. To be eligible for reflection periods or residence permits, victims must meet the set criteria established under national law. The eligibility criteria vary from country to country. The length of residence permits in the countries studied range from three months to an indefinite period corresponding to the duration of legal proceedings or other immigration provisions. Below is a comparative table summarizing the conditions for obtaining residence permits in the four countries studied.

	Reflection period	Temporary residence	Precondition	Extension of temporary residence/ Permanent residence
Austria: Article 69(a) of the Settlement and Residence Act of 2006	–	Six-month permit with six-week prescribed issuance period (renewable)	Instituting civil or criminal legal proceedings	Settlement permit unrestricted based on integration into society (extension)
Belgium: Act of 15 September 2006 amending the Act of 15 December 1980 concerning the Access to the Territory, the Stay, the Settlement and the Removal of Foreigners	Order to leave within 45 days (equates to a reflection period)	Two three-month permits (renewable once for six months)	Cooperation with law-enforcement authorities and under the care of one of the three State-mandated NGOs	Indefinite duration permit after successful conviction of the trafficker (practical equivalence to permanent residence)

Italy: Article 18 of Legislative Decree No. 286 of 25 July 1998	–	Six-month permit (renewable for one year or more)	“Judicial path”: cooperation with law-enforcement authorities; “Social path”: participation in the rehabilitation and social integration programme	Conversion to work or study permit for the duration of employment or study programme (extension)
United States: Victims of Trafficking and Violence Protection Act of 2000, as amended by the Reauthorization Acts of 2003, 2005 and 2008	–	Four-year T visa or continued presence status linked to criminal investigations (residence extended to family members)	Cooperation with law-enforcement authorities	Adjustment of status to lawful permanent residence with the issuance of a permanent resident card (permanent residence)
NOTE: The provisions in all four laws are subject to the fulfilment of set criteria.				

The competent authorities responsible for the issuance of residence permits vary in the countries studied. In Austria, the provincial governor is the competent authority, and local authorities at district immigration offices are authorized by the provincial governor to issue temporary residence permits to victims. In Belgium, the Office of Aliens of the Ministry of Interior is responsible for issuing temporary residence permits and victims are compelled to obtain the support from one of the official NGOs (Payoke, Pag-Asa and Surya) as they are legally mandated to apply for residence permits on behalf of victims. In Italy, the central reference authority for immigration issues is the Ministry of Interior, which has a decentralized structure at the local level though the municipal police headquarters (*questura*), with the chief of the local headquarters and the mayor of the city having delegated powers. In the United States, the responsible authority for issuing residence status to victims is the United States Citizenship and Immigration Services (USCIS), and the Vermont Service Center is the USCIS processing centre that handles T visa applications.

4.3.1 Identification and identity documents

Formal identification is a prerequisite for the issuance of residence permits in all four countries studied. In Austria, the Criminal Intelligence Service (Bundeskriminalamt) is responsible for formally identifying victims at the federal level. In practice, the local police usually first identify victims and subsequently inform the Criminal Intelligence Service of each particular case. The victim is then in most instances referred to LEFÖ-IBF (Intervention Centre for Migrant Women Affected by Human Trafficking), the government-funded NGO mandated to assist female victims, or Drehscheibe, a support centre operated and specifically established by the City of Vienna/Vienna Youth Welfare Authority to accommodate victims of child trafficking. In Belgium, the three official NGOs (Payoke, Pag-Asa and Surya) have the competency to establish the trafficking status of victims, but this must be confirmed by the Office of Aliens of the Ministry of Interior. In practice, the three official NGOs are involved in the initial screening of the victim. In Italy, the law states that victims must be identified as being in a situation of violence or “serious” exploitation, and there must be danger to life.⁹⁵ The law also requires NGOs assisting victims to register with the Ministry of Equal Opportunities. In practice, registered NGOs and local authorities have a formal role to identify situations of violence or serious exploitation for the purpose of issuing residence permits and the competent authority must verify such decisions. In the United States, victims must be identified as victims of a “severe form of trafficking” to benefit from the TVPA protections.⁹⁶ In practice, service providers and attorneys play a role in the identification of victims by assisting with T visa applications and verifying trafficking details of the particular victim. They do not, however, have a formal role in determining trafficking status as the competent authority is vested with this responsibility.

Interviewees noted that proper identification is crucial as it is often one of the main barriers to the provision of the right to residence. It also prevents secondary victimization resulting from victims being

⁹⁵ “Seriousness” is not defined in the law, but the Ministerial Directive (Decree 394/1999 – see section 4.1) states that the competent authority has the discretion to evaluate the seriousness and veracity of the danger.

⁹⁶ Severe forms of trafficking are defined as “sex trafficking in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such an act is under eighteen; or the recruitment, harboring, transportation, provision, or obtaining of a person for labor or services, through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.” (definitions given in the TVPA).

summarily deported or placed in detention facilities for irregular migrants (see also Part 5).

In contrast to the laws in the other countries, the law in Belgium creates an additional procedural requirement: victims must submit proof of identity to obtain residence permits. This additional requirement is not envisaged in regional and international legal instruments; nor is it evident in the laws in the other countries studied. As confirmed by the interviewees, the law is overly burdensome and creates a practical problem since many traffickers are not in possession of their identity documents (interviewee response, Belgium). In practice, however (as outlined in Part 5), Austria, Italy and the United States also require the submission of identity documents, with varying degrees of flexibility.

An additional point to note is the importance of Guideline 10 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking which highlights that: “Privileges and immunities attached to the status of an employee should not be invoked in order to shield that person from sanctions for serious crimes such as trafficking and related offences.” Since diplomatic families are protected by privileges and immunities, a number of domestic labour trafficking cases have fallen by the wayside. One interviewee in Belgium noted: “We had some problems with human trafficking within private residencies of diplomats and international delegations. Because you need a penal investigation and trial, it was not possible for those people [trafficked persons] to benefit from the procedure.” (interviewee response, Belgium). Interviewees in all the countries mentioned similar concerns and cited examples of trafficking for labour exploitation by people with diplomatic status. The 2008 Ministerial Circular in Belgium makes provision for these cases and recognizes such a victim if accompanied by one of the official NGOs mandated by the Government. This also appears to be happening in practice in the other three countries studied. In the United States, for example, the Ambassador-at-Large of the Office to Monitor and Combat Trafficking in Persons at the State Department recently stated that: “Immunity should not mean impunity to enslave domestic servants on US soil, and we will continue to work to ensure that these domestic workers are accorded full rights and human dignity in our country.”⁹⁷

⁹⁷ See S. Fitzpatrick: Diplomatic immunity leaves abused workers in shadows. *The Washington Post*, 20 September 2009.

4.3.2 Personal situation of the victim

The safety and best interests of the victim are critical to a human-rights based approach. Italy is the only country of the four countries studied to adopt two grounds for the issuance of residence permits as outlined in Article 14 of the Council of Europe Convention: first, based on the personal situation of the victim (“social path”); and/or, second, based on cooperation with law-enforcement authorities (“judicial path”) (see also section 4.3.3 below).

The Italian “social path” focuses on assistance and reintegration of victims and takes into account their personal circumstances, including fear of reprisal from the trafficker against them or their family. The condition for entry into the “social path” is that the victim voluntarily consents to enter a rehabilitation and social integration programme and accepts the conditions of enrolment and all obligations associated with the execution of the programme. Interviewees noted that enrolment in a rehabilitation and social integration programme is also a prerequisite in the “judicial path,” even though it is based on cooperation with law-enforcement authorities. The law stipulates that NGOs and public social services must register with the Ministry of Equal Opportunities, and they are responsible for designing a detailed assistance, protection and integration programme tailored to the needs of the victim. In addition, biannual monitoring is conducted to ensure that the rights and interests of the victim are protected at all times.

The Italian law states that the safety and best interests of the victim are crucial. Victims must, however, be in a situation of violence or serious exploitation and there must be concrete danger to life. Should there be a case where a person is exploited without the use of violence, the law would still be applicable as long as the exploitation is “serious.”⁹⁸ Since Italy’s strategies traditionally focus on sexual exploitation and assistance to women and girls, in practice, cases of labour exploitation do not always qualify as meeting the threshold and are sometimes not considered “severe” or “serious” enough to benefit from the law.⁹⁹ As stated by one interviewee: “... the legislature did not mention the state of abuse or the position of vulnerability ... the law is [however] translated to [mean that the victim must have been] continuously subjected to

⁹⁸ Article 18, therefore, also applies in cases of debt bondage. See Giammarinaro (1999).

⁹⁹ Trafficking in Human Beings: A Collection of Italian Legislative Provisions and Regulations. This document was provided by one of the interviewees during the research.

exploitation” (interviewee response, Italy). This leaves a wide margin of discretion. In addition, given the decentralized system and varying level of competency in the different regions, this could result in an unequal application of the law. Similarly, in the United States, only victims of a “severe form of trafficking” can benefit from the T visa scheme. This criterion has been criticized for being too burdensome. In practice, victims need assistance from specialized immigration attorneys to complete the T visa applications. Interviewees noted that many clients use alternative avenues¹⁰⁰ because “the application process is simply too hard and it is difficult to prove that the case is a severe form of trafficking” (interviewee response, United States).

In 2005, the TVPA in the United States was extended to include internal trafficking and to exclude the requirement to “reasonably cooperate with law enforcement” if physical or psychological trauma impedes such cooperation (Reauthorization Act of 2008). This exemption de-links cooperation with law-enforcement authorities in situations where the circumstances of the victim are taken into account. While this positive legal step is commendable, interviewees noted that there is no guidance on this exemption, and its application is left to the discretion of the competent authorities. One interviewee noted: “It’s there ... but it has never been used; besides, all victims suffer physical or psychological trauma.” (interviewee response, United States). Another interviewee noted that local offices lacked sensitivity towards the needs of the victim and the United States Department of Homeland Security (USCIS) had to intervene to address this lack of sensitivity (interviewee response, United States).

The law in Italy takes into account risk assessments and the safety of the victim both while in Italy and upon return to the country of origin. In Italy, children are usually given a right to stay in the country, unless contrary to public order or national security. Although Article 18 of Legislative Decree No. 286/1998 does not specifically mention children, the best interests of the child and unaccompanied minors are covered under other applicable legislation. The United States

¹⁰⁰ Victims who do not meet the requirement of being a “victim of a severe form of trafficking” under the TVPA can access alternative avenues to obtaining residence status, as follows: U visa, if they are victims of a serious crime and suffered physical and mental abuse; S visa, if they assist law-enforcement authorities to investigate or prosecute organized crime; asylum, if the particular circumstances of the victim amount to fear of persecution on legitimate grounds; special immigrant juvenile status, which is available to children who cannot return home and allows for foster care; and assistance under the Violence Against Women Act.

law specifically covers children by exempting them from having to cooperate with law-enforcement authorities if they are under 18 years of age. Notwithstanding this provision, in practice, children are sometimes still required to cooperate with law-enforcement authorities as a prerequisite (see Part 5). Similarly, the Belgian law specifically covers unaccompanied minors and states that the best interests of the child should be taken into account at all times. However, in Belgium the unaccompanied minor has to meet the same criteria as adult victims, including cooperation with law-enforcement authorities. Interviewees in Austria noted that the new law was interpreted to also apply to children, but was not clearly stated. It should be noted that the new Article 69(a) provision of the Settlement and Residence Act of 2006, which entered into force only in April 2009, was recently amended by the Austrian Parliament (23 November 2009). It now explicitly includes a provision on the issuance of residence permits (temporary permit – special protection) to unaccompanied minors.

The issue of unaccompanied minors arriving at borders and seeking asylum has become a serious global concern. To address this challenge, the European Commission developed the Action Plan on Unaccompanied Minors (2010–2014), which states that: “European Union legislation and policies do not address the situation of minors who cannot be returned, leaving the granting of residence permits for compassionate, humanitarian or other reasons to national legislation. In cases where return is not possible or integration in the country of residence is considered in the best interests of the child, a legal status should be granted to unaccompanied minors entitling them to at least the same rights and protection as beforehand, and suitable accommodation should be found. The minors should be supported in their path toward successful integration in the host society.”¹⁰¹

In the United States, the Unaccompanied Alien Children Program was introduced in 2008 to give effect to the child-protection provisions of the Reauthorization Act of 2008. In addition to the exemption from having to cooperate with law-enforcement authorities, the Act ensures mandatory referral of unaccompanied children who are determined by Department of Homeland Security to be either victims of human trafficking, at risk of being trafficked upon return, or having a credible fear of persecution upon return.

¹⁰¹ Communication from the Commission to the European Parliament and the Council: Action Plan on Unaccompanied Minors (2010–2014).

Unlike the laws in the other countries studied, the United States law recognizes the victims' fear of reprisal from the trafficker and their concern for family members. The law extends to family members abroad under set conditions. Immediate family members (spouse, children, parents and minor siblings) are eligible to file derivative applications for T nonimmigrant status if the victims can establish that their immediate family members would suffer extreme hardship by staying abroad without them.

4.3.3 Cooperation with law-enforcement authorities

The law in Austria, Belgium and the United States links the issuance of residence permits solely to cooperation with law-enforcement authorities. However, in Austria it is interpreted with flexibility. The commentary notes to the Settlement and Residence Act of 2006 highlight that the outcome of criminal or civil proceedings is irrelevant, and that it cannot be derived from the law that the issuance of residence permits is subject to cooperation with law-enforcement authorities. That said, the prerequisite is to institute legal proceedings, which leaves room for interpretation. It is not clear if cooperation with law-enforcement authorities is a precondition. The commentary notes state that the Article 69(a) provision should be interpreted to mean that there is no link to cooperation. It does not, however, define the term "cooperation." Although it is not clear in the law, one of the interviewees provided a definition: "Cooperation is defined as no obligation to testify or stay in further contact with the police." (interviewee response, Austria).

