

GUIDELINES on TRAFFICKING in HUMAN BEINGS

for the

CRIMINAL JUSTICE CHAIN

In

UKRAINE

**Marjan Wijers
Roelof Haveman**

June 2006



European Union



International Organization
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INTRODUCTION

i. Improving the Criminal Justice Chain: Guidelines

i.i Criminal Proceedings

Five years ago we wrote a review of the law on trafficking in persons in Ukraine. The main focus of the report was on substantive criminal law, i.e. the crime definitions of trafficking in human beings.

The current report is a follow up to this 2001 report, and focuses in particular on the criminal procedural law. Compared to five years ago many improvements have taken place. The Code of Criminal Proceedings has been amended and several other laws have been adopted, improving among other factors the position of the victim/witness in criminal proceedings.

However, we would like to repeat what has been written in the previous report about the law in the books and the law in action.

In order to assess the effectiveness of legislation, and to review key legislative provisions in a number of areas to ensure that they are both comprehensive and complementary, it is of course important to review the law as it has been written down in code books and other regulations, though it certainly is not sufficient. The 'law in the books', i.e. the law as it has been written down in code books and other legislative products, can be entirely different from everyday practice, often called the 'law in action'.

This aspect too can be seen as a function of the Rule of Law. For instance, the law in the books may provide for strict rules on pre-trial detention, but this does not guarantee that in practice these rules are followed. Whether a state is governed by the Rule of Law is of course not only dictated by the letter of the law, but at least as much – maybe even more – by the way the letter of the law is applied in practice.

Another example: the fact that the constitution of a certain country says that 'the principle of Rule of Law is recognised and exists', does not mean that in practice indeed the Rule of Law exists in this country.

The difference between the law in the books and the law in action can be caused by judicial decisions in which the law is explained; these decisions become part of 'the' law, sometimes even to the extent that it can be considered part of the law in the books.

Another reason for a difference between law in the books and law in action is less 'innocent': corruption for instance can make a legal system, which as it shows in the books may be considered to be of high quality, entirely worthless from a constitutional – Rule of Law – point of view.

We may conclude now that the law in the books has considerably been improved; however in action the law is less effective than it could be. It is not always clear where in particular the criminal justice system lacks in efficacy. Some point to the police, other to investigators, others again to prosecutors and judges. All may be true or false. It, however, shows that the criminal justice system is a chain of subsequent steps by various actors.

At least three remarks may be made regarding the criminal justice chain:

1. The criminal justice chain is as weak as its weakest link;
2. Every link should anticipate what the subsequent links need to know and do;
3. Every link should use what previous links have done.

When considering ways to improve the functioning of the criminal justice chain, it is important to take as many small steps on as many levels as possible. Most problems are not solved by one big overarching solution – which most of the times is not feasible, no matter how seducing the idea is – but by many little steps that together can make a big change.

Some of these steps are already made by, in particular NGOs, and could be viewed as ‘best practices’ that deserve support. Others still need development.

In general the following success factors can be identified:

- close cooperation between NGOs and police, based upon an open attitude of the police towards NGOs. This means that NGOs are seen as partners;
- close cooperation between all the separate links that together form the criminal justice chain (operational police, investigators, prosecutors, judges);
- cross-sectoral joint trainings of the police and NGOs, and of the separate links of the criminal justice chain;
- translation of the national policy into district or local level.

Crucial however for the success of these steps is, that there is clarity and transparency on the law and on the way the law has to be – and in practice is – applied by the relevant public and private servants. An important tool to achieve clarity and transparency is to work according to guidelines on these issues.

i.ii Guidelines

One way to enhance clarity and transparency is the development of (public) guidelines, on which police, prosecutors and judges, but also civil servants base their actions. Such guidelines can not only enhance the clarity of the law, but also

prevent corruption by establishing more transparency and thus control over the law, the way it has to be interpreted, and the way public servants apply the law in concrete cases.

These guidelines may serve as a training tool for those involved in combating trafficking within the criminal justice system. Furthermore these guidelines should be distributed broadly amongst those in civil society – e.g. NGOs, defence lawyers – that support victims.

It is in light of this that we come back to the final recommendation of our 2001 report:

Last but not least, the development of specific guidelines should be considered for the police and prosecutors on how to deal with victims of trafficking, in which a number of the above mentioned issues can be addressed, such as the attitude towards the victim, the provision of adequate information about her/his rights, et cetera. The guidelines should also contain the obligation for the police to inform victims about the existence of NGOs and their possibilities to provide support.

The interviews we have held in 2005/2006 showed that we were too restrictive when limiting guidelines to police and prosecutors. Although very important indeed, other actors in the criminal justice chain, such as the investigators, judges and no less the lawyers who assist victims/witnesses, are as important. Extrapolated to the entire criminal justice chain, this means that this document provides guidelines for:

- i. victims' lawyers
- ii. police
- iii. investigators & prosecutors
- iv. judges

These guidelines form the first part of this report. They cover the general principles underlying the treatment of victims, the various provisions relating to the actual treatment of victims during the various phases of the criminal proceedings and issues such as compensation and protection. They conclude with an analysis of the definition of trafficking in the UN Protocol on trafficking in human beings. This can serve as a tool to interpret the article on trafficking in the Ukrainian Criminal Code, since the article in the Criminal Code is based on the UN Protocol. Finally the guidelines contain a list of indicators of trafficking.

The second part of the report describes the legal background of these guidelines with a focus on international law, including the recent Council of Europe Convention on Action against Trafficking in Human Beings. Attention is also paid to the prevention and combat of corruption. Part III examines the current situation in Ukraine with regard to the position of victims of trafficking and related issues.

ii. Method of working

Through interviews with the various actors in the criminal justice chain, including police officers, investigators, prosecutors, judges, defence lawyers and NGOs that support victims, insight was gained in the specific barriers for victims to press charges in Ukraine, as well as in the existing provisions in the criminal procedural law to address these barriers. Based on these interviews, existing documents and instruments (including international and European human rights standards and instruments relating to trafficking) draft guidelines were developed. Consequently, these were discussed during a second visit with a number of the interview partners of our first visit and others to check and refine them.

Because at the time of the 2001 report all interview partners, without exception, mentioned the problem of corruption as an important impediment in improving the response of the criminal justice system to trafficking, special attention was paid to the risks of corruption throughout the process, as seen and experienced by the interview partners. On the basis of this second round of interviews, a final draft was developed.