The Belgian law allows victims to apply for residence permits both during and after the reflection period, if they decide to cooperate with law-enforcement authorities. In addition, they have to meet four essential criteria: first, be considered a victim of trafficking; second, make a declaration to the police or file a complaint against the perpetrator; third, sever all ties with the perpetrator; and fourth, accept the counselling services from one of the official NGOs. It is mandatory under Belgian law to obtain the services of one of the official NGOs as only they are authorized to request reflection periods and temporary permits on behalf of victims. Once a statement or complaint is made, a three-month renewable permit is issued.

In Italy, the "judicial path" establishes a clear link to cooperation with law-enforcement authorities, and it usually applies in circumstances

where the victim is already cooperating with national authorities. The law is not clear on the definition of cooperation. The Central Administrative Tribunal, however, recently reaffirmed that the residence permit is not to be considered as a reward for the victim's testimony and, as such, is not linked to the outcome of the prosecution.¹⁰² One interviewee noted that it requires the victim "to make a formal report and statement to the police" (interviewee response, Italy). Another interviewee, however, stated that there is wide discretion on the interpretation of "cooperation", and that it depends on the prosecutor's interpretation in a particular region.

Under the TVPA in the United States, continued presence status and T nonimmigrant status both require cooperation with law-enforcement authorities. Continued presence status protects victims from removal by allowing them to remain in the United States if they are considered potential witnesses in criminal proceedings. Only a federal law-enforcement officer may request continued presence for victims deemed to be beneficial to the investigation or prosecution. Continued presence is initially authorized for a period of one year. The continued presence may be authorized for a longer period if investigations are ongoing.

To be eligible for a T visa, victims must meet four criteria: first, be a victim of a severe form of trafficking; second, be physically present in the United States or at a United States port of entry due to trafficking;¹⁰³ third, comply with any "reasonable requests" for assistance in investigating or prosecuting traffickers, unless under 18 years of age; and fourth, suffer "extreme hardship" involving unusual and severe harm if removed from the United States. Interviewees noted that the "reasonableness" standard limits the discretion of law-enforcement authorities and aims to balance law-enforcement objectives and the interests of the victims. However, in practice, cooperation is narrowly defined and the eligibility criteria are burdensome and difficult to prove (see Part 5).

¹⁰² Council of State, Judgement No. 6023/2006, published in *Diritto, Immigrazione e Cittadinanza*, 2006. See Raffaelli (2009).

¹⁰³ Note that the TVPA Reauthorization Act of 2008 extended this to victims who have been brought into the United States to participate in an investigation or prosecution.

4.3.4 Reflection periods

As stated in Parts 2 and 3, the reflection period should ideally have a firm legal basis. The Belgian law explicitly provides for a right to a reflection period. The law is silent on reflection periods in Austria, Italy and the United States; however, in practice, a recovery and reflection period is granted on an ad hoc basis with high degrees of discretion.

In Italy, one interviewee equated the reflection period with the temporary permit. It is, however, important not to confuse the reflection period with the temporary residence period. The purpose of the reflection period should be clear: to take time to recover mental stability, to consider available options to regain autonomy and to make an informed decision whether to cooperate with law-enforcement authorities. Interviewees noted that the Ministry of Interior in Austria issued a decree clarifying that victims should be afforded a 30-day reflection period.¹⁰⁴ A lawyer interviewed noted that the 30-day reflection period has become soft law, and police and authorities are usually willing to grant it.¹⁰⁵

As stated above, Belgium is the only country of the four countries studied to have a clear legal basis for the right to a reflection period. Moreover, it exceeds the regional minimum standard. Victims are required to report to the police or public prosecutor to obtain an “order to leave”, giving them 45 days to leave the country. The 45-day period equates to a reflection period and is intended to allow the victim to consider whether to make a statement or file a complaint against the perpetrator. If the victims refuse to make a statement or file a complaint, they are compelled to leave the country after the expiration of the 45 day period. To obtain the “order to leave”, two criteria must be met: first, the absence of residence status; and second, commitment to receiving the counselling services of one of the three official NGOs. As previously mentioned, it is obligatory to obtain the services of the NGOs as only they are mandated to submit residence applications on behalf of victims.¹⁰⁶

¹⁰⁴ Since the decree is an internal instruction, it is not publicly accessible. Note that the researchers were unable to obtain a copy during the field research.

¹⁰⁵ One interviewee noted that: “In practice, the reflection period can vary from 30 days to six months.” Another interviewee, however, noted that: “The reflection period is never really implemented in Austria.”

¹⁰⁶ Although the three NGOs have the official mandate for status identification and residence permit applications, this has caused some problems with regard to inconsistent screening. For example, trafficked persons may be referred between NGOs for security reasons, but there have been cases where one NGO has then disagreed about whether a person is in a trafficking situation (although this is said to be uncommon).

The absence of the right to a reflection period may result in deportation as there is no protection against enforcing expulsion orders.¹⁰⁷ Interviewees noted that this does, in fact, happen in practice. Even though the reflection period does not exist in law, a few interviewees noted that, in practice, there is a prohibition against enforcing expulsion orders for the duration of processing applications. Victims are, however, not afforded any legal protection as they are not issued with any documentation until receipt of the special protection permit. Similarly, the wording of the documentation in Belgium – “order to leave” within 45 days – appears to emphasize law-enforcement objectives, rather than the purpose of the reflection period.

As stated above in section 4.2, the Austrian Administrative Court recently found the practice of deporting individuals during the application period to be unlawful.¹⁰⁸ This reinforces the need for reflection periods and special protection from expulsion in accordance with regional legal instruments.

4.3.5 Immediate protection and assistance

In all four countries studied, social assistance for victims is made available through State funds or through the assistance of service providers that are either officially mandated NGOs funded by the government, or other active NGOs that are not legally mandated. Since the wide range of necessary assistance and protection measures are unregulated in law, it leaves much room for discretion. However, in practice, if assisted by an officially mandated NGO, victims receive assistance packages which include accommodation, medical and psychological treatment, legal aid, assistance for obtaining the residence permit, education and assistance in finding a job. In Austria there is one official NGO, and in Belgium there are three. Italy has a number of NGOs, none of which is officially mandated by the Government. The Italian law stipulates that NGOs must be registered and that national funds are allocated to the Ministry of Equal Opportunities to provide funding to NGOs to implement rehabilitation and social integration programmes.

¹⁰⁷ See Article 6(2) of the European Union Council Directive.

¹⁰⁸ Administrative Court, Docket No. 2009/21/0149 (Decision) of 14 September 2009.

In the United States, victims are entitled to social benefits only once they have temporary residence status. The law, however, states that the Office for Victims of Crime receives government funds to support emergency services prior to the issuance of residence permits.¹⁰⁹ In addition, the Federal Crime Victim Assistance Fund for Victims of Crime is made available to assist with emergency services, which may include shelter, case management, interpretation services, medical care, dental care, crisis counselling, legal/immigration assistance, criminal justice system advocacy, job training and transportation.

4.3.6 Temporary stay

I've been asked: When do you feel the chain is broken?

Honestly, once a victim receives their status.

(interviewee response)

In Austria, the law outlines the preconditions for obtaining special protection permits (residence permits): first, to conduct criminal proceedings for prosecutions; or, second, to enforce civil law claims in connection with such an offence. The law explicitly states that failure to institute proceedings renders the application inadmissible. The law sets a good standard and states that the competent authorities have to issue a six-month renewable permit within six weeks.

As stated above in section 4.1, in Belgium a temporary permit is issued for three months and then renewed for a further three months, if set conditions have been met. It should be noted that this two-tier approach is contrary to the European Union Council Directive, which stipulates that temporary residence permits should be issued for a minimum period of six months. The extension of the first and second three-month temporary permit is subject to the prosecutor or labour inspector confirming that four criteria are met: first, the victim has continued trafficking status; second, the victim demonstrates a clear intention to cooperate; third, it is clear that investigations or prosecution is ongoing; and fourth, there is clear severing of all ties with the perpetrator. The law states that the temporary permit can be renewed only once. This legal limit may create a practical barrier in the event of overzealous application of the law. In practice, however, this does not seem to be a problem. Interviewees noted that temporary permits are often extended beyond the limit, if needed for the duration of the investigation or

¹⁰⁹ <http://www.ovc.gov>

prosecution, or on humanitarian grounds. One of the interviewees noted that: “Generally, a six-month permit is granted; and thereafter it is extended for another six months.” (interviewee response, Belgium).

In Italy, the temporary residence permit is issued for six months and can be renewed according to the personal circumstances of the victim for a period of one year. The competent authorities have the discretion to withdraw the temporary residence permit if the victim ceases to participate in the rehabilitation and social integration programme. If victims find regular work or enrol in a study programme, the temporary residence permit can be converted to a work or study permit for the duration of the employment or study programme.

As described above in section 4.3.3, in the United States continued presence status is granted if a federal law-enforcement officer deems the victim to be a potential witness in criminal proceedings. The continued presence status is issued for one year and may be extended if the investigating or prosecuting authority certifies that continued presence is necessary. To be eligible for a T visa, victims must meet four criteria as described above in section 4.3.3. Victims who receive T nonimmigrant status are eligible to remain in the United States for up to four years and their status can be converted to permanent residence status under set conditions.

4.3.7 Permanent stay

In contrast to laws in the other countries studied, the United States is unique: victims with T nonimmigrant status can apply for lawful permanent residence after three years. Although this right has existed since 2000, there were no regulations to give effect to the application of the law. The Interim Rule on Adjustment of Status to Lawful Permanent Resident, which is effective as of 12 January 2009, outlines the procedure allowing T visa applicants to apply for lawful permanent residence.¹¹⁰ Interviewees noted that this long-awaited regulation took almost seven years to come into effect. In the interim there was an obvious gap in the law, which, at times, resulted in a number of victims being without status after the expiration of their T visa.

¹¹⁰ Adjustment of Status to Lawful Permanent Resident for Aliens in T or U Nonimmigrant Status, Federal Register (Volume 73) 75540 (12 December 2008). See also Office of the Citizenship and Immigration Services Ombudsman (2009).

In Belgium, “indefinite duration” permits are offered as the practical equivalent of permanent stay. This acts as an incentive for cooperation with law-enforcement authorities in order to secure a successful conviction of the perpetrator and may be issued if the victim is deemed “significant” to the successful conviction. Italy and Austria grant permanent residence based on social integration into the country under set conditions.

4.3.8 Access to social and economic rights

As stated in section 4.3.5, Italy and Belgium have a well-structured and government-funded framework. Since there is no reflection period in Italy, social grants are available immediately upon enrolment in a rehabilitation and social integration programme, regardless of whether the victims take the “social path” or “judicial path”. In Belgium, social grants are available during the reflection period and the temporary residence period. The United States implements a fully fledged package of protection and assistance that is available once the T visa is issued and is equivalent to the social benefits given to refugees.

Employment

In Austria, once issued with a temporary permit, victims are entitled to access the labour market, but do not have an automatic right to employment. As noted by one of the interviewees: “Access to the labour market requires a work permit, which is near impossible to obtain.” (interviewee response, Austria). The Regulation on Exceeding the Maximum Number of Work Permits sets a quota on the number of work permits granted to third-country nationals. In the United States, once granted T nonimmigrant status or continued presence status, victims and their families have the right to apply for an employment authorization document, which would grant them the right to work in the United States for the duration of the residence status. The Belgian law is silent on the right to employment.¹¹¹ However, in practice, as stated by the interviewees: “All stakeholders still follow the previous regime [under the 1994 Ministerial Circular] that allowed victims to work after receipt of the first three-month temporary permit.” (interviewee response, Belgium). This is also stated in the 2008 Ministerial Circular.

¹¹¹ One of the interviewees provided the researcher with a policy document entitled Kingdom of Belgium: Policy and Approach Document. The document notes that the three-month temporary residence permit is a type C work permit similar to the one issued to foreigners. The law, however, is silent on this.

In Italy, victims are entitled to register for an employment permit. The employment permit is linked to the duration of the temporary residence permit. Temporary permits can be converted into work or study permits after the expiration of the temporary resident permit. One interviewee noted that: “It is important to avoid stigmatization: no indicators should be on the work permit as this [often] limits access to the labour market.” (interviewee response, United States).

Family reunification

Of the four countries studied, the United States is the only one to clearly provide for family reunification in law. The victims’ immediate family members (spouse, children, parents and minor siblings who fear reprisals from traffickers) are eligible to file derivative applications for T nonimmigrant status if the victims can establish that their immediate family members would suffer extreme hardship. The law in Italy does not allow for family reunification during the temporary residence period. As stated by one interviewee: “This is a weak point ... it’s only possible in extreme cases through other channels. It is, however, possible once the residence permit is converted to a regular work permit for two years.” (interviewee response, Italy). In practice, the other two countries consider family reunification on an ad hoc basis; however, it does not seem to include family members abroad; it includes only family members who are present in the country.

Notwithstanding the challenges, significant positive steps have been taken in all four countries. Many commentators have acknowledged that the Italian system, which is centred on the rights of the trafficked persons with the unconditional option to cooperate with law-enforcement authorities, should be replicated elsewhere. Belgium is seen as the model, with the reflection and recovery period embedded in law. In Austria, although the law is new and still being developed, the standard has been set for prescribed issuance periods. The law in the United States has exemptions for vulnerable cases and takes the victims fear of reprisal into account, including fear for the well-being of family members.

PART 5: Assessment of the practical implementation of the legal frameworks: Challenges, choices and conditional cooperation

5.1 Obtaining a residence permit on the grounds of trafficked person status

In this section of the report, the focus turns to providing a detailed assessment of how the relevant laws are working in practice. Key issues that interact with the process of accessing residence include how trafficked persons are identified, whether or not there is a need to cooperate with law-enforcement authorities, whether or not a reflection period is enacted, the victim's personal situation, and the provision and forms of assistance provided to trafficked persons during the process.

5.1.1 Missed opportunities: How identification impacts upon residence

In the four countries studied, one of the key barriers to protecting and safeguarding the rights of trafficked persons is formal identification of the trafficking status of an individual. For trafficked persons who are exploited and identified in a country where they are without legal residency status, only individuals who have been formally identified by the competent authorities to be victims of trafficking are eligible for residence. Importantly, in all four countries, the scope of formal identification for the purpose of accessing residence options is linked to the individual having been trafficked, exploited¹¹² or at risk of being trafficked in the respective country. In cases where the individual is identified in a country where they have not been exploited – such as a transit country, or a neighbouring country to which the victim has fled for security reasons – the legal framework would not in practice be seen to be applicable.

The report findings should thus be read within this context. Furthermore, this section dwells at some length on the issue of victim identification because it poses perhaps the greatest challenge to any anti-trafficking

¹¹² It should be noted that the Belgian and Italian legal frameworks can be used to provide temporary residence rights to smuggled migrants; however, in practice, the legislation is applied largely only to victims of trafficking.

strategy, and because a sound identification system is a prerequisite to effective implementation of temporary residence legislation. Which victims are identified, and thus able to access residence, nevertheless remains a subjective issue.

Equal opportunities for all victims: Identification biases: A definition of the crime of trafficking has been provided by the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000 (United Nations Protocol),¹¹³ yet many countries have adopted an adapted version of the United Nations definition, in line with their national legal framework.¹¹⁴ Consequently, the term leads to widespread misunderstanding and confusion. In the course of the research, it was not uncommon for interviewees in all four countries to mention interpretation of the definition of human trafficking as being the main barrier to correct identification of trafficked persons, and consequently to access to the right to residence. At the centre of this is the issue of bias, often with regard to the type of exploitation or the gender of the trafficked person.

Type of exploitation and gender as identification biases: Information collected during the field work revealed that there is often reluctance – largely due to misunderstandings – to identify other forms of trafficking aside from trafficking for sexual exploitation. As a consequence, cases of trafficking for forced labour or domestic servitude, for example, are not being correctly identified. Furthermore, the victims involved are largely going unassisted and their rights unprotected.

Such biases are largely linked to the manner in which the anti-trafficking framework has been developed: that is, from being understood as a phenomenon affecting mainly women and girls trafficked for sexual exploitation, to an issue that should today be understood as affecting males and females, trafficked for all forms of exploitation (see Brunovskis and Surtees, 2010; Surtees and Craggs, 2010). From the

¹¹³ Please see Part 2: Universal instruments.

¹¹⁴ In the United States, for example, it is necessary to prove that “a severe form of trafficking” has occurred before an individual can be determined to be a victim of trafficking, eligible for State protection. Many of the service providers and attorneys interviewed mentioned that, in practice, this can be highly problematic; accordingly, they are focusing their training to law-enforcement authorities on this area.

outset, the terrain was challenging from a gender perspective. As many critics have noted, explicitly mentioning women in the title the United Nations Protocol immediately takes the focus away from men.

At the national level, in Italy, for example, earlier versions of Article 18 of Legislative Decree No. 286/1998 were seen to recall the national legislation on prostitution, Act No. 75/1958 (“Legge Merlin”). This similarly created a bias by immediately putting the focus on sexual exploitation. As one interviewee noted: “It took seven years of trafficking history for many to realize that trafficking is primarily a labour issue.” (interviewee response, Italy). In Belgium, reference was made to trafficking for all forms of exploitation, of both males and females, as early as the 1994 Ministerial Circular concerning human trafficking.¹¹⁵ Nevertheless, only within the last decade have residence permits been issued for cases of trafficking for labour exploitation and in cases of trafficking in men and boys.

Trafficking is an ever-evolving phenomenon, both in terms of the manner in which traffickers operate and, importantly, the ways in which the anti-trafficking community has addressed the issue. In all four of the countries studied, specific training has been provided to actors involved at the identification phase, and particularly law-enforcement authorities, to sensitize them to all forms of trafficking. However, as one interviewee in the United States mentioned: “With the labour cases, there is still this belief that undocumented immigrants get treated badly in the work place, and that is just too bad for them.” (interviewee response, United States).

Bias in the perception of victim status: Another barrier is that of the perception of exploitation and victim status. In practice, few trafficked persons identify themselves as having been trafficked. It was broadly acknowledged among research participants that only in the rarest of cases does a victim find his or her own way to protection and assistance. The reasons cited were wide-ranging, but included instances where the victim was scared of deportation; had a fear of cooperating with law-enforcement authorities (see below also); had previously experienced

¹¹⁵ This was superseded by the 26 September 2008 Ministerial Circular. Please also see the national section on Belgium for further information.

rejection of victim status; had chosen to decline assistance;¹¹⁶ or had returned home voluntarily. Interviewees also indicated that males trafficked for labour exploitation may be more likely to reject the label or status of victim.

In addition, certain victims, particularly males trafficked for labour exploitation, may be reluctant to relay their trafficking experiences and are particularly hesitant to acknowledge that they have been exploited by another person, especially another man. To cite an example from the United States: “Men are very comfortable saying that they were afraid for their families, but not so much for themselves.” (interviewee response, United States). If individuals are reluctant to talk about their trafficking experiences, this may later have an impact upon the forms of assistance they are able to access, and the residence options available. It is, therefore, important that a gender-sensitive approach is taken towards identification and determination of victim status (see also Surtees, 2008b, 2008c).

As regards victims of labour exploitation, often the individuals themselves consider their conditions of work to be more favourable than those in their country of origin; thus, they do not rationalize the exploitation suffered. As one interviewee noted: “If you come to a construction site, factory or wherever, where people are working, you will hardly find any [...] worker there who says that he or she is a victim of trafficking.” (interviewee response, Austria). Furthermore, interviewees often mentioned that individuals trafficked for labour exploitation are more interested in obtaining lost earnings or compensation and then returning home, rather than obtaining residence rights. In Italy, many of those identified as having been trafficked for labour exploitation decide to return back to their country of origin without having accessed any formal protection or assistance programme. Others still are simply deported.

Wrongly detaining victims; wrongly denying rights: As trafficking in persons largely takes place in the informal and unregulated sectors, with many trafficked persons themselves being undocumented, it is unfortunately not uncommon for presumed trafficked persons to be wrongly held in detention centres or immediately deported due to their

¹¹⁶ In Belgium, for example, out of the total number of trafficked persons assisted by one NGO, roughly 50 per cent wanted to stay in Belgium, while the other 50 per cent wanted to return home. This finding was also repeated by one NGO in Austria.

irregular immigration status. In practice, this proved to be a common challenge in all four of the countries studied. Within a country, there are also stark regional differences as to how a trafficked person found to be in an irregular situation would be treated by the authorities.

In the United States, one interviewee made reference to a case in which she was involved concerning more than 200 certified trafficked persons exploited for forced labour. While a significant number of the victims received their temporary residence status (T nonimmigrant status), she mentioned that there was a group of approximately 100 individuals who were never able to avail themselves of protection in the United States. They had instead been deported back to their country of origin after initial screening. Admittedly, this was one of the first trafficking cases investigated by United States authorities. However, it highlights that there is inconsistency of approach when looking to identify trafficked persons. As another interviewee noted: “I’ve worked with women and men who were picked up in labour raids, trafficking raids, and ended up in removal proceedings. And so my experience was that there was very little done to protect the victim, and many times victims were deported before they had an opportunity to apply for anything even approaching residency.” (interviewee response, United States).

Similar experiences were also cited in Austria, Belgium and Italy. In Belgium, misidentification has significant consequences on the right to residence. Only trafficked persons who have been formally identified by the Office of Aliens and are furthermore being assisted by one of the three State-registered NGOs are eligible for either reflection or temporary residence. In this regard, one Belgian NGO recounted how it pays regular visits to the local detention centre to ensure that trafficked persons have not been wrongly detained.

On the same theme, a number of interviewees mentioned that it is common practice for irregular migrants in Italy to be intercepted by the police and consequently placed in detention centres across the country. In this case, identification – as seen by the authorities – is identification of name, surname and nationality. However, one Italian NGO highlighted that it is able access one of the detention centres near Rome with a view to screening for vulnerabilities among the female detainees. Owing to the restrictive working environment, and the great number of obstacles faced, a triage approach is taken, with Nigerian women being the main group screened for trafficking. Yet this places a significant burden on

civil society actors. Limited resources, coupled with limited access, also pose a great risk to the non-identification of detainees who may have been trafficked, but who are not of Nigerian nationality or not females. Importantly, screening for victim of trafficking status does not take place in the male section of the detention centre; thus, instances of wrongly detained trafficked males are being completely overlooked.

A similar situation was relayed in Austria regarding asylum applicants at asylum-processing centres. In practice, trafficking has been viewed as an issue outside of the asylum process, despite one interviewee estimating that half of the women in the asylum-processing centre had been exploited. This resulted in a situation where potential or presumed trafficked persons were left fighting to uphold their own rights. After conducting the field work, the research team was informed that one Austrian NGO has begun operating within the asylum-processing centres with a view to screening for victim of trafficking status. Nevertheless, this again places a significant responsibility on civil society actors, forcing them to take a more proactive approach where the official authorities are failing.

As van Liempt (2006) argues, restrictive policies can make individuals vulnerable to trafficking: “Policies designed to encourage irregular forms of migration encourage violation of human rights.” Ultimately, and as highlighted in a keynote speech delivered by Mr. Mike Dottridge at the June 2009 IOM International Dialogue on Migration, “States should not consider detention as a valid option, even in cases where detention is thought to be an option for ‘protecting’ the victims from their traffickers.” As van Liempt (2006) similarly argues: “This is when the anti-migration aspect of the anti-trafficking strategy becomes dominant.” There is a need for targeted training to sensitize immigration authorities to the phenomenon of human trafficking, and to inform them of the protection mechanisms that are in place to protect all trafficked persons, regardless of gender or the form of exploitation.

“Competent” identifying authorities: There are also challenges where law-enforcement authorities are the competent identifying authority. In practice, it appears that in most countries law-enforcement authorities are often the first authorities to come into contact with presumed or at-risk trafficked persons. In Italy, the situation is slightly unique due to the social welfare path, which allows for NGOs to directly identify trafficked persons and provide them with the needed care. However,

in practice, the initial referral often comes from law-enforcement authorities. Somewhat similarly, in Belgium, the three government-authorized NGOs have the competency to establish victim status, but this still needs to be confirmed by the Office of Aliens. And again, in practice, a large proportion of referrals are from the police, although, notably, in the past two years, it has become increasingly common for other stakeholders to be involved in the identification process, such as labour inspectors, service providers and clients of prostitutes.

The bias towards the involvement of the police at the identification phase raises a number of issues. As noted, the lack of training of law-enforcement authorities or an inadequate understanding of the phenomenon of human trafficking – and consequently the support options available to trafficked persons – was seen to be a major issue in all four countries. As one interviewee noted: “If she first gets in contact with us [NGO], she has all the time in the world because nobody will deport her. But, if she first gets in contact with the police, they have no time at all.” (interviewee response, Italy). One interviewee, working in a country of origin, further noted that they had faced some issues with the Italian model in that a number of trafficked persons had been returned home without having first received any information on the residence options available to them.

In addition, the identification process is often highly decentralized, with local police referring to local authorities. In Belgium, focus has been placed on increased training at the national level to prevent trafficked persons from being wrongly detained and deported on account of their irregular situation. In addition, a list of indicators has been developed for the police, labour inspectors and other stakeholders to help them better identify all forms of trafficking. On this note, interviewees in Belgium noted that it is important to pay particular attention to atypical situations. In Austria, the Criminal Intelligence Service (Bundeskriminalamt) has also developed a concise online national training manual on trafficking that is accessible for all police officers. The training material not only provides information on identification, but also offers guidance on how to interview trafficked persons. In Italy, the Carabinieri note that they pay particular attention to adopting a “preventative policing” approach in their attempts to combat trafficking. However, the situation was previously quite different, with one interviewee recounting that, in the beginning, police officers used “to laugh” at the prospect of the “social path”.

It is also common for trafficked persons to be afraid of law-enforcement authorities. As mentioned above, traffickers commonly use the threat of deportation to keep individuals in an exploited situation. One interviewee also mentioned that the police themselves have been known to threaten trafficked persons at the interview phase: “Sometimes law enforcement are their best friends ... other times they just have horrible experiences.” (interviewee response, United States).

Interviewees talked about the identification process as being a negotiation between the police and civil society: “It depends a lot on the capacity of these two actors to establish a reciprocal confidence and common platform for a dialogue.” (interviewee response, United States). And as another noted: “Only through negotiation and relationships with the authorities can you really end up with a common occasion of sharing of information and sharing of concepts.” (interviewee response, Italy). In short, while there are a number of barriers to the adequate identification of trafficked persons, these could be resolved through the adoption of a true multiagency approach, making use of good cooperation channels, and applying a cultural and gender-sensitive approach. The role of NGOs should not be overlooked. In Austria, Belgium and Italy, government-approved NGOs have been given a more formal role at the identification phase. For ensuring that all victims in need of protection are able to access the necessary forms of assistance, this is perhaps a model to look towards, providing that there is independency of approach.