I. GUIDELINES

A. GENERAL PART

1. Introduction

The Code of Criminal Procedure of Ukraine (further called 'CPC'- non official translation) makes a distinction between 'victims', 'civil claimants' and 'witnesses'. These guidelines apply to the victim as well as the witness and civil claimant. Where these guidelines speak about the victim, this also means witness and civil claimant, when applicable.

Care for the victim by the police, the Public Prosecutor and the Court means that they always take into account the interests of the victim during the execution of their duties in the framework of the criminal case, insofar as this is reasonable.

2. Background

Trafficking in human beings constitutes a serious infringement of the integrity of the victim, which justifies special attention to the treatment of victims by the police and judicial authorities. The willingness of victims to report to the police and cooperate in criminal proceedings is strongly related to their general treatment by the police and judicial authorities, the protection of their safety and privacy and the availability of assistance. A proper and respectful treatment of victims constitutes a crucial element in an effective approach to trafficking in human beings. A proper treatment includes acknowledgement of the right of the victim to be treated with respect for her/his dignity.

Article 16 CPC

Justice in criminal cases shall be administered on basis of equality of citizens before law and a court, regardless their backgrounds, social and material status, race, ethnic origin, gender, education, language, religion, character and nature of occupation, places of residence and other circumstances.

A proper and respectful treatment of victims includes the right to provide and receive information, the right to understand and be understood, the right to actively take part in the criminal proceedings and the right to be protected at the various stages of the criminal proceedings.

The quality of the treatment of victims is also important with an eye to the public support for the criminal justice system. At the same time attention needs to be paid to the general interest of the process of truth finding.

3. Barriers for Victims to Press Charges and/or Act as Witness

Several barriers inhibit victims of trafficking to turn to the police and press charges. Especially if they were trafficked for prostitution they risk stigmatisation

and social exclusion, more than victims of criminal offences in general. Another barrier is the threat of reprisals, which is strengthened by the fact that the offence usually takes place in some sort of organised structure in which a huge amount of money is at stake.

However, apart from the stigma and the fear of reprisals an important barrier is formed by the criminal justice system itself. In particular in the light of the prevailing attitudes towards prostitutes, victims do not feel confident that their complaints will be taken seriously; that they will be treated respectfully and properly; that their privacy will be respected; that their interests will be taken into account and that they will be adequately protected from reprisals and/or harassment, either from the side of the suspects or from the side of the authorities. They do not trust, for example, that they will not be prosecuted themselves or refused a future passport or travel visa if it becomes known that they have been trafficking victims. In short: they fear that pressing charges or acting as a witness will worsen their existing problems or even create new problems, rather than contributing to a solution.

An additional factor is the fear for corruption and abuse of power from the side of the police, the prosecutor or the judges. These are all factors that need to be addressed. However, this is not to say that victims have no interest in the criminal justice system. On the contrary, successful prosecution may serve as recognition of the wrong that has been done to them.

The criminal justice system itself, at the other hand, has its own in-built limitations. It poses requirements, for example the right to a fair trial, which may interfere with the interests of the victim. It is important to be aware that fundamentally the criminal justice system serves other interests than those of the victim. Whereas the position of the victim is a general problem in criminal law, this is exacerbated in trafficking cases, e.g. due to the 'moral' context of the offence. Moreover, many policemen, prosecutors and judges are not experienced in trafficking cases and/or not trained to take the position of victims into account. In addition, corruption poses a problem. Not only the potential corruption in itself, but as importantly the perception of the victim of corruption as a major obstacle to a fair trial and actual punishment of the criminal, provide the victim little incitement to pursue his or her rights.

4. Aim of these guidelines

The aim of these guidelines is to upgrade and ensure an appropriate 'fair treatment response' on the part of the criminal justice system, which

- takes the perspective and rights of the victims into account, so as to lower the threshold for victims to co-operate in the prosecution and to increase their confidence in the criminal system;

- is feasible within the criminal justice system, that is, is workable within the limitations of the criminal justice system; and
- addresses the specific conditions of Ukraine, including the problem of corruption.

The guidelines describe each stage of the criminal proceedings, from the first contact of the police with the victim, to the gathering of evidence, the court-case itself and the possible conviction of the suspects, through to the compensation of the victim. They give directions for a professional, adequate and victim friendly treatment of trafficked persons, which does justice to their vulnerable position.

5. Underlying Principles

Underlying principles for the treatment of victims include:

- A correct, unprejudiced and, where necessary, personal treatment of the victim;
- Provision of information to the victim: information should be given from the earliest stage on and should be accurate, relevant and clear;
- Respect for the right to privacy of the victim;
- Protection of the safety of the victim: the safety of the victim and her/his family and friends must be a paramount consideration;
- Provision of assistance and support where possible, including referral of the victim to a victim support organisation;
- The maximum use of existing possibilities in the context of the criminal case for the compensation of damages to the victim;
- The need for special provisions for children.

In short, victims have to be treated in a decent way.

These principles are reflected in the recent Convention on Action against Trafficking in Human Beings of the Council of Europe, to which Ukraine is a party. The Convention obliges state parties to protect and promote the human rights of victims of trafficking. This includes, among other things, the obligation to adopt measures to properly identify victims, to provide for trained officials, to ensure cooperation between the various authorities and NGOs, to protect the private life and safety of victims, and to provide victims with a minimum standard of assistance, regardless of whether or not s/he is willing to act as a witness. It also contains the obligation to inform the victim as from their first contact with the authorities about the relevant proceedings and to ensure that they have the right to legal assistance, free legal aid and compensation (see Chapter 18 and Annex VI). Also the UN Protocol contains a number of victim provisions (see Chapter 17 and Annex VII).

5.1 Correct and Respectful Treatment

Methods of detection, investigation, gathering and interpretation of evidence

should minimise intrusion and should not degrade the victim.

In particular in cases of trafficking for prostitution or other forms of sexual exploitation, the personal history, alleged 'character' or the current or previous occupation of the victim should not be used against the trafficked person or cited as a ground for disqualifying the trafficked person's complaint or for deciding not to investigate the case or prosecute the offenders.

This is reflected in Decree no. 13 of the Supreme Court Plenum (non official translation presented) which states that the court should ensure that, in the course of interrogation of a victim of crime, he/she is not asked questions that are offensive to his/her dignity, offensive to him/her personally and his/her close friends/relatives, as well as questions on personal matters that are not relevant for the case.

**Plenum Supreme Court of Ukraine
Decree No. 13 of 02.07.2004**

17. A court should ensure that, in the course of interrogation of a victim of crime, he/she is not asked questions that are offensive to his/her dignity, offensive to him/her personally and his/her close friends/relatives, as well as questions on personal matters that are not relevant for the case.