5.1.2 The challenge of identity documents

Another recurring and problematic aspect to accessing residence was that of identity documents. In practice, all four countries require trafficked persons to submit identity documents to be eligible for the residence permit, although the point at which identity documents need to be shown differs from country to country. This has proven to be highly challenging. It is common for traffickers to withhold identity documents as a means of controlling trafficked persons. In addition, some trafficked persons were not in possession of valid travel and identity documents in the first instance. In other cases, tales were recounted of law-enforcement authorities retaining the individual’s identity documents for investigative purposes, thus hindering their right to access assistance and residence.

In one example, the passport of a trafficked woman was taken by her trafficker. This forced her to go to the Austrian authorities and report it stolen. However, the women involved first approached four different police stations before she found someone to listen to her. As the interviewee stated: “She said ‘but I was so scared because I had no permit; I just had this registration paper; I was so scared to go there’.” (interviewee response, Austria). The implications for the trafficked person are great: they remain in an irregular situation and are exposed to what is arguably unnecessary administrative and bureaucratic stress. One formerly trafficked person interviewed in the course of the research strongly underlined the issue of identity, and the fact that not having formal identification or a sense of identity is a huge problem. As another interviewee in Belgium noted: “The most important thing for them [the trafficked person] was a paper that mentioned this is me, that is my name, because when you have nothing, when you are illegal, you are nothing. You do not exist.” (interviewee response, Belgium).

There are also practical challenges hindering the acquisition of national identity documents due to the fact that some trafficked persons are not aware of their true age, place of birth, or even full name. Furthermore, in some countries a national birth registry fails to exist. For the three European countries studied, this was cited as being particularly problematic for certain nationalities, such as Nigerians and Chinese, as well as for minors in general.

Where national identity documents cannot be obtained during the residence permit application process, in practice, findings revealed that countries are taking a more flexible approach. In Belgium, for example, interviewees stated that so long as the individual “tries to do all that is possible to get his or her documents back”, then they will look into alternatives (interviewee response, Belgium). Similar cases where national identity documents are needed for the second issuance of the residence permit were cited in Italy and Austria. It is normal practice for those in need of a new passport – due to it having been lost, stolen or expired – to have it reissued in the country of origin. For trafficked persons, out of their country of origin and in an irregular situation, this is, of course, highly problematic. Some embassies have recognized this as being a particular issue and have started to grant passports out of country (where authorized by the ministry of interior). However, as one interviewee in Italy noted, the cost of a new passport issued overseas is in the range of EUR 500. This fee is proving too high for

the trafficked person to pay since many, if not most, trafficked persons have few resources available to them. The financial burden is therefore falling on family members and NGOs.

While the issuance of national documents to trafficked persons falls outside the administrative scope of the country of destination issuing the residence permit, this is clearly an issue to bear in mind due to the potential practical and economic barriers posed and the attendant impact on the right to access residence.

5.1.3 Individual choices and individualized approaches

One of the key guidelines in *The IOM Handbook on Direct Assistance for Victims of Trafficking* is the concept of “individualized treatment and care” (IOM, 2007):

While acknowledging that trafficking victims share some common experiences and circumstances, organizations should recognize and respect the individuality of victims and, to the extent possible, provide personalized care and assistance. Throughout the assistance process, staff should strive to provide the most appropriate protection, assistance and support appropriate to the needs and circumstances of the individual victim.

Subsequently, the granting of the right to residence should duly take into account the personal situation of the victim.

An individual risk assessment should be conducted at all phases and for all victims regardless of age and gender. Interviewees in all countries considered risk assessment a must. When used correctly, risk assessment can be a valuable tool to assess the protection needs of the individual in the country of destination and also in the country of origin should return or resettlement be an option. Risk assessment also allows for the identification of particularly vulnerable cases such as minors or individuals with medical and mental health concerns. It enables service providers to tailor assistance accordingly. However, in practice, interviewees pointed out that, while many countries have risk assessments in place on paper, implementation is not quite as successful. For example, there have been cases where minors have been returned back into the environment in which they were first trafficked.

The granting of a residence permit thus needs to be inextricably linked with a risk assessment to determine what is in the best interests of the trafficked person in terms of the assistance options that should be made available, including if there are any particular security concerns.

At the same time, the opportunity to access residence in the country of exploitation and/or identification is only one of many options that should be made available to trafficked persons. Possible assistance options may also need to include return to the home country or moving to a country of resettlement. Where trafficked persons decide to leave the country of exploitation, their decision should be voluntary and assistance should be offered to ensure that their return home or move to a country of resettlement is safe, dignified and free of risk.

As mentioned in Part 4, Italy is the only country to explicitly adopt measures based upon the personal situation of the victim (“social path”). In the United States, the TVPA Reauthorization Act of 2005 laid out a new provision exempting victims from having to meet the requirement to “reasonably cooperate with law enforcement” if physical or psychological trauma impedes such cooperation. In practice, interviewees mentioned that it is extremely difficult to prove the degree of physical or psychological trauma needed to meet the exemption requirement for non-cooperation. Indeed, the provision appears to be contradictory in nature: as mentioned previously, a condition to receiving the T visa in the United States is the need to prove “a severe form of trafficking”. As one interviewee commented, every victim who first needs to prove that they have been a victim of “a severe form of trafficking” is physically or psychologically traumatized as an outcome of the trafficking experience. The additional level of trauma that a victim must prove thus remains ambiguous. Similarly, while it is not written into the law, one interviewee in the United States noted that the policy position is that the child needs to cooperate with law-enforcement authorities (see also section 5.1.4). Where this is the case, it is arguably against the best interests of the child and thus contrary to the minor’s personal situation.

5.1.4 Challenged choices and conditional cooperation

It is exhausting. And first thing coming out of a trafficking experience, you don't want to be interrogated again.
(interviewee response)

The previous section mentioned that the initial identification of victims is in the main part undertaken by the police, with other public authorities and NGOs providing supplementary identification and authorization of victim status. This section discusses one of the often central conditions to temporary residence: cooperation with law-enforcement authorities when accessing residence.

The frameworks in the four countries studied differ significantly in terms of cooperation with law-enforcement authorities. The issue of a victim's conditional cooperation with law-enforcement authorities when accessing a residence permit is also the subject of much discussion and controversy among academics, practitioners and policymakers. As one interviewee mentioned, this is the big debate.¹¹⁷ Some commentators have additionally expressed concern regarding the conflict between the need to protect trafficked persons, and the subsequent need to secure a conviction. It is argued that this places an unnecessary burden on the trafficked person and their family, and is a negation of human rights (see, for example, Goodey, 2003; Kanics et al., 2005; Egan, 2008).

At the national level, Italy is the only country to have a formal non-cooperation option initiated through the "social path". The right to residence is therefore not conditional upon cooperation with law-enforcement authorities unless the "judicial path" is chosen. In the United States, receiving both continued presence and the T visa is dependent upon cooperation with law-enforcement authorities, although minors are legally exempt from having to cooperate. Similarly, in Belgium, all trafficked persons are obliged to be under the care of one of the three State-approved NGOs and required to provide testimony to law-enforcement authorities. In Austria, however, the provision of the special protection permit is not linked to cooperation, but there must be an ongoing criminal or civil investigation.

¹¹⁷ Indeed, one interviewee relayed that the European Commission is considering a revision of the European Union Council Directive 2004/81/EC. It appears that the Italian model might provide new inspiration, with the Commission considering a dual approach of both conditional and non-conditional cooperation.

How cooperation with law-enforcement authorities works in practice is, nevertheless, a different issue.

Defining “cooperation”: From the outset, and as many interviewees noticed, an overarching issue relates to how cooperation is defined. This is a very subjective issue at the international, regional, national or local level. There remains a high degree of confusion and ambiguity as to what is actually expected from the trafficked person in terms of cooperation. In addition, the authors could not find an internationally agreed upon definition of “cooperation” in the context of trafficking. As one interviewee argued: “If we mean by cooperation simply that a victim has to testify, then it won’t work, for many reasons.” (interviewee response, United States).

The United States is an interesting starting point as cooperation is defined as “meeting all ‘reasonable requests’”, although the definition of a “reasonable request” is ambiguous. In practice, the practitioners interviewed recounted worrying tales of trafficked persons being required to knock on the door of a trafficker’s house or make a phone call to a trafficker in order to meet the “reasonable request” and subsequently obtain their temporary residency permit. As one interviewee stated: “There is so much abuse that happens from the federal agents to the trafficked person in terms of threats, in terms of inappropriate relationships, in terms of the official getting the client to do things, in terms of cooperation, that the client doesn’t need to be doing.” (interviewee response, United States). There was clear hesitation as to the “reasonableness” of such requests in these instances.

In the United States, there are grounds to access temporary residence through non-cooperation on the basis of an exclusion clause – linked to the physical or psychological state of the individual – but these grounds are in practice difficult to prove. One NGO, with a significant yearly caseload, mentioned that, during a year, they have a maximum of three cases where the trafficked person is granted a permit without having to testify, talk to the police, or provide any formal information.

Furthermore, in Italy, where there is a social (non-cooperation) and judicial (cooperation) path to access residence, it was noted that, in practice, the majority of trafficked persons cooperate with law-enforcement authorities at some point regardless of the path

chosen.¹¹⁸ As one interviewee mentioned: “Of course when the girl [or trafficked person] decides to be involved in a protection programme, then of course the relationship with the police forces necessarily becomes closer.” (interviewee response, Italy). Another respondent also noted that: “Nobody is passive with respect to cooperation.” (interviewee response, Italy). Where the “social path” is used in its true sense, it appears to be reserved for vulnerable persons or special cases such as people with severe physical or psychological difficulties. Similarly, in Austria, where cooperation is not a precondition to receiving the residence permit – only the existence of an ongoing case – one interviewee noted that, in practice: “The person needs to give one statement for the criminal proceedings to start and then the residence permit can be given.” (interviewee response, Austria).

Another issue is that of minors. In Austria, respondents did, however, point out that child victims of trafficking are not pressured to cooperate with law-enforcement authorities.¹¹⁹ In general, children are sheltered from having to cooperate with the police. Instead, and mirroring the legal (if not practical) framework of the Italian model, relevant information is passed to the police through the NGO that is caring for the minor. In the United States, however, interviewees said that minors are, in practice, required to cooperate. One interviewee noted that the child must cooperate with law-enforcement authorities: “If a minor client was meeting with officials before gaining access to a lawyer or a social service provider, officials will completely ignore that rule and will be telling the minors that they have to cooperate, that they have to do this and that.” (interviewee response, United States). This has even resulted in cases where the child has been called to court, without him or her being aware that non-cooperation was an option. Another issue is that of the victim’s age during the trafficking experience. An individual might have been trafficked as a child but is identified as an adult, or reaches the age of majority during the process. In such instances, the individual is automatically required to cooperate.

¹¹⁸ The “social path” is not available to trafficked persons identified in detention; in such cases, the victim is instead obliged to cooperate with law-enforcement authorities.

¹¹⁹ Interviewees in Belgium mentioned that they are considering making the residence permit for minors non-conditional on cooperation with law-enforcement authorities, although, at the time of writing, this provision was not yet in the law.

The purpose of conditionality: In view of the previous examples, the following question could be asked: Why make residence conditional on cooperation?

Some respondents considered that conditional cooperation adds a degree of authority to the residence permit process – it enables all actors to check and verify that the individual is, in fact, a trafficked person. A number of criminal justice actors were also keen to relay the importance of the relationship between the right to residence and the need to cooperate: “As a prosecutor there is no question that it is essential for us. And it has been extraordinarily helpful for us to have that second part where the victims do get to report, be certified and they can get T visas. It makes the witness much more able.” (interviewee response, United States).¹²⁰ In addition, another interviewee noted that: “Our experience, as heard from the police, was that most of them [trafficked persons] do cooperate ... Maybe it’s easier for them to cooperate with the police after granting the residency permit because they have a secure future and do not have to go back, especially when they are afraid...” (interviewee response, Austria).

Interviewees additionally mentioned that there has been abuse of the system in the past, and that making residence conditional on cooperation guards against such abuse. “If the directive is really unconditional then there’s a problem because you just create a new asylum procedure and everybody can go and say: ‘I am a victim’, but nobody checks. That is not really the meaning of procedure.” (interviewee response, Belgium). As another interviewee noted: “I guess the problem becomes how do you police potential fraud?” (interviewee response, United States). Indeed, who would determine if the trafficked person is a victim? However, as one interviewee in the United States pointed out: “I have never had a victim who comes to me and knows about the benefits, knows about the status.” There is also a grave risk that conditional cooperation seriously compromises a victim’s right to recover in a safe and dignified manner. Furthermore, there are no statistics to prove that the link to cooperation with law-enforcement authorities deters abuse, or that the lack of such a condition encourages abuse.

¹²⁰ Importantly, however, there was common agreement that, even in such cases where cooperation is obligatory, it is necessary to include a multitude of different actors to ensure the stability of the victim as a witness.

The purpose of cooperation: Another important issue related to the definition of cooperation is the purpose for which cooperation is needed. Often, the conditionality of residence upon cooperation with law-enforcement authorities is equally rationalized by the fact that the information provided by the trafficked person will be of “use” to a criminal investigation. However, many interviewees warned that obligatory cooperation can sometimes be counter-productive. Are victims seen as criminal justice instruments, or autonomous individuals? In most cases, only after contact with a service provider does the victim feel at ease and willing to relay the full degree of information. In the Balkan region, where IOM has previously implemented a project focusing on the right to residence for trafficked persons, NGO data confirmed that the more protected and stabilized victims feel, the more likely they are to cooperate. One NGO worker involved in outreach work in Italy additionally mentioned that only after a number of meetings with the presumed trafficked person is the level of trust high enough to broach the issue of exploitation. Often, the NGO waits until the individual asks to be taken to a medical facility (as this is a support service the NGOs provide). “And it is in that moment that you can really build confidence ... when you start to speak about health you always send other messages.” (interviewee response, Italy).