Examples of such questions are questions about the victim being a prostitute, having left Ukraine to make money or other questions that suggest that the victim her/him self is guilty.

5.2 Informing the Victim

Transparency of procedures and honesty of information is paramount. Trafficked persons will have been frequently deceived and abused. It is important that the victim is given full and accurate information to enable her/him to take informed decisions. Provision of accurate information at an early stage will enable the victim to build a cooperative relationship with law enforcement and other officials.

This means that as from the first contact with the police the victim should be informed about her/his rights as a victim, including the possibilities for protection of her/his privacy and safety and the right to submit a claim for compensation of damages.

**Plenum Supreme Court of Ukraine
Decree No. 13 of 02.07.2004**

The Constitution of Ukraine provides for the duty of the State to protect and ensure rights

and freedoms of every individual. In this connection, correct and uniform application of provisions of the due criminal procedure legislation on rights of victims of crimes becomes particularly important.

In order to ensure constitutional and procedural guarantees of rights of victims of crimes in the course of criminal justice procedures, and in connection with issues that emerged in court practices, the Plenary Session of the Supreme Court of Ukraine DECREES:

1. To draw attention of courts to the fact that consistent and implacable compliance with provisions of the criminal procedure law of Ukraine that provide for rights of victims of crime, is one of major preconditions for the materialisation of citizens' rights for court protection from illegitimate acts, as declared in Article 55 of the Constitution of Ukraine.

5.3 Protection of Privacy

All possible steps should be taken to ensure the privacy of the victim, witnesses and, if applicable, the partner and family members of the victim. There should be no public disclosure of the identity of the victim and her/his privacy should be protected to the extent possible, while taking into account the rights of the accused to a fair trial.

Law enforcement agencies and the courts should not publish names or addresses of trafficked persons or information that may easily identify a victim and thus jeopardise her or his safety and/or privacy. No details should be passed to the media that could lead to the identification of the victim, including name, address, photograph or medical data.

The victim should be given full warning, in advance, of the difficulties inherent in protecting identities and other personal data and should not be given false or unrealistic expectations regarding the capacities of law enforcement agencies and the court in this regard.

5.4 Safety of the Victim

Before, during and after the criminal proceedings, all necessary and possible measures should be taken to protect the victim from intimidation and (threats of) reprisals from the side of the suspect(s) and/or their associates, or from persons in a position of authority. If necessary, similar protection should be provided to the family and/or friends of the victim.

Law enforcement should be particularly careful that enquiries (for example in the victim's home town or neighbourhood, with the victim's friends or associates or with trafficking suspects) do not lead to the identification or social exclusion of the victim or to safety risks to the victim, her/his family or friends. The need for safety of the victim and her/his family and friends should be taken into account in all

decisions with respect to the arrest, detention and terms of any form of release of the suspect. If the suspect is released, the victim should be notified prior to the release of the suspect from custody or detention.

If the victim feels threatened s/he has the right to ask for protection.

5.5 Assistance & Support

The police can be expected to cooperate with regard to the (organisation of) assistance to the victim. This requires that the police are informed about and keep good contacts with (non-governmental) organisations for victim support. At the first contact with the victim, the police inquire with the victim if there is sufficient support and assistance in the direct social environment of the victim and explain the possibilities for support by NGOs and other victim support agencies. The police establish contact with an organisation for victim support, which can discuss with the victim necessary support. Referral should take place at the earliest moment possible and preferably before the official statement of the victim. It is recommended that each (sub)district establishes procedures for the assistance and referral of victims.

The victim should always have the possibility to receive support from a social organisation during pre-investigation, investigation, interview(s)/ interrogation and trial.

According to Article 49-52 CPC a representative of the victim – which can be a lawyer but also a counsellor, social worker or other companion of the choice of the victim – should be permitted to be present during these proceedings to emotionally assist and support the victim.

B. THE TREATMENT OF VICTIMS DURING CRIMINAL PROCEEDINGS

6. Pre-investigation

If the victim wants to press charges, the police are obliged to take down her/his statement.

The police however do not have to wait for a victim pressing charges against a particular suspect. The moment elements of crime are identified, the police are under the obligation to act.

Article 4 CPC
The Obligation to Initiate a Criminal Case and to Disclose a Crime

A court, a prosecutor, an investigator and a body of inquiry are obliged, within their relevant spheres of competence, to initiate a criminal case if elements of crime are identified, and to take all actions, provided by law, for identification of the event of the crime, persons who committed the crime and for the prosecution of these persons.

It is therefore crucial that operational policemen, investigators and prosecutors know the elements of the crime of trafficking and the explanation thereof by heart; see on this issue below §§ 11, 12 and 13.

6.1 Expertise & Cooperation: teams

The treatment of victims, in particular of sexual exploitation, requires specific expertise. Therefore every police department should dispose of officers who are trained in dealing with trafficking cases. These should be experienced police officers who dispose of social skills, have expertise on the specific characteristics of trafficking and its impact on victims, are knowledgeable about the position and problems of victims, and who are acquainted with organisations that can provide assistance and support to victims.

In the light of the potential preference of some victims to be heard by female officers, particularly in cases involving sexual exploitation, every police department should dispose of trained female officers in order to be able to comply with this preference.

Police officers who are not specifically trained in dealing with this type of cases and who come into contact with a (alleged) victim in the course of their duties should refer the victim as soon as possible to a trained colleague.

The same pertains to investigators and prosecutors.

Trafficking cases not only require specific expertise, but also excellent cooperation between all authorities involved. It is therefore recommended to form a team, consisting of operational police, investigators and prosecutors, which follows a case from the initial stage that there are indications that a trafficking

case is at hand, until the verdict in court.

6.2 Informing the Victim

The decision to press charges might have severe implications for the victim, which need to be fully understood and considered. It is important that the victim can make an informed decision. A victim of trafficking may be traumatised and may need some time before she/he can fully consider her/his position and options. If the victim needs more time to make an informed decision about pressing charges and/or act as a witness, this time should be given. This lessens the likelihood of re-victimisation of the victim and is likely to lead to better evidence and a stronger witness in the long run. If a victim is put under pressure to make a statement, risks are that she/he will withdraw or weaken her/his statement in a later phase.

Although a victim only acquires the official status of victim at the time of the opening of a criminal case, any person who suffered moral, psychological and/or physical damages as a result of a crime (allegedly) committed against her or him should be considered and treated as a victim from the very first moment she/he gets in contact with the police.

From the out start the victim shall be informed about:

- The different stages of the proceedings and the role and position of the victim in connection with the criminal proceedings, in particular her/his rights and duties;
- The possibilities to obtain (free) legal aid through, for instance, NGOs, IOM and legal aid institutions;
- The degree and nature of protection the victim can expect. This includes information about the measures, including in-court measures, which are available for protecting the safety of victims and witnesses, and the possibilities to protect the privacy of the victim, including protection against media intrusion;
- The possibilities to be kept informed about the progress of the proceedings. The police ask whether or not the victim wants to be kept informed about the progress of the case. If so, the police shall do so to the best of their ability.
- The procedures available to claim damages in the context of the criminal case or through a civil law suit; The police always ask the victim whether or not she/he has suffered – material and/or immaterial – damages and whether she/he wishes to claim compensation. If so, the police inform the victim about the possible procedures to claim compensation and/or refer the victim to an organisation that can help her/him to claim compensation.

- Any decision to change the accusations or to stop the investigation or the prosecution.

This information is given both verbally and in the form of written information.

Part of the process of taking down the statement – written or in a less official form – is the referral of the victim to an organisation which can provide her/him with the necessary psychological, medical, social and/or legal assistance. This should be done as a matter of course, giving the NGO and the victim the opportunity to jointly discuss the needs and possibilities for assistance in any stage of the proceedings.

If the victim has expressed her or his wish to claim compensation and/or to be kept informed about the proceedings following her or his pressing charges, the police and investigator shall, to the best of their abilities, inform the victim about the progress and disposition of the case up till the moment the record is sent in to the prosecutor. From that moment on the prosecutor should be responsible for the proper information of the victim.

6.3 Taking down the Statement of the 'Victim'

Pressing charges is not without consequences. Once a statement is made, the victim cannot withdraw her or his statement. It is therefore of the utmost importance that the statement of the victim is taken down in a professional way, that means with great care and precision.

A victim statement that is carefully recorded can prevent that the victim has to be heard over and over again in later stages of the criminal proceedings. Police officers who record a victim statement have to anticipate what the subsequent links in the criminal justice chain need to know and have to do. Forming a team of operational police, investigators and prosecutors who together are responsible for the case from the beginning to the end is crucial.

Working with a team of two officers can contribute to the quality of the statement: officers can complement each other, it facilitates a critical assessment, it gives more opportunity for observation and diminishes the chance of influencing the victim.

Interviews of trafficked persons should meet the following standards:

- Interviews will be conducted by personnel trained in trafficking and in conducting interviews with victims. For children, interviewers should be specifically trained in interviewing children;
- On the request of the victim, the interviewer will be of the same sex as the victim;
- The interview will take place in a non-confrontational, non-judgmental and professional environment. If a victim prefers to be heard at another venue

than the police station, this wish will be granted, unless the interest of the investigation opposes this;

- If a victim expresses the wish to have a companion, for example a friend, a social worker or a worker from a non-governmental organisation, present during the interview this wish will be granted. It should be pointed out to the victim, however, that in principle that person cannot act as a witness anymore in a later stage of the case;
- The victim will be free to leave at any time of the interview; interviews will preferably last no longer than two hours;
- The interview questions and technique will be non-confrontational and non-judgmental; in interviewing the victim no questions are posed that might suggest that the integrity of the victim is put into doubt, that call the victim to account or that blame the victim for the crime committed to her/him.
- In cases involving trafficking for prostitution or other forms of sexual exploitation questions regarding the victim's sexual history which are not immediately relevant to the allegations will not be asked;
- If needed, the victim will be provided with a competent, qualified translator when taking down her/his statement;
- Although not yet an official victim, she/he should already in this phase of the proceedings be supported by a lawyer as her legal representative.

6.4 Contacts with the Victim

Law enforcement should be particularly careful that enquiries (for example in the victim's home town or neighbourhood, with the victim's friends or associates or with trafficking suspects) do not lead to the identification or social exclusion of the victim or to safety risks to the victim, her/his family or friends. The need for safety of the victim and her/his family and friends should be taken into account in all decisions on the arrest, detention and terms of any form of release of the suspect. If the suspect is released, the victim should be notified prior to the release of the suspect from custody or detention.

If no further examination of the victim is needed and the victim indicates that she or he wishes to have no further contact with the police, this wish should be respected. If further examination of the victim is needed, which often will be the case, the victim should be consulted about the best way to contact her/him, in order to minimise the intrusion on the privacy of the victim. This can mean, for example, that any further contact with the victim is established through her or his lawyer or the NGO supporting her or him.

Each and every contact with the victim should be assessed in terms as to whether it is necessary for the criminal case. Unnecessary contact should be avoided.

7. Pre-Trial Investigation: a Criminal Case

The aims of criminal investigation and prosecution policies on trafficking in human beings are:

- To protect the victim;
- To expose criminal acts of traffickers and other persons involved in the recruitment and exploitation of trafficked persons and roll up the criminal gangs behind them;
- To cream off financial profits;
- Specific and general prevention.

7.1 The Criminal Case

7.1.1 Opening the Criminal Case

It is the competence of the investigator to decide whether or not to open a criminal case, to be authorised by the prosecutor. It is the competence of the prosecutor to check whether all investigation activities have been done according to the law, and whether or not there is sufficient evidence to proceed.

The decision to open a criminal case has to be made within 3 to 10 days

- after the official statement of the victim, or
- after the police send a case to the investigator for opening (which may be concurrent).

Given the seriousness of the crime, indications of trafficking should in principle always lead to investigation, and, if possible, prosecution.

Opening a criminal case obviously does not require the same evidentiary material as the decision to send a case to court. A criminal case should be opened if, as a result of the operative stage of the proceedings, there are sufficient indications that the crime of trafficking has been committed, to proceed with an official investigation. It is not necessary that all evidence has already been gathered and a conviction is guaranteed.

Failing to prove a case of trafficking in court, despite a thorough research during the operative stage and the investigation stage should not lead to negative consequences for the investigators and/or prosecutors in charge of the case.

Cases of trafficking are too complex to be able to assess already at the moment of opening a criminal case whether or not a prosecution, after subsequent investigations, will end in a conviction.

Although from a tactical point of view it may be preferable not to take the official victim's statement until all other relevant facts have been investigated, and only then open the criminal case, this should not lead to postponement of notifying the victim on her or his rights.

7.1.2 Refusal to Open a Criminal Case

If there are no grounds to initiate a criminal case, the prosecutor, investigator (or another body of inquiry) or judge must issue a resolution on refusal to initiate a criminal case and inform the interested persons and organisations about this decision. The victim and other interested persons (or their representative) can appeal against a refusal to open a criminal case within 7 days.