Medical research conducted by the London School of Hygiene and Tropical Medicine (LSHTM, 2006) found that it took 90 days for the mental health symptoms experienced by trafficked persons to begin to subside. Similarly, one interviewee pointed out that many victims have been in traumatic settings where they might not have slept or eaten properly: “If I want to have a proper interview, if I want to have a proper intervention, I have to have a proper setting and I have to make sure that the people are able to give me proper information; which does not work if the people are falling asleep or ... haven’t eaten the whole day or for some days. So this is the first thing.” (interviewee response, Austria). One interviewee additionally noted that: “Through my personal and direct experience, with some victims of trafficking, it takes so much time for these persons to first of all really gain the awareness that they are victims, and then to be able to reconstruct all the passages that could be useful for police investigations.” (interviewee response, Italy).

The nature of the trafficking experience – the high degree of abuse and exploitation – has thus caused some service providers and commentators to question the degree of criminal or investigative information that

can realistically be obtained from a trafficked person on exit from the trafficking situation: “Memory difficulty is a fundamental element of a psychological portrait of a trafficking survivor.” (LSHTM, 2006). In practice, it is not always understood that only a well-assisted and stabilized victim will be able to contribute as a reliable witness (Kanics et al., 2005). As one study found, more than one third of women had difficulty recalling the full trafficking experience (their most exploitative experiences) and 63 per cent suffered from general memory problems. It warned that: “Memory loss or unclear or confused recollections can have serious practical repercussions for women whose residency status (e.g. asylum claim) and social benefits might depend on their credibility with authorities, and will likely pose significant challenges during law enforcement and judicial proceedings.” (LSHTM, 2006).

Goodey (2003) similarly states that “not only does this [conditionality of residence permits] limit the level and kind of assistance afforded victims, with regard to their willingness to testify, but it is a limited response given the scant knowledge that trafficking victims generally have with regards to their traffickers”. Where residence rights are conditional on cooperation, the concept of “value” and how to decide what information and which trafficked person is “valuable” or “useful” to a court case comes into play. Others still have cautioned against a rhetoric of “incentivizing victims” (Egan, 2008), where the temporary residence permit acts as an incentive for cooperating. Raffaelli (2009) further adds that benefits which depend upon the victim’s cooperation might actually affect the credibility of the witness; they might be inclined to exaggerate the information in order to obtain the permit.

In conclusion, it would appear that, beyond their usefulness as witnesses for the prosecution, the needs of victims of trafficking are often not respected. This view was echoed by the European Commission Group Experts on Trafficking in Human Beings, which called for unconditional temporary residency rights and not just for those who are seen as “useful” victims.

Victim-centred fears, risks and issues related to cooperating with law-enforcement authorities: At the same time, where victims chose to cooperate – and it should be noted that victims sometimes want to cooperate – there is the issue of how they feel and how they are treated during the process. They could fear for their safety, and that of their family and friends. It is not uncommon for trafficked persons to have

experienced some form of relationship with their exploiter or another person involved in the trafficking process, thus potentially creating an atmosphere of fear of repercussions. For example, IOM assistance data confirm that a significant number of trafficked persons are recruited by someone they know. Trafficked persons are also often frightened of the implications of their cooperating with law-enforcement authorities due to issues of corruption, leaked information, power dynamics, and so on. As one interviewee noted: “She was terrified of cooperating with law enforcement because the man who had trafficked her was from her home town and he owned lots of land and he had lots of power, so there would be consequences for her and her family.” (interviewee response, United States).¹²¹

A number of practitioners further expressed reservations about obligatory cooperation because of the potential misuse of information. In the United States, the discoverability of the victim’s testimony submitted with their residence claim is an issue. All information submitted for T visa applications is discoverable and could in theory be used by the defence in court. As a result, some attorneys have to delay – or are even asked to delay – the T visa application process. While this might be beneficial in that the victim’s testimony cannot be used in court, the practical impact on the trafficked person is wide-ranging. As one interviewee noted: “If my client says that the most important thing for me is to get my family here immediately, then I say no, I am filing for the T visa tomorrow as it is the only way that my client can get their child here immediately.” (interviewee response, United States). Yet this is somewhat contradictory, as attempts to protect the victim from re-victimization in court can actually result in further re-victimization in the form of prolonged irregular status and delayed benefits.

When victims cooperate, it is all too common for their experience with and treatment by law-enforcement officers to be upsetting. Respondents noted that law-enforcement officers can be dismissive and harassing in their attempts to obtain information. Another issue raised was the use of threats by law-enforcement authorities at the cooperation phase, especially if the victim’s immigration status is still pending: “That really sticks with me, the trauma like the threat of removal – I mean, how it is used so destructively?” (interviewee response, United States).

¹²¹ In this particular case, the attorney involved was able to pursue another form of protection – special immigrant juvenile status – in place of the T visa. In such instances, it is clear that anti-trafficking actors find the alternative forms of protection preferable.

The impact on the victim of insensitive treatment by law-enforcement authorities is far-ranging, with the risk of re-traumatization clearly quite high. Where a trafficked person has a bad experience with law-enforcement authorities, it is also not uncommon for them to drop out of the assistance and residence process altogether; this has dire implications not only for the protection afforded to the victim, but for the criminal case too.

Interestingly, one police officer in Italy highlighted that cooperation – and trust – should be a two-way process to mitigate the victim’s fears and concerns about speaking to law-enforcement authorities: “If I carry out an investigative action when I already know a lot about the criminal organization behind the trafficking, I can immediately provide the person with information about the organization in order to reassure them that I know a lot about the exploiters. And they can be reassured that they can provide me with additional information because I will be efficient in protecting them because I know what is behind them. On the contrary, if I intervene in a very initial phase ... and I cannot provide information ... and I can not really reassure her ... I will not be able to protect her. We must also provide them [trafficked persons] with reassurance about our capacities and capabilities of investigating their exploiters.” (interviewee response, Italy).

Others still have argued for an approved NGO to take on the information/intelligence gathering role instead, thereby removing the need for the trafficked person to meet with law-enforcement authorities. This is more reflective of the model in Italy with its “social path” and “judicial path”. In the former, an NGO can authorize victim status and provide the needed assistance and protection without the victim having to cooperate with law-enforcement authorities. Where the individual might reveal information relevant to a case, this can be passed on to the relevant authorities by the NGO, provided that legal and data protection frameworks are respected.

Furthermore, respondents were keen to highlight the need for an individualized approach to cooperation. Many of the interviewees emphasized that the relationship between achieving temporary residence status and testifying varies from one case to the next. For example, in one particular case, two young girls were trafficked at similar times. One girl decided to testify and went through a harrowing year, not sleeping and crying all the time; while the other girl – who

did not testify – was seen to stabilize quite quickly in the same period. Today, however, the girl who testified is doing significantly better than the girl who chose not to pursue a criminal investigation (interviewee response, United States). As this case highlights, it is important to assess cooperation with law-enforcement authorities on an individual basis, and not in terms of conditionality for a residence permit.

5.2 Protection and rights granted when accessing residence

The following section focuses on the specific protection measures and rights granted to the trafficked person during the procedure for obtaining the residence permit.

5.2.1 Reflection period

The reflection period plays a central role in the right to residence. Where temporary residence is conditional on cooperation with law-enforcement authorities, the reflection period has been specifically designed to provide a period of time for the individual to decide whether to cooperate.

From the outset, the reflection period should not be confused with temporary residence status, as the purpose of the reflection period is quite unique. While the European Union Council Directive and Council of Europe Convention define the “reflection period” at the regional level, a common international definition does not exist. In practice, the term is broadly conceived as being a period of time in which individuals can consider their options in a safe environment, without risk of being removed from the country, and while also benefiting from a social assistance framework. Trafficking involves a high degree of trauma, stress and violence. When exiting a trafficking situation, the individual is immediately confronted with a sudden change of environment and faces a number of questions: What will my future hold? What will I do? What can I do? The major choices facing trafficking victims often include whether to cooperate with law-enforcement authorities, whether to accept assistance, whether to return home voluntarily, whether to go to a country of resettlement, or whether to pursue other protection options. The reflection period should thus provide time for the person to consider all options and to embark on the process of recovery and rehabilitation – in order to stabilize emotionally and physically through accessing immediate direct assistance – without fear of deportation.

The reflection period can also be an occasion to positively identify cases where there is an element of doubt (see also the relevant sections on identification and cooperation with law-enforcement authorities for further discussion), or cases where a victim first rejects his or her victimhood and chooses to decline assistance on the basis of being a trafficked person. Most importantly, and where temporary residence is conditional on cooperation with law-enforcement authorities, the reflection period serves to provide the individual with time to decide whether to cooperate.

Practical implementation: Equal choices for all victims? In practice, implementation of the reflection period and the frameworks in the four countries studied varies significantly. Belgium is the only country included in this research to grant the reflection period as a right: temporary residence is linked to cooperation with law-enforcement authorities; thus, the reflection period is largely regarded as the period of time for the individual to decide whether to cooperate. However, the field work revealed that the majority of trafficked persons are identified by the Belgian police, thus rendering the reflection period in these instances redundant. Where trafficked persons are identified by the police, it is largely considered that they will automatically cooperate: “I wouldn’t believe that any person who has first contact with the police didn’t give a statement in some form. So what is the reflection period for then?” (interviewee response, Italy).

An issue flagged in Austria concerned lack of knowledge of the process. As previously mentioned, the reflection period is not written into Austrian law. In practice, this results in confusion among various actors, particularly police officers, at the implementation phase. In one example, a trafficked person who was awaiting her temporary stay permit was detained by police for being in an irregular situation. The woman was held at the police station for two hours until she was able to contact the service provider who then explained her situation to the police. This obviously caused unnecessary stress to the individual which could have arguably been avoided if the reflection period was formalized.

In each of the countries studied, a delicate balance must also be struck between the need to protect the rights of the trafficked person, and the desire to secure a conviction. As one interviewee highlighted: “After three months, can you still begin an investigation?” (interviewee

response, Italy). This leads to a central issue surrounding the reflection period and the right to residence in general. This conflict is also reflected in many international, regional and national instruments. As the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking suggest, while “The human rights of trafficked persons shall be at the centre of all efforts ... States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers...”. Yet, a human rights approach demands that the needs and rights of trafficked persons take priority.

Duration of the residence permit and individualized approaches:

An additional challenge concerns the duration of the reflection period. In the four countries studied, the reflection period ranged from 30 days (Austria) to 45 days (Belgium); with Italy and the United States having no formal reflection period included in the law.¹²² There did, however, appear to be some dispute over the duration needed. While one interviewee in Belgium mentioned that most trafficked persons agree to talk after five days, another interviewee in Belgium mentioned that three months could be a better option. It is recognized that a 45-day reflection period is not long enough for cases involving extreme exploitation. Interviewees in Austria stated that it is extremely difficult for the individual to make a decision in 30 days. Some people might reveal the full details of their exploitation within 24 hours; for others, it might take two years. In practice, it appears that there is a degree of flexibility and that in some cases the reflection period can be prolonged. This nevertheless creates a system of discretion in which cases of trafficking do not receive equal treatment.

Medical research has found that it takes 90 days for the mental health symptoms experienced by trafficked persons begin to subside (LSHTM, 2006). The study consequently called for a recovery and reflection period of a minimum of 90 days. It argued that this would ensure that women’s cognitive functioning had improved to a level at which they are able to make informed and thoughtful decisions about their safety and well-being, and provide more reliable information

¹²² However, with regard to the situation in Italy, as one interviewee noted: “In Italy, you are protected from removal and this is a sort of a reflection period. We do not call it a reflection period because during this time the person can decide already to collaborate; or to never provide information. But, nevertheless, they are all put in the same shelter; they are all given the same opportunity.” (interviewee response, Italy).

about trafficking-related events. The study sparked much discussion in Europe, with many anti-trafficking actors calling for a minimum reflection period of at least three months. The European Commission Group of Experts on Human Trafficking equally advocates for period of 90 days to ensure that the trafficked person has sufficient time to recover and make an informed decision on whether to cooperate with law-enforcement authorities.¹²³ A number of interviewees said that the length of the reflection period was a central issue in deliberations surrounding the Council of Europe Recommendations. Many advocates indeed called for the Council of Europe to set a 90-day reflection period; however, these calls were not answered and a 30-day period was established.

5.2.2 Immediate protection and direct assistance needs

I'm an attorney, but any time I work with a trafficked person I always work in conjunction with a case worker. I don't think our work would be successful without the trafficked person also working very closely with the case manager; making sure they have shelter, and housing, and safety and all those other protections as well.

(interviewee response)

Findings from the field work reveal that the right to residence cannot – and should not – be separated from the right to immediate protection and assistance. Interviewees in all countries reiterated that only once the trafficked person has been able to access some form of social or economic assistance does their sense of stability and trust greatly improve. As one interviewee noted: “We should always have in mind what trafficking is. It involves people. And those people should just be able to have a normal life; to lead a normal life.” (interviewee response, Italy).