Article 99-1 CPC
Appeals against Decisions to Refuse Initiation of a Criminal Case

Resolutions of an investigator and a body of inquiry on refusal to initiate a criminal case can be appealed against to a relevant prosecutor. If such resolution was issued by a prosecutor, it can be appealed against to a superior prosecutor. Such appeals shall be submitted by an interested person or by his /her representative within seven days from the date of reception of a copy of the resolution.

Resolutions of a prosecutor, an investigator and a body of inquiry on refusal to initiate a criminal case can be appealed against by an interested person or by his/her representative to a court according to procedures stipulated in Article 236-1 of the CPC.

Resolution of a judge on refusal to initiate a criminal case can be appealed against by an interested person or by his/her representative within seven days from reception of a copy of the resolution, according to appeal procedures.

7.1.3 Closure of a Criminal Case

When a criminal case is closed without leading to court proceedings, the victim or other interested persons (or their representative) can appeal against this decision.

Article 215 CPC
Appeals against a Resolution on Closure of a Case

A resolution of an investigator on closure of a case can be appealed against to a

prosecutor within seven days from the date of reception of a written notification or a copy of the resolution on closure of the case.

If a resolution of an investigator on closure of a case is appealed against, a prosecutor shall review the case and, within thirty days from the date of reception of a complaint, shall reverse the resolution on closure of the case and recommence the pre-trial investigation or shall refuse to satisfy the complaint and notify a person who submitted the complaint on these matters.

A resolution of a prosecutor, an investigator and a body of inquiry on refusal to initiate a criminal case can be appealed against in a court by a person whose interests the resolution affects or by his/her representative, according to procedures stipulated in Article 236-1 of this Code.

7.2 Victim and Witness: Status, Rights & Recognition

Individuals cannot be officially recognised as ‘victim’, ‘civil claimant’ and ‘witness’ until the opening of the official criminal case. This does not mean, however, that individuals who have suffered moral, psychological or physical damages as a result of the (alleged) crime should not be considered as victim, civil claimant and/or witness and be treated as such already before it has been decided to open a criminal case.

Other than the witness, the victim and the civil claimant (and their representatives) can participate in court as parties and enjoy equal rights and freedoms in submission of evidence, examination of the evidence and proving its pertinence before the court (Article 16-1 CPC). See for the civil claimant, below § 9.

7.2.1 The Victim

Care and attention for the interests of the victim can be seen as an important element of the proper administration of justice, in which a correct treatment of victims is paramount. An essential element of a correct treatment is the provision of comprehensive and comprehensible information by the police, the prosecutor and the court to the victim and/or other injured parties.

Generally, a victim can be defined as a natural person who has suffered harm, including physical or mental injury, emotional suffering or economic loss, directly caused by acts or omissions that are in violation with the criminal law. ‘Victim’ includes the parents of a child victim and surviving relatives of the victim.

Article 49 CPC The victim

A victim shall be recognised as a person, who suffered moral, physical or material damage as a result of a crime.

A person who is recognized as victim is 'granted all the rights of a victim of crime and a civil claimant as stipulated by law' (Article 7 SC Decree). This includes the right to participate in the criminal proceedings.

**Article 49 CPC
Rights of the victim**

A citizen, recognised as a victim of a crime, shall have the right to testify in a case. A victim and his/her representatives shall have the following rights:

- to submit evidence,
- to submit requests,
- to review all materials on the case from the moment of completion of the pre-trial investigation, or from the moment of transfer of the case for court examination (in cases that do not incorporate pre-trial investigation);
- to participate in the court examination;
- to submit motions on dismissal;
- to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court, as well as to appeal against the court sentence or court orders and resolutions of a people's judge; and, provided relevant reasons
- the right to be granted security.

In cases, stipulated in the CPC, a victim shall have the right to pursue a charge in the course of the court examination, personally or via his/her representative. A victim can participate in court debates.

The rights of a victim include the right to protection as defined in the CPC and the Law on Protection of Individuals involved in Criminal Proceedings (see below, § 10).

**Article 52-1 CPC
Ensuring Security of Persons, who Participate in Criminal Justice**

If persons who participate in criminal justice, are under a real threat to their lives, health, housing or property, they shall have the right to be granted security.

The following persons shall have the right to be granted security, provided relevant reasons:

- 2) a victim or his/her representative in a criminal case;

5) a witness;
7) family members and close relatives of persons, listed in clauses 1-6 of this article, if they are under threats or other illegitimate actions to influence participants or criminal justice.

Since there are a number of basic rights attached to the legal recognition of a person as victim, the competent body should recognise the victim as such in the earliest possible stage of the proceedings, if not *de jure* than at least *de facto*.

If the case goes to court, the judge has the obligation to check whether all persons who suffered moral, physical or material damage have been recognised as victims. If a body of inquiry or of pre-trial investigation has substantially limited the legitimate rights of a victim (for example to choose a legal representative, to make requests, to submit evidence et cetera) the judge has to return the case for additional investigation (SC Degree, par. 4). Moreover, the court is obliged to respond by separate court orders in case of unjustified delays in the recognition of a victim (if there are clear signs of damage incurred by the crime) by bodies of inquiry or pre-trial investigation (SC Degree, par. 5).

**Plenum Supreme Court of Ukraine
Decree No. 13 of 02.07.2004**

2. According to paragraph 2 of Article 49 of the CPC of Ukraine, a person, who suffered moral, physical or material damage as a result of a crime, shall be granted rights of a participant of court proceedings only after his/her recognition as a victim of crime. A body of inquiry, an investigator, a prosecutor and a judge shall issue resolutions on recognition or non-recognition of a person as a victim of a crime, and a court shall issue a court order on these matters.

The investigator who recognises a person as victim is obliged to tell the victim her/his rights. This should not be merely an enumeration of the applicable articles in the CPC and other relevant acts, but should encompass an explanation of the content of the relevant articles – including all procedural terms.

A correct procedure in this respect can be guaranteed by using a protocol in which all information is included in a clear and concise way, which has to be signed by the victim if she or he fully understands her or his rights. Such protocol should contain all relevant articles and an explanation thereof in a language that is understandable to victims.

Article 122 CPC
Procedures of Notification of a Victim on his/her Rights

An investigator who recognises a person as a victim of a crime, shall explain this person his/her rights stipulated in Article 49 of this Code and shall note these matters in a resolution that shall be confirmed by signature of the victim.

If a crime caused material damages to a person, a facility, a body or an organisation, an investigator shall notify a victim and his/her representative on the right to make a civil lawsuit and shall note these matters in a protocol of interrogation or shall send a written notification to the victim; a copy of the notification shall be incorporated into the case materials.

The defining element of trafficking is the use of violence, coercion or deceit (See for a detailed description of the elements of the crime of trafficking in human beings §§ 11-13, 'Definition and Indications of Trafficking').

In order to be a victim of trafficking – and to be recognised as such – it is not relevant whether the victim has been working in prostitution before or knew she would be working in prostitution, whether he/she voluntarily migrated or voluntarily accepted a job abroad.

In order to properly identify victims and to act correctly it is crucial that every policeman, investigator and prosecutor knows the elements of the crime of trafficking and their explanation by heart.

7.2.2 The Witness

In addition, the CPC and other legal documents contain provisions with regard to the position of the witness.

Article 68 CPC
Testimony of Witnesses

Any person who is known to have information on circumstances associated with a case, can be called as a witness.

A witness can be interrogated on circumstances to be identified in a given case, including facts that characterise personality of a suspect or an accused and his/her relations with them.

Like victims and civil claimants, also witnesses have rights, as enumerated in Article 69-1 CPC.

**Article 69-1 CPC
Rights of a Witness**

A witness has the following rights:

- 1) to testify in his/her native language or in another language he/she knows and use the services of an interpreter;
- 2) to demand recusal of an interpreter;
- 3) to know, in connection with what and under what case he/she is being interrogated;
- 4) to handwrite his/her testimony in a protocol of interrogation;
- 5) to use notes and documents in the course of his/her testifying in cases, when his/her testimony is associated with calculations or other data, he/she can hardly remember;
- 6) to refuse testifying against him/herself, his/her family members and close relatives;
- 7) to review a protocol of interrogation and require to introduce changes, additions and comments into the protocol, to handwrite such additions and comments;
- 8) to submit complaints to a prosecutor against actions of a person in charge of inquiry and an investigator;
- 9) to get reimbursements for his/her costs incurred by being called to testify.

Provided relevant grounds, a witness shall have the right to be granted security by application of the measures stipulated by law and according to the procedures stipulated in articles 52-1 - 52-5 of this Code.

A witness is obliged to appear when called to testify. An interrogation of a witness may take place in her/his place of stay (Article 167 CPC).

7.3 The Victim's Lawyer

7.3.1 Lawyer, Representative

It is crucial for the position of the victim and the success of the criminal case that a victim is assisted by a lawyer, from the earliest moment possible.

According to Articles 52 jo 49 CPC the victim and a civil claimant are entitled to have themselves represented by a lawyer or another representative of their choice.

**Article 52 CPC
Representatives of a Victim, a Civil Claimant and a Civil Defendant**

Representatives of a victim, a civil claimant and a civil defendant can incorporate

lawyers, close relatives, legal representatives as well as other persons, recognised as such representatives according to a resolution of a person in charge of inquiry, an investigator, a judge, or according to a court order of a court.

If the roles of civil claimants or civil defendants are fulfilled by a facility, an official body or an organisation, their interests can be represented by persons, specially authorised by these entities.

Representatives, referred to in this article, shall enjoy the procedural rights of the persons whose interests they represent.

Moreover the victim is entitled to be accompanied by a trusted person of her/his choice whenever she/he wants, apart from her/his legal representative.

Since the first stage of the criminal proceedings can be decisive in ensuring the victim's rights during the further procedures, it should be ensured that the victim has a lawyer from the very beginning of the criminal case. Also before the opening of an official criminal case, i.e. during the operative – pre-investigative – phase, assistance of the victim by a legal representative should be ensured.

7.3.2 Responsibilities

The victims' lawyer defends the interests of the victim during investigation and prosecution and during in-court proceedings. The victims' lawyer enjoys the same procedural rights as the victim herself (Article 50 par 2 CPC); see for these rights supra § 7.2.1.

Other responsibilities of the victims' lawyers include:

- To explain to the victim her/his rights;
- To prepare the statement with the police together with the victim, including the request to open a criminal case;
- To support the victim in her/his contacts with the police;
- To be present during the police interview and subsequent interrogations;
- The right to question the victim to have her answer more directly;
- The right to question the suspect if present;
- To tell the victim that she does not have to answer an irrelevant question;
- To participate in other events, initiated by the investigator in which the victim is involved;
- To check if the statement is moving and an official case is opened;
- To provide legal assistance during investigations and the court case;
- To advise the victim about civil claims for compensation and gather relevant documentation (health documents, medical examination etc.) with regard to the claim for compensation, in particular with regard to immaterial damages;

- To request to continue the investigation if stopped; the representative can request additional witnesses to be heard; can add documents to the evidence (for example a statement of a doctor about the psychological and physical state of the victim).

7.3.3 Presence of the Victim's Lawyer

According to article 49 CPC the victim has the right to have her/his lawyer present in all events initiated by the investigator in which the victim is involved. In fact the representative enjoys all the rights of the victim her/himself.

The victim also has the right to ask to participate in events in which s/he is not involved. In that case the investigator has the competence to refuse participation of the victim. The same rules go for the defence. In principle a direct confrontation between the victim and the suspect should be avoided (see below, § 7.5).

7.4 Privacy, Anonymity, Protection

During the police investigation the privacy and anonymity of the victim and the suspect should be secured as much as possible. According to article 52-3 the victim has the right to use an alias for the criminal proceedings, as soon as s/he is granted security to shield her/him from a 'real threat' to her or his life, health, housing or property.

In that case her/his real name will be only known to the prosecutor and the court. The decision to hide the identity of the victim can be made by the investigator on the request of the victim, her/his lawyer or the police officer. If the victim or her/his representative does not make this request, the investigator should ask on her/his own initiative whether the victim wants to use her/his own name or an alias.

This should be done in the earliest possible stage of the criminal proceedings in order to prevent that the identity of the victim becomes known through documents in the dossier or through other channels.

If the victim chooses not to inform her/his direct surroundings (family, partner, friends, neighbourhood, and village) about her/his predicament, this wish should be respected at all times. Contacts with the victim should be made in a way that respects this wish, for example through the services of a victim support organisation. Contacts with the victim should preferably be made by police officers in plain clothing. Investigation in the place of residence or neighbourhood of the victim, if necessary, should be done as much as possible by police in plain clothes and with the use of unmarked cars.

See in detail, below § 10, on protective measures for victims.