The degree of support provided differs from country to county and depends on the residence period. Importantly, support services also differ within the four countries. In Belgium, all trafficked persons

¹²³ European Commission Group of Experts on Trafficking in Human Beings 2004 Opinion on reflection period and resident permit for victims of trafficking in human beings, which was reinforced by Opinion No. 4/2009 on a possible revision of Council Directive 2004/81/EC of 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.

must be assisted by one of the three government-mandated NGOs to be granted the reflection period or temporary residence. Trafficked persons are afforded almost identical protection and assistance during the reflection period as those provided upon receipt of temporary residence status. At all stages, trafficked persons are eligible to access health care, shelter, psychological assistance, social welfare benefits, education and language training. The only difference is that trafficked persons are not entitled to work before receiving temporary residence status. While the services offered are comprehensive, one study found that, out of a total of 619 registered trafficked persons (intake for all three NGOs in 2008), only 176 accepted assistance (US Department of State, 2008). As mentioned previously, it is not uncommon for victims to decline assistance due to threats, fear of the authorities, or fear stemming from their irregular immigration status. If the only way to access the reflection period or a residence permit is through an authorized NGO, this might have the unintended consequence of denying the right to residence to others who need it.

In Austria, trafficked persons are formally able to access state welfare only after the reflection period and once they receive the special protection permit. As one interviewee noted: “That’s one of the limbo factors.” (interviewee response, Austria), which results in a situation where a trafficked person in the pre-permit phase is without health insurance. Again, the responsibility for their care falls on NGOs or the trafficked person themselves: LEFÖ-IBF and other NGOs assist victims with their direct assistance needs on identification and during the informal reflection period by providing shelter, emergency health care, psychological counselling and legal assistance. However, “NGOs only have capacity to assist with basic emergency needs: the big problem is that victims do not have access to medical insurance.” (interviewee response, Belgium). Concerning minors, the Austrian Youth Welfare Act provides for a regulated nationwide scheme to assist all children, regardless of nationality or immigration status (Federal Ministry of Economy, Family and Youth, 2009). The youth welfare authority is required to provide necessary protective measures, including legal representation and provision of accommodation and food in accordance with the specific standards in the particular province. These protection measures are available to children from the first point of contact.

In the United States, trafficked persons are able to access direct assistance by receiving continued presence status, or by applying for

deferred action. A number of different government departments¹²⁴ provide funding for the provision of direct assistance to trafficked persons in the United States, the main one being the Department of Health and Human Services, which funds NGOs through a grants system contracted to the United States Conference of Catholic Bishops. The Conference provides case management services to pre-certified and certified victims on a per capita reimbursement basis through a network of service providers across the United States. Services include the provision of shelter, job training, health care and access to vital emergency services prior to the receipt of certification.¹²⁵

In Italy, within the framework of Article 18 of Legislative Decree No. 286/1998, national funds have been allocated to support and implement social protection projects with a view to providing shelter, information, social and health services, medical and psychological care, assistance in finding employment, vocational training, legal counselling and the services of a competent translator in the event of legal proceedings. Interviewees did, however, express concern regarding a perceived reduction in funding, with many interviewed service providers stating that they have recently experienced budgets cut and were forced to reduce their services.

Regarding the needs of trafficked persons in general, one interviewee described three main considerations and steps: ensuring regularization of status; obtaining shelter; and working towards recovery and rehabilitation. As one commented: "... [temporary residence] was for them a paper to freedom; secondly, it was a roof; and, thirdly, it was thinking about what to do in the future." (interviewee response, Belgium).

¹²⁴ The Department of Justice provides funding to State-level task forces for identification and rescue; the Department of Homeland Security provides funding to the Victim Assistance Program of the Immigration and Customs Enforcement; and the Bureau of Population, Refugees, and Migration funds an IOM-run family reunification programme.

¹²⁵ See Office to Monitor and Combat Trafficking in Persons (2009). It should be noted that service providers are unable to use federal funding to provide sexual and reproductive health services given that the funds are transferred through a religious organization. This is highly significant as many trafficked persons experience some form of sexual exploitation regardless of the sector into which they have been trafficked.

5.3 The road to rehabilitation: The granting of residence options

The following sections aim to draw together Part 5, and provide an overview of the practical challenges faced once residence options are obtained. Key issues covered include temporary stay, permanent stay, and access to social and economic rights.

5.3.1 Temporary residence – temporary rights?

Through trafficking or through exploitation the person is reduced to a thing, to a piece of merchandise. The re-establishment of the right to identity is among the basic human rights. Through the re-establishment of the right to identity, therefore, the State should allow the person ... to access [basic human] rights, among which is the right to residency.

(interviewee response)

In all four countries, residence permits have to some degree the dual purpose – and conflict – of encouraging victims to cooperate with law-enforcement authorities and protecting their human rights (see also previous sections of this report). In practice, however, the protection of human rights is often secondary.

Biased implementation and procedural problems: In Belgium, when a victim is identified by law-enforcement authorities or shows willingness to cooperate with them shortly after being identified by one of the three official NGOs, he or she immediately qualifies for the three-month temporary residence permit. Temporary residence can be granted on the same working day or overnight.¹²⁶ There also appears to be a degree of flexibility when going from the first to second temporary permit: the permit can be extended by making a phone call. However, as one interviewee mentioned, the situation very much depends on the police officer involved. Regional variation is, therefore, not uncommon: some officers grant trafficked persons six-month residence permits straight away, while, for others, obtaining the three-month permit to which they are entitled proves to be quite difficult. This is a common

¹²⁶ A 24-hour hotline is in place, which the three registered service providers call to register the individual immediately on receipt of a new case.

challenge also faced by the other countries included in this research. In short, there is little consistency and the treatment of victims can vary greatly, depending on the city where they are identified or which agency or individual conducts their interview.

Delays and discrepancies: In Austria, the right to apply for residence on the grounds of being a trafficked person was recently formalized through a Constitutional Court decision.¹²⁷ With the ruling came the requirement to determine a maximum processing period which was set at six weeks, along with a minimum duration of temporary residence of six months. One interviewee also mentioned a specific case involving a woman who waited four years for her residence status to be resolved. In the interim, she saw other beneficiaries (20 to 30 new cases) obtaining their residence status and moving on. This situation caused the victim great stress. In addition, she was forced to turn down offers to visit family abroad as she was without status and had no legal right to travel.¹²⁸ Fortunately, due to the recent change in the law, her situation is now resolved. As also mentioned: “People have different approaches to the legal process, so that will sometimes create disparities in how it [temporary residency] is pursued and the time lines for different clients ... that can cause problems.” (interviewee response, United States).

Wide discrepancies in the time taken to process and issue a residence permit were also cited as an issue in Italy, with one interviewee mentioning that the process can take up to nine months. During this time, the trafficked person remains in limbo with regard to their immigration status. As one interviewee noted: “They have to live with it every day ... it’s very complicated ... it is constantly hanging over them. It is the fact for them that they have this temporary status related to what is clearly a very traumatic life experience.” (interviewee response, United States).

While the legislative model in the United States differs quite significantly from the European model, the time period for issuing visas was again seen to be a significant barrier. Barriers to obtaining temporary residence include the competency of the attorney; the diligence of the case manager; the knowledge of the police officers; and the state where the victim is identified. Once obtained, the T visa is

¹²⁷ Constitutional Court (VfGH), Case No. G246/07 of 27 June 2008.

¹²⁸ The immigration status of the individual during this period remained irregular, although she was not deported.

valid for four years. As one interviewee commented: “It’s a significant benefit; it’s not just temporary.” (interviewee response, United States).

The issue for most victims, however, is that the residence option is merely a temporary one – after which, they are required to either return home, seek other immigration solutions, including re-migration and protection procedures, or be resettled. Added to the complications described previously with regard to identification and cooperation, obtaining even temporary residence rights is therefore a challenge.

5.3.2 Permanent stay: Complete rehabilitation?

Temporary residence permits provide only one – albeit essential – solution. To fully recover, trafficked persons must be able to move on with their lives and reintegrate socially and economically. As mentioned by IOM (2007): “Return to the country or community of origin is not always the best solution or the desired solution for the victim ... Organizations may also wish to advocate on behalf of the victim for a longer stay in the country of destination.” As one interviewee also noted: “You are only a victim for a certain amount of time and, after that, you are not a victim any more. It is part of your history and you will not get it out of your history. But, as soon as you manage to work through your trauma, you manage your situation; you are not a victim anymore.” (interviewee response).

Options and opportunities: Of the four countries studied, it appears that permanent residence is the easiest to access in the United States. This is not, however, without its challenges. The regulations for adjustment of the T visa to a green card came into force in early 2009. The duration of the T visa is four years, after which the holder needs to apply for adjustment to the green card. Existing holders of the (four-year) T visa were given just 90 days from issuance to file for their green card. Many interviewees mentioned that this time frame was too short.¹²⁹ While it is still too soon to tell, there is a fear among service providers and attorneys that many T visa holders might be out of status (where the four-year T visa period has expired) or have lost contact with their attorney or case manager, and are therefore at risk of being deported.

¹²⁹ See also Office of the Citizenship and Immigration Services Ombudsman (2009).

In Austria and Italy, permanent residence is often linked to a work or study permit; however, as previously mentioned, very few trafficked persons are, in practice, able to access the labour market, and fewer still fulfil the integration agreement required in Austria to receive the settlement permit. In Belgium, a trafficked person is legally eligible for permanent residence only if a case goes to court and a conviction is made. However, interviewees note that, in practice, permanent residence is granted if a victim “does their best to cooperate” or in cases where the trafficked person has been in the care of one of three registered NGOs for more than two years.

Individual choices: It is not uncommon for trafficked persons to ultimately want to return home. Where return to the country of origin is a viable and safe option, the decision should, in all instances, be accompanied by a detailed risk assessment in both the country of destination and the country of origin. As also noted: “Assistance providers should also keep in mind that return to the country of origin should not require that the victim return to the community of origin unless that is the victim’s preference. If possible, services should be provided to assist the victim in relocating to a community of his or her choosing.” (IOM, 2007). Many return success stories are based on good cooperation between governmental and civil society actors in both countries.¹³⁰ It should be emphasized, however, that return should not be viewed as the only option available to the trafficked person in instances where a criminal investigation has ended either due to a successful conviction or termination.

5.3.3 Beyond immediate assistance: Accessing social and economic rights

While all four countries offer immediate protection and assistance at the point of identification and during the reflection period, the right to temporary or permanent residence can also open up opportunities to access other social and economic rights. In the European context, a recent study on complementary protection found that two rights seem to be ubiquitous: the right to education, and the right to health care (ECRE, 2009). This finding was also corroborated by our field work. Indeed, in all four countries, trafficked persons have access to a

¹³⁰ Many interviewees made reference to the important role of international organizations, such as IOM, in this regard.

broad package of assistance once they have received their temporary residence status. At a minimum this includes the right to shelter, health care, psychosocial counselling and employment. Some countries provide more holistic packages, including the right to legal counsel, the right to education and language training, and the right to family reunification.

As a general finding, there remains, however, a critical lack of specialized support services for trafficked males. In Belgium, one interviewee relayed that trafficked men are taking up shelter in accommodation normally reserved for homeless persons. This was cited as being particularly problematic because of the risk of re-traumatization. There similarly remains a lack of adequate support services for males in Austria, Italy and the United States. In Italy, for example, only the province of Venice has specialized services for males.

Legal counsel: In the United States, providers are unable to use federal trafficking funds to pay for the provision of legal aid. Legal counselling is nevertheless essential if the trafficked person is to be fully informed of his or her rights. It was also widely agreed that the T visa cannot, in practice, be applied for without the assistance of an attorney owing to the complexity of the process. Without federal funding, the responsibility falls on the shoulders of NGOs or lawyers undertaking pro bono work. Pro bono lawyers are often inexperienced in handling trafficking cases, and, generally, paying clients take precedence over non-paying ones. In some instances, trafficked persons are themselves required to pay for legal services. In cases involving a group of victims, it is not uncommon for some of them to receive their residence permit months before others.¹³¹ This causes great stress and anxiety, with the trafficked person involved being led to think that they have done something wrong. Free legal advice was also mentioned as being an important issue in Austria. As one interviewee mentioned, a language barrier might prevent the individual from being able to apply for the special protection permit on their own. While individuals now have the right to apply for the special protection permit, there is perhaps a need to go one step further and also grant the right to free legal counsel in a language understood by the trafficked person.

¹³¹ One interviewee provided the example of a large case, involving more than 200 trafficked persons, in which she was involved. Owing to the sheer number of potential T visa applicants, the victims were referred to lawyers across the United States, but this resulted in some victims receiving their T visas months before others. Each T visa application is estimated by an attorney working in the field to take 80 hours to prepare (interviewee response, United States).

Employment: In all four countries, access to employment was cited as being a particularly important element in the full recovery of the victim. As already highlighted, the right to access the labour market differs from country to country, but remains a challenge in all four countries studied.

One of the key barriers to obtaining work is that of language. It is not uncommon for trafficked persons to be exploited within their own communities, only rarely being exposed to the local community and local language. To overcome this, the Belgian authorities have made language training compulsory as of the first week of being assisted. In Austria, trafficked persons are required to fulfil an integration agreement after one year, including demonstrating knowledge of the national language. However, due to the quota system in place, it was acknowledged that, in practice, trafficked persons often do not fulfil the criteria for acquiring a work permit. In an attempt to overcome this, discussions have taken place at the national level about the possibility of former trafficked persons (and holders of the special protection permit) to work as seasonal workers. Given that exploitation is common in the seasonal work sectors, due attention and protection must, however, be afforded to trafficked persons to guard against their repeat victimization or re-trafficking.

Indeed, one former trafficked person interviewed in the course of the field work recounted her frustration at not being able to work before having received official immigration status. She mentioned that she needed to work to support her family back home, yet without a social security number that was impossible. This forced her to work illegally in the informal sector, putting her at risk of further exploitation and re-trafficking. Due attention needs to be afforded to the right to employment as well as the right to residence. Trafficked persons are often economic migrants who have migrated in search of work.