7.5 Confrontation

A direct confrontation between the victim and the suspect should be avoided. If nevertheless such confrontation is necessary, for instance because of contradictions between the statement of the victim and the suspect, the victim should be carefully prepared on forehand. Such confrontation should only take place with the consent of the victim and in a way that the victim is not recognisable for the suspect.

If the victim has a lawyer as her representative, a confrontation should only be done in the presence of this representative. If the victim wishes to have a companion present at such confrontation, this should be allowed.

If a line-up identification is necessary, this should be done according to the rules laid down in article 174, 4th and 5th paragraph, CPC for 'exceptional' and 'necessary' cases. As a principle, one may assume that cases of human trafficking in this respect are always 'exceptional' and 'necessary' cases.

This means that in cases of trafficking a one-way screen is used for any line-up confrontation. Where this is impossible, identification should be done with the use of photos.

Article 174 CPC
Presenting a Person for a Line-up Identification

In exceptional cases, in order to ensure security of an identifier, a line-up identification shall be conducted out of eyesight of a person to be identified, in compliance with requirements stipulated in this Article. A person who was presented for identification must be informed on the outcome of the identification.

In necessary cases, identification can be made with the use of photographs, in compliance with the requirements stipulated in this Article.

7.6 Physical Examination

Physical examination of a victim should occur only when absolutely necessary for the investigation. It should be conducted by a trained medical practitioner of the same sex. To this aim it is advised that the police maintain a relationship with a specialised medical practitioner, hospital or other medical service. If the victim, however, prefers to make use of the services of another doctor, this wish should be respected.

If requested by the victim, a counsellor or companion should be allowed to be

present.

The results of any medical examination are confidential and should be used for the purpose of the investigation only.

The victim must give her/his informed consent to any medical or other examination. To be able to do so, s/he must in any case be informed about the very limited possibilities to keep the medical data confidential if the case goes to court. In particular in the light of these limited possibilities, refusal to consent should not be seen as a failure to cooperate with the authorities.

If the victim does not want to cooperate with an (medical or other) examination needed to collect evidence of the crime, the police shall try to collect the necessary evidence in other ways, without burdening the victim.

Article 193 CPC
Conduction of a Physical Examination

If it is necessary to conduct a forensic medical examination of an accused, a suspect, a victim or a witness, the said examination shall be conducted by a forensic medical expert or a physician as instructed by an investigator.

An investigator does not have the right to be present in the course of physical examination of a person of the opposite sex, when the examination is associated with the need to strip the person under examination. In the course of physical examination it is prohibited to act in a way that is derogatory for the dignity of a person under examination or is dangerous to his/her health.

7.7 Audio- and Video Recording

If it is considered in the interest of the investigation to audio or video record the interview, the officer shall do this, unless the victim expresses serious and justified objections against such recording.

Audio and video recording can also be used to avoid repeated hearing of the victim in later stages of the criminal proceedings.

Article 85-1 CPC
Use of Audio Recording in the Course of Pre-trial Investigation

Audio recording can be used in the course of interrogation of a suspect, an accused, a witness, a victim, in the course of a confrontation, face-to-face identification, reconstruction of circumstances and in the course of other investigation actions at the

time of pre-trial investigation.

Article 85-2 CPC

Use of Filming and Video Recording in the Course of an Investigation Action

Filming and video recording can be used in the course of inspections, searches, reconstruction of circumstances and in the course of other investigation actions.

8. Trial Investigation

8.1 Informing the Victim

At a court session, the court is obliged to explain to a victim and his/her representative their rights under Articles 49, 52, 52-1, 87, 87-1, 88, 267, 348, 384 CPC (SC Decree par. 13-14).

It may sound superfluous, but the court moreover is obliged to ensure that these rights are actually realised.

A victim of crime, who has the status of civil claimant, shall be explained the rights of a civil claimant, specified in Articles 50 and 268 CPC. If a victim of crime failed to submit a civil lawsuit in the course of the pre-trial investigation, the court has to explain the victim her/his right to do this at a court session, but before initiation of trial investigation proceedings (SC Decree par. 13).

8.2 Avoiding Direct Contact between the Victim/Witness and the Accused

For trafficked persons the fear of being directly confronted with the accused (suspect) may be significant. If possible, direct confrontation between the victim/witness and the accused during the trial should be avoided in order to protect the victim/witness from intimidation by the accused.

To this aim, the victim/ witness should be provided with a separate waiting area and other necessary facilities. If this is not possible, different times to enter and exit the courtroom and escorts to and from the courtroom should be arranged.

If there is evidence that the presence of the accused may influence the testimony of the victim/witness or may harm the mental wellbeing of the victim/witness, the court should decide that the victim/witness be heard in absence of the accused.

The judge can determine the order in which the parties are heard. It deserves recommendation that the victim/witness is heard at the beginning of the court

session, so s/he can leave as soon as possible and before the examination of the accused, if s/he wishes so.

8.3 Trial behind Closed Doors / In Camera Hearings

In principle court examinations are public. There are however some exceptions which are of particular importance to trafficking cases.

The judge has the competence to order the hearing to take place behind closed doors if the victim requests so, in cases of sexual offences, as well as in other cases, in order to prevent publicity of information on intimate details of the personal life of persons who participate in such a case, and if it is necessary for the interests of security of persons under protection (Article 20 CPC).

It is recommended that, on the request of the victim, cases involving sexual offences should always be tried behind closed doors. In the case of children, the trial should always take place behind closed doors. Nonetheless, there is the possibility that a victim could prefer a more transparent court procedure due to her/his concerns about corruption.

One of the reasons behind the general principle of public court hearings is the concern about corruption: closed hearings could be used by the judiciary to avoid transparency. For this reason, in the case of a closed hearing, the victim should be allowed to have her/him accompanied by an NGO of her or his choice. This allows for (minimum) public control, while respecting the privacy and safety of the victim.

A second form of public control is the publication of verdicts. According to the law of Ukraine about access to judicial verdicts, it is feasible that judgements are published, but without references to the identity of the victim.

In any case the hearing shall be held behind closed doors when it pertains a victim that officially has been recognised as a person under protection according to the Protection Act.

The Law of Ukraine

On Ensuring Security of the Persons who Participate in Criminal Legal Proceedings

Article 16

1. In certain circumstances, for reasons of security, court hearings involving persons under protection may be held in camera.
2. to secure protection of witnesses or victims to be interrogated, a court of law may, on its own initiative or as submitted by the public prosecutor's office or other participant in court hearing, pass a ruling stating the reasons and

ordering such interrogation without the defendant being present. (...) After a defendant is brought back to the court room the court shall familiarize him/her with the evidence received in this defendant's absence and allow this defendant to offer explanations on this evidence.