Family reunification: Family reunification was also cited as an important element in the full recovery of the victim. In practice, however, it seems to be a genuine hurdle for many trafficked persons. Given the length of the residence permit application process, many individuals are forced to spend many years apart from their family members. One former victim mentioned that she had spent five years separated from her children. It is not uncommon for the family unit to completely break down due to the distance and time spent apart.

In Belgium, one case worker stated that she provides all trafficked persons with all the necessary information regarding family reunification; and is honest in highlighting that, only if their case is going well, can they try to bring over immediate family members. However, where temporary residence is officially linked to a successful court case, as in Belgium, the victim ultimately runs the risk of being in an irregular situation, together with their family, if they act prematurely. In practice, most individuals wait until they have reached some level of stability and integration – such as being able to speak the language, and having a job and accommodation – before they bring their family members to join them in the respective country. Similarly, in Austria the trafficked person must demonstrate that they have insurance, accommodation, financial resources, and so on, before family reunification can be granted.

In conclusion, as the above examples demonstrate, acquiring permanent immigration and social and economic rights still does not guarantee a smooth and easy path to rehabilitation for the trafficked person. Therefore, there is still a need to constantly evaluate how best to reintegrate and rehabilitate victims of trafficking.

PART 6: Conclusion

One of the key barriers to the efficiency of the residence permit procedure remains the manner in which legislation is translated into practice. Current laws not only have gaps, but are often not fully implemented. On the other hand, practice often goes further than the provisions in the law. In short, there is little consistency and the treatment of victims can vary greatly, depending on the city where they are identified or which agency or individual conducts their interview. The gender of the victim and the nature of the exploitation suffered also have an impact on identification, with males and victims of trafficking for forced labour struggling to have their rights duly protected due to misidentification or missed identification opportunities. There is room for improvement with regard to the identification of all potential male and female victims, trafficked for all forms of exploitation. A sound identification system is a prerequisite to effective implementation of the right to temporary residence.

The law creates a high degree of discretion which, in turn, creates a high degree of confusion among State and civil society personnel when implementing assistance and protection measures; this results in a disparate approach. Anti-trafficking actors are often unsure of how to interpret certain legal provisions, policy recommendations, particular terms, or specific measures of assistance. The issues of reflection periods and cooperation with law-enforcement authorities are perhaps most central to such confusion. The importance of the reflection period cannot be overstated. As demonstrated throughout this report, the reflection period is an essential means by which to ensure the stabilization of the trafficked person. When implemented correctly, it facilitates the creation of a safe space, whereby trafficked persons can access assistance and consider the options available to them without the risk of deportation.

Inter-agency cooperation is essential to the correct implementation of anti-trafficking measures. In this regard, a number of interviewees pointed to the importance of monitoring and evaluation mechanisms. In practice, all countries have established multiagency working groups, forums or task forces at both the senior and operational levels to facilitate dialogue and monitor anti-trafficking interventions. However, questions remain as to the independence of these groups. As one

interviewee pointed out, it essentially comes down to whether a person or group has the authority to issue sanctions if laws are breached or malpractice occurs.

The Organization for Security and Co-operation in Europe advocates for the concept of an independent national rapporteur or equivalent mechanism that is truly independent. The role of the national rapporteur is to assess anti-trafficking interventions and yearly trends, offering recommendations for improvement and development at the national level. In addition, a key finding from an IOM-implemented project on temporary residence in the Balkan region was the role played by NGO watchdogs. By means of setting up an adequately financed monitoring mechanism, local NGOs were given the authority to assess the status of implementation of temporary residence protection. The NGOs were additionally tasked with data collection and the provision of key recommendations.

Similarly, the findings of this study have demonstrated that cooperation with law-enforcement authorities remains a key issue. Some interviewees highlighted that obligatory cooperation is an essential part of the right to residence: abuse of the system and possible inflow of fraudulent applications are often cited as the reasons for not issuing residence permits to trafficked persons. Yet, interviewees in all the countries studied noted that such cases have not been proven and that this fear remains unfounded. The report findings reveal that such conditions are often at the cost of protecting the human rights of trafficked persons. Poor victim protection and victim assistance discourage victims from cooperating with law-enforcement authorities due to fear of mistreatment and deportation, fear for their lives and concern for family members. To ensure that the human rights of trafficked persons are fully respected, efforts to investigate and prosecute traffickers need to be duly balanced against protecting the victim's human rights and interests. The enactment of the reflection period and the right to residence are a means by which to reinforce this human rights framework.

At the same time, the opportunity to access residence in the country of exploitation and/or identification is only one of the many options that should be made available to trafficked persons. Possible assistance options may also need to include return to the home country or moving to a country of resettlement. Where trafficked persons decide to leave

the country of exploitation, their decision should be voluntary and assistance should be offered to ensure that their return home or move to a country of resettlement is safe, dignified and free of risk.

Despite the somewhat critical conclusion that has been drawn, significant and admirable efforts are being made in each of the four countries studied. All four countries are committed to taking positive steps to provide protection and assistance to trafficked persons in accordance with regional and international standards. Since the completion of the study, further legal developments have been made. The experience of trafficked persons and the views of practitioners, policymakers and law-enforcement officials on the implementation of the national laws helped to outline the discrepancies in the law, the key challenges faced and possible solutions and considerations for future policies. Even though the right to residence seems to be invariably linked to law-enforcement objectives, activists continue to argue for a paradigm shift from a law-enforcement perspective to the recognition that the rights of trafficked persons are paramount in the fight against human trafficking. The provision of legal residence can be seen as a solution for trafficked persons who fear returning to their countries of origin. It may help to rehabilitate trafficked persons and could prove to be instrumental in combating human trafficking. Below are some of the good practices identified by interviewees over the course of the research.

- Placing human rights at the centre of law-enforcement efforts.
- Adopting a gender-sensitive approach to anti-trafficking interventions, including the right to residence.
- Availability of a 90-day minimum reflection period, clearly defined in law, which guarantees protection against deportation as a legal right.
- Availability of a one-year minimum renewable temporary residence permit as a legal right that is not conditional upon the capacity or willingness of the victim to cooperate with law-enforcement authorities.
- Mandating national NGOs to play a formal role in identification and the provision of assistance, including legal advice on obtaining temporary residence.
- Flexibility in requirements to produce personal identity documents that may not be easily accessible to the victim.

- Accessing the right to employment upon receipt of the temporary residence permit.
- Undertaking of individualized risk assessments in the country of origin and the country of destination where a safe and voluntary return is a viable option.

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Annex: Glossary of terms¹³²

Adjudication – In the migration context, a decision as to whether an applicant is qualified for the visa, refugee status, or other immigration status he or she seeks.

Adjustment (change) of status – Procedure whereby a non-national present in a State may seek a different immigration status. For example, provision may be made by law by which a non-national holding a student visa, on completion of studies, is able to seek a change of status so that his or her student visa is replaced by a work visa.

Affidavit of support – A certified legal document, containing written testimony given under oath before a competent authority. In the migration context, an affidavit is normally signed by a sponsor, guaranteeing full cost of maintenance of a migrant to enable entry to be granted into the country, frequently required for elderly migrants and those who are ill and unable to fend for themselves.

Alien – A person who is not a national of a given State.

Amnesty – A general pardon, “regularization” or “legalization” that is extended to people who can show residence in a country for which the amnesty is granted, despite the fact that such residence was unauthorized.

Appeal – A procedure undertaken to review a decision by bringing it to a higher authority; often the submission of a lower court’s or agency’s decision to a higher court for review and possible reversal.

Application – In the migration context, a request (usually written) submitted to the government by an individual or organization seeking governmental or legal action.

Arbitrary – In an unreasonable manner, related to the concepts of injustice, unpredictability, unreasonableness and capriciousness.

¹³² This glossary draws primarily on the IOM *Glossary on Migration 2nd Edition*, IOM, Geneva (2011) and the *Asylum and Migration Glossary – A tool for better comparability*, European Migration Network (2010), http://www.emn.fi/files/179/EMN_GLOSSARY_Publication_Version_January_2010.pdf

Asylum – A form of protection given by a State on its territory based on the principle of non-refoulement and internationally or nationally recognized refugee rights. It is granted to a person who is unable to seek protection in his or her country of nationality and/or residence in particular for fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

Asylum (diplomatic) – The refuge which States may grant beyond the boundaries of their territory in places which are granted immunity from jurisdiction, to an individual seeking protection from the authority who persecutes or claims him or her. Diplomatic asylum may be granted at diplomatic missions and the private residences of the heads of mission, warships or aircrafts, but not in the premises of international organizations, nor consulates. There is no right of an individual to obtain diplomatic asylum, nor an obligation of a State to grant it.

Asylum (territorial) – Protection granted by a State to an alien on its own territory against the exercise of jurisdiction by the State of origin, based on the principle of non-refoulement, leading to the enjoyment of certain internationally recognized rights.

Asylum-seeker – A person who seeks safety from persecution or serious harm in a country other than his or her own and awaits a decision on the application for refugee status under relevant international and national instruments. In case of a negative decision, the person must leave the country and may be expelled, as may any non-national in an irregular or unlawful situation, unless permission to stay is provided on humanitarian or other related grounds.

Best practices – Means to further the application of existing norms and principles, both at the international and the national levels. Best practices may be translated into operational directives, codes of conduct or other manifestations of soft law, but should not lead to a weakening or erosion of positive law. They are characterized by being innovative, developing creative solutions; showing a positive impact on the level of implementation of migrants' rights; having a sustainable effect, especially by involving migrants themselves; and having the potential for replication.

Bondage – The state of being under the control of another person.

Bonded labour – Service rendered by a worker under condition of bondage arising from economic considerations, notably indebtedness through a loan or an advance. Where debt is the root cause of bondage, the implication is that the worker (or dependants or heirs) is tied to a particular creditor for a specified or unspecified period until the loan is repaid.

Carabinieri – The national gendarmerie of Italy, policing both the military and civilian populations.

Child – An individual being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier (United Nations Convention on the Rights of the Child, 1989).

Claim – An assertion made to a government agency or court seeking an action or determination of a right or benefit, such as refugee status or the right to compensation or legal redress in civil proceedings.

Coercion – Compulsion by physical force or threat of physical force.

Continued presence – This is a form of temporary immigration relief that may be provided to a potential witness who is assisting with an investigation or prosecution. It must be requested by a federal law-enforcement agency on behalf of the potential witness and enables the individual to obtain an employment authorization document and other federal benefits available to certified victims of trafficking.

Country of destination – The country that is a destination for migratory flows (regular or irregular).

Country of origin – The country that is a source of migratory flows (regular or irregular).

Country of transit – The country through which migratory flows (regular or irregular) move.

Cultural orientation – Training courses provided to migrants that seek to impart knowledge of the host country, and may include its history, geography, language.

Debt bondage – The status or condition arising from a pledge by a debtor of his or her personal service or those of a person under his or her control as security for a debt, if the value of those services as reasonably assessed is not applied toward the liquidation of the debt or the length and nature of those services are not respectively limited and defined (United Nations Supplementary Convention on the Abolition of Slavery of 1956).

Deception – In the migration context, this term not only refers to false or wrong information, but also to the intentional abuse of capitalizing on the lack of information available to the migrant.

Defendant – A person sued in a civil proceeding or accused in a criminal proceeding.

Deportation – The act of a State in the exercise of its sovereignty in removing a non-national from its territory to his or her country of origin or third state after refusal of admission or termination of permission to remain.

Detention – Restriction on freedom of movement through confinement that is ordered by an administrative or judicial authority. There are two types of detention: criminal detention, having as a purpose punishment for the committed crime; and administrative detention, guaranteeing that another administrative measure (such as deportation or expulsion) can be implemented. In the majority of countries, irregular migrants are subject to administrative detention, as they have violated immigration laws and regulations that are not considered to be crimes. In many States, a non-national may also be administratively detained pending a decision on refugee status or on admission to or removal from the State.

Discretion – A public official’s power or right to act in certain circumstances according to personal judgment and conscience, often in an official or representative capacity.

Discrimination – A failure to treat all persons equally where no objective and reasonable distinction can be found between those favoured and those not favoured. Discrimination is prohibited in respect of “race, sex, language or religion” (Article 1(3), United Nations Charter, 1945) or “of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status” (Article 2, Universal Declaration of Human Rights, 1948).

Displaced person – A person who flees his or her State or community due to fear or dangers other than those which would make him or her a refugee. A displaced person is often forced to flee because of internal conflict or natural or man-made disasters.

Dublin II Regulation – Council Regulation (EC) No. 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (OJ 2003 L 50/1), named “Dublin II,” which replaces the provisions in the Dublin Convention (Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Communities, signed in Dublin on 15 June 1990). Under the Dublin II Regulation, Member States have to assess, on the basis of objective and hierarchical criteria, which Member State is responsible for examining an asylum application lodged on its territory. The system is designed to prevent “asylum shopping” (where an asylum-seeker submits several requests for asylum in various States) and at the same time to ensure that each asylum applicant’s case is processed by only one Member State.

Eurodac – This is the name given to an information technology system, the purpose of which, via the collection, transmission and comparison of fingerprints, is to assist in determining which Member State of the European Union is to be responsible pursuant to the Dublin Convention for examining an application for asylum lodged in a Member State, and otherwise to facilitate the application of the Dublin Convention under the conditions set out in the regulation establishing Eurodac.

Expulsion – An act by an authority of the State with the intention and with the effect of securing the removal of a person or persons (non-nationals or stateless persons) against his or her will from the territory of that State.

Expulsion order – The judicial or administrative order of a State obliging a non-national to leave its national territory.

Family reunification/reunion – Process whereby family members already separated through forced or voluntary migration regroup in a country other than the one of their origin. It implies a certain degree of State discretion over admission.

Green card – An identity card issued by the U.S. Government to non-nationals which grants permanent resident status in the United States. Also called a Permanent Resident Card, it is evidence of a non-national being a lawful permanent resident with a right to live and work permanently in the United States. A person may qualify for a green card through employment or through sponsorship by a family member who is a citizen or permanent resident. In addition to the right to live and work in the United States, a green card also allows the holder to travel abroad for periods of time, gives the right to apply for U.S. citizenship after a period of time, and the right to petition for a green card for the applicant's spouse and unmarried children under 21 years of age.

Human rights – Those liberties and benefits based on human dignity which, by accepted contemporary values, all human beings should be able to claim “as of right” in the society in which they live. These rights are contained in the International Bill of Rights, comprising the Universal Declaration of Human Rights, 1948, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, 1966 and have been developed by other treaties from this core (e.g. The Convention on the Protection of All Migrant Workers and Members of Their Families, 1990).

Humanitarian assistance – Aid that addresses the needs of individuals affected by crises. It is primarily the responsibility of the State but also supported by international organizations, non-governmental organizations (NGOs) and the Red Cross/Red Crescent Movement. This assistance is provided in accordance with the humanitarian principles, particularly the principles of humanity (human suffering must be addressed wherever it is found, with particular attention to the most vulnerable in the population, such as children, women and the elderly; the dignity and rights of all victims must be respected and protected), neutrality (humanitarian assistance must be provided without engaging in hostilities or taking sides in controversies of a political, religious or ideological nature), and impartiality (humanitarian assistance must be provided without discriminating as to ethnic origin, gender, nationality, political opinions, race or religion. Relief of the suffering must be guided solely by needs and priority must be given to the most urgent cases of distress).

Identity document – A piece of documentation issued by the competent authority of a State designed to prove the identity of the person carrying it.

Immigration status – Status which a migrant is accorded under the immigration law of the host country.

Integration – While the term is used and understood differently in different countries and contexts, “integration” can be defined as the process by which migrants become accepted into society, both as individuals and as groups. It generally refers to a two-way process of adaptation by migrants and host societies, while the particular requirements for acceptance by a host society vary from country to country. Integration does not necessarily imply permanent settlement. It does, however, imply consideration of the rights and obligations of migrants and host societies, of access to different kinds of services and the labour market, and of identification and respect for a core set of values that bind migrants and host communities in a common purpose. Local integration is one of the three durable solutions to address the plight of refugees. It may also be applied to victims of trafficking and unaccompanied children.

Integration agreement – A term used primarily in the Austrian context. An integration agreement serves to prove that the victim is integrating into Austrian society. The objective is to ensure that victims acquire a basic knowledge of the German language and are able to read and write and participate in social, economic and cultural life in Austria.

Interview – The process of questioning or talking with a person in order to obtain information or determine the personal qualities of the person. An interview is a common step in the adjudication of an application for refugee or other immigration status.

Judicial path – A term used primarily in the Italian context. Once a victim of human trafficking is admitted into the protection programme, there are two different procedures¹³³ which can lead to the issuance of a residence permit. The so-called “judicial path” necessarily involves justice authorities. This procedure applies when the victims are already cooperating with national authorities, and the residence permit is issued by the police headquarters (*questura*) at the prosecutor’s request. See also “Social path”.

Lawful – Not contrary to law; conforming to or permitted by law.

¹³³ These procedures are clearly described in Article 27 of Presidential Decree No. 394/1999, which contains provisions referring to Article 18.

Legalization – The act of making lawful; authorization or justification by legal sanction.

Legitimate – Something that is genuine, valid, or lawful. For example, a legal migrant enters with a legitimate intent to comply with the migration laws, and present legitimate travel documents.

National – A person, who, either by birth or naturalization, is a member of a political community, owing allegiance to the community and being entitled to enjoy all its civil and political rights and protection; a member of the State, entitled to all its privileges.
A person enjoying the nationality of a given State.

Non-discrimination – The refusal to apply distinctions of an adverse nature to human beings simply because they belong to a specific category. Discrimination is prohibited by international law, for example in Article 26 of the International Covenant on Civil and Political Rights (1966), which states: “All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

Non-national – A person who is not a national or citizen of a given State.

Non-refoulement – Principle of international refugee law that prohibits States from returning refugees in any manner whatsoever to countries or territories in which their lives or freedom may be threatened. The principle of non-refoulement is considered by many authors as part of customary international law, while for others the two requirements for the existence of a customary norm are not met.

Palermo Protocols – Supplementary protocols to the United Nations Convention against Transnational Organized Crime (2000): Protocol against the Smuggling of Migrants by Land, Sea and Air; Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children; and Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition.

Permanent residence – The right, granted by the authorities of a host State to a non-national, to live and work therein on a permanent (unlimited or indefinite) basis.

Permit – Documentation, usually issued by a governmental authority, which allows something to exist or someone to perform certain acts or services. In the migration context, reference to residence permits or work permits is common.

Pro bono – Latin for “For the public good”, being or involving uncompensated legal services performed especially for the public good.

Prosecution – A criminal action or proceeding usually brought by a government in which an accused person is tried. Broadly, the maintaining of an action or proceeding, whether civil or criminal.

Protection – “The concept of protection encompasses all activities aimed at ensuring full respect for the rights of the individual in accordance with the letter and the spirit of the relevant bodies of law, i.e. human rights law, international humanitarian law and refugee law. Human rights and humanitarian organizations must conduct these activities in an impartial manner (not on the basis of race, national or ethnic origin, language or gender)” (Inter-Agency Standing Committee). Protection given to a person or a group by an organization, in keeping with a mandate conferred either by international instruments, in application of customary international law, or by the activities of the organization. Such protection has as its aim to ensure respect for rights identified in such instruments as: 1951 Refugee Convention, 1949 Geneva Conventions, and 1977 Protocols, right of initiative of the International Committee of the Red Cross, de facto protection by the International Organization for Migration, International Labour Organization Conventions, human rights instruments.

Push–pull factors – Migration is often analysed in terms of the “push–pull model”, which looks at the push factors, which drive people to leave their country (such as economic, social, or political problems) and the pull factors attracting them to the country of destination.

Quota – A quantitative restriction in the migration or asylum context. Many countries establish quotas, or caps, on the number of migrants to be admitted each year.

Reception centre – A facility lodging asylum-seekers or migrants in an irregular situation on arrival in a receiving country, while their status is determined; in practice, such facility is very often a detention centre.

Reflection period – Since there is no internationally approved definition of this term, a reflection period is commonly seen as a period of time in which the trafficked persons can consider their options in a safe environment, without risk of being removed from the country, and while also benefiting from a social assistance framework. For a definition of the term “reflection period” in the European context, see Article 13 (Recovery and reflection period) of the Council of Europe Convention on Action against Trafficking in Human Beings (Council of Europe Treaty Series No. 197).

Refoulement – The return by a State, in any manner whatsoever, of an individual to the territory of another State in which his or her life or liberty would be threatened, or he or she may be persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion; or would run the risk of torture. Refoulement includes any action having the effect of returning the individual to a State, including expulsion, deportation, extradition, rejection at the frontier (border), extraterritorial interception and physical return.

Refugee – A person who, “owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinions, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country” (Convention relating to the Status of Refugees of 1951, Article 1A(2), as modified by the 1967 Protocol).

Reintegration – Re-inclusion or reincorporation of a person into a group or a process, e.g. of a migrant into the society of his or her country of return.

Removal – Enforcement of the obligation to return; physical transportation out of the country.

Residence – The act or fact of living in a given place for some time; the place where one actually lives as distinguished from a domicile. Residence usually just means bodily presence as an inhabitant in a given place, while domicile usually requires bodily presence and an

intention to make the place one's home. A person thus may have more than one residence at a time but only one domicile.

Residence permit – A document issued by the competent authorities of a State to a non-national, confirming that he or she has the right to live in the State concerned during the period of validity of the permit.

Return – In a general sense, the act or process of going back to the point of departure. This could be within the territorial boundaries of a country, as in the case of returning internally displaced persons (IDPs) and demobilized combatants; or between a host country (either transit or destination) and a country of origin, as in the case of migrant workers, refugees, asylum-seekers, and qualified nationals. There are subcategories of return which can describe the way the return is implemented, e.g. voluntary, forced, assisted and spontaneous return; as well as sub-categories which describe who is participating in the return, e.g. repatriation (for refugees).

Right of asylum – A generic term, used in two senses: the right to grant asylum (a State may grant asylum in its territory to any person at its own discretion) and the right to be granted asylum either vis-à-vis the State in whose territory asylum is requested, or vis-à-vis the pursuing State.

Risk assessment – A valuable tool to assess the protection needs of the individual in the country of destination and also in the country of origin, should return be an option.

Schengen Agreement and Convention – By the Schengen Agreement signed on 14 June 1985, Belgium, France, Germany, Luxembourg and the Netherlands agreed that they would gradually remove controls at their common borders and introduce freedom of movement for all nationals of the signatory Member States, other Member States or third countries. The Schengen Convention supplements the Agreement and lays down the arrangements and safeguards for implementing freedom of movement.

The Agreement and the Convention, the rules adopted on the basis and the related agreements together form the “Schengen acquis”. Since 1999, this has formed part of the institutional and legal framework of the European Union by virtue of a protocol to the Treaty of Amsterdam.

Settlement permit (unrestricted) – This permit allows victims to stay in Austria for an unlimited period.

Severe forms of trafficking – (a): sex trafficking in which a commercial sex act is induced by force, fraud or coercion, or in which the person induced to perform such an act is under 18 years of age; or (b): the recruitment, harbouring, transportation, provision, or obtaining of a person for labour or services, through the use of force, fraud or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage or slavery.

Smuggled person/migrant – A migrant who is enabled, through providing financial or material benefit to another person, to gain illegal entry into a State of which he or she is not a national or a permanent resident.

Smuggler (of migrants) – An intermediary who moves a person by agreement with that person, in order to transport him/her in an unauthorized manner across an internationally recognized state border.

Smuggling – The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident (Article 3(a) of the United Nations Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime of 2000). Smuggling, contrary to trafficking, does not require an element of exploitation, coercion, or violation of human rights.

Social path – A term used primarily in the Italian context. Once a victim of human trafficking is admitted into the protection programme, there are two different procedures¹³⁴ which can lead to the issuance of a residence permit. The social welfare route, or so-called “social path”, does not require any action by the prosecutor, as it involves only the social services (including registered non-governmental organizations and associations) and the police headquarters (*questura*). See also “Judicial path”.

¹³⁴ These procedures are clearly described in Article 27 of Presidential Decree No. 394/1999, which contains provisions referring to Article 18.

Special protection permit – Visa issued on humanitarian grounds in Austria.

T nonimmigrant status – A nonimmigrant visa category created by the Victims of Trafficking and Violence Protection Act of 2000 (TVPA of 2000) allowing foreign national victims of trafficking to remain in the United States for four years and apply for lawful permanent residence after three years or the completion of the investigation or prosecution. To be eligible for T nonimmigrant status, the victim must: (a) be in the United States or United States territory on account of the trafficking or participation in an investigation or prosecution; (b) have complied with any reasonable law-enforcement request for assistance with an investigation or prosecution, unless under the age of 18 years or unable to do so due to physical or psychological trauma; and (c) be likely to suffer extreme hardship upon removal. The victim (the principal applicant or T-1) can apply for derivative T nonimmigrant status for immediate family members (T-2, T-3, T-4 and T-5).

T visa – See “T nonimmigrant status” above.

Third-country national – Means any person who is not a citizen of the European Union within the meaning of Article 17(1) of the Treaty establishing the European Community, including stateless persons.

Trafficker of human beings – An intermediary who is involved in the movement of person in order to obtain an economic or other profit by means of deception, physical or psychological coercion for the purpose of exploitation. The intent *ab initio* on the part of the trafficker is to exploit the person and gain profit or advantage from the exploitation.

Trafficking in persons – The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation (Article 3(a) of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime of 2000).

Travel documents – Generic term used to encompass all documents issued by a competent authority which are acceptable proof of identity for the purpose of entering another country. Passports and visas are the most widely used forms of travel documents. Some States also accept certain identity cards or other documents such as residence permits.

U nonimmigrant status – A nonimmigrant visa category created by the Victims of Trafficking and Violence Protection Act of 2000 (TVPA of 2000) allowing non-citizen victims of crime to remain in the United States for four years and apply for lawful permanent residence after three years. To be eligible for U nonimmigrant status, the criminal activity must have occurred in, or violated the laws of, the United States and the victim must: (a) have suffered substantial physical or mental abuse as a result of having been a victim of a qualifying criminal activity; (b) have information about the criminal activity; and (c) have been, be, or be likely to be helpful in an investigation or prosecution of the crime. The victim (principal applicant or U-1) can apply for derivative U nonimmigrant status for immediate family members (U-2, U-3, U-4 and U-5).

U visa – See “U nonimmigrant status” above.

Unaccompanied minors – Persons under the age of majority in a country other than that of their nationality who are not accompanied by a parent, guardian, or other adult who by law or custom is responsible for them. Unaccompanied children present special challenges for border control officials, because detention and other practices applied to undocumented adult non-nationals may not be appropriate for children.

Victim of human trafficking – Any natural person who is subject to trafficking in human beings.

Violence against women – Any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Article 1 of the Declaration on the Elimination of Violence against Women of 1993).

Voluntary return – The assisted or independent return to the country of origin, transit or another third country based on the free will of the returnee.

Vulnerable person – Refers to minors, unaccompanied minors, disabled people, elderly people, pregnant women, single parents with minor children and persons who have been subjected to torture, rape or other serious forms of psychological, physical or sexual violence.

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