3. as an exception, a court of law may relieve witnesses or victims under protection from the obligation to report to a court hearing, provided they confirm their previous testimonies in writing.

8.4 Presence of the Victim in Court

In principle a victim has the right to appear in court. Denying him/her this right may even lead to abrogation of a court sentence.

**Plenum Supreme Court of Ukraine
Decree No. 13 of 02.07.2004**

12. (...) Examination of a case in absence of the victim of crime (his/her legal representative), without issuance of a warrant to appear in a court session, is a substantial violation of his/her procedural rights and may justify abrogation of a court sentence/verdict or another court order.

(...)

This does not say, however, that the victim is obliged to appear in court. Although it is true that in principle the victim is obliged to appear in court, there are exceptions.

First, if the victim, after having been issued a warrant to appear, fails to attend the court session, this does not automatically lead to an acquittal. In that case the court decides on further examination of a relevant case or on postponement of the session (acc. to Article 290 par 1 CPC), depending on whether it is possible to ascertain all circumstances of the case and to protect her/his rights and legitimate interests in her/his absence.

It is moreover important to note that the testimony of the victim of crime, submitted in the course of inquiry or preliminary investigation may be presented in cases, specified in Article 306 CPC.

Last but not least the SC-Decree on the Rights of Victims expressly states that in exceptional cases a victim may be exempted from participating in court proceedings.

Plenum Supreme Court of Ukraine

Decree No. 13 of 02.07.2004

12. (...). In exceptional cases, for example, if it is necessary to ensure security of a victim of crime, a court may free him/her from participation in court proceedings, provided he/she preliminary certifies authenticity of his/her testimony, submitted in the course of inquiry or pre-trial investigation.
(...).

8.5 The Use of a Pre-Trial Statement

In particular in cases of trafficking for prostitution or other forms of sexual exploitation, it deserves preference to use the possibility of statements made during the pre-trial investigative phase.

The SC Plenum-Decree on the Rights of Victims (par. 12) expressly states that the testimony of the victim of crime, submitted in the course of inquiry or preliminary investigation may be presented in cases, specified in Article 306 CPC.

The lawyer of the victim/witness has to request the absence of the victim in court, and the use of her/his statement as made during the pre-trial investigation, before the start of the trial.

8.6 Questioning the Victim/Witness

It is the competence of the judge to decide about the limits within which evidence may be introduced, including the relevance of questions to the victim/witness. Given the nature of the crime of trafficking, questions relating to the personal history, previous sexual behaviour, the alleged 'character' or the current or previous occupation (e.g. as a prostitute or domestic worker) of the victim must, in general, be deemed irrelevant as evidence whether or not the crime of trafficking has been committed.

**Plenum Supreme Court of Ukraine
Decree No. 13 of 02.07.2004**

17. A court should ensure that, in the course of interrogation of a victim of crime, he/she is not asked questions that are offensive to his/her dignity, offensive to him/her personally and his/her close friends/relatives, as well as questions on personal matters that are not relevant for the case.

In particular in cases of trafficking for prostitution or other forms of sexual exploitation, the defendant should only be allowed to introduce such evidence with the leave of the president of the court. The introduction of such evidence

should only be allowed if the president is satisfied that the evidence is of such relevance and its omission would be so prejudicial to the defendant, that this would result in a miscarriage of justice for the defendant. In such case, the president will still establish the limits within which such evidence or questions may be introduced.

The victim and her/his lawyer have the right to introduce the accusation from her/his perspective.

8.7 Change of Accusation

The Decree of the Supreme Court Plenum on the Rights of Victims is clear on what to do in cases when the prosecutor wants to change the accusation (par. 23).

According to Article 277 CPC the prosecutor has the right to change the accusation. If he/she does so in the course of court proceedings, the prosecutor should issue copies of the motivated resolution on the new charges to the victim and her/his (legal) representative. If the resolution stipulates the application of a criminal provision that covers a lesser crime or reduces the charge, the court should explain to the victim and her/his (legal) representative their rights to demand prosecution under the previous charges. The opinion of the victim must be recorded in the protocol of the court session.

If the prosecutor dismisses the charge (par. 3, Article 264 CPC), the court should explain to the victim and his/her legal representative their rights to demand continuation of the examination of the case by the court. This should be recorded in the court session protocol. In such case, the opinion of the victim is a priority for the court. If the victim does not agree with the prosecutor, s/he assumes the function of prosecution and the court examination of the case shall continue. If the victim agrees with the prosecutor, the court shall close the case.

8.8 Interpreter

A victim, who does not know the language of the legal process, has the right to testify in her/his native language, and – if necessary – to use free interpretation services (SC-decree on the rights of victims, par. 16).

If necessary, the victim should be provided with a competent, qualified translator when testifying in the court case.

9. Compensation of the Victim

9.1 The Civil Claimant

Apart from provisions on the position of victims and witnesses, the CPC and other legal documents contain provisions with regard to the position of the injured party or 'civil claimant'.

With civil claimant a person – most often a victim – is meant who has joined a civil action for compensation to the criminal procedure according to Article 50 CPC.

Article 50 CPC
The civil claimant

A civil claimant shall be recognised as a citizen, a facility, an official body or an organisation, that suffered material damages from a crime and submitted a request on compensations for these damages according to Article 28 of this Code. A body of inquiry, an investigator and a judge shall issue resolutions on recognition or non-recognition of a civil claimant, and a court shall issue a court order on these matters.

A person who is recognized as civil claimant is 'granted all the rights of a civil claimant as stipulated by law' (SC Decree, Article 2 and 7). This includes the right to participate in the criminal proceedings.

Article 50 CPC
Rights of the civil claimant

A civil claimant or his/her representatives have the following rights:

- to submit evidence;
- to submit requests;
- to participate in court examination;
- to apply to a body of inquiry, an investigator and a court with requests to take measures in order to secure enforcement of their claims;
- to pursue a civil charge;
- to review materials on the case from the moment of completion of the pre-trial investigation, or from the moment of transfer of the case for court examination (in cases that do not incorporate pre-trial investigation);
- to submit motions on dismissal;
- to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court; as well as to appeal against a court sentence or court orders to the extent of their connection with a civil lawsuit; and provided relevant reasons;
- the right to be granted security.

The rights of the civil claimant include the right to protection as defined in the Law on Protection of Individuals involved in Criminal Proceedings.

If a civil lawsuit is filed, the investigator is obliged to take a motivated decision on the recognition of a victim as civil claimant.

Article 123 CPC
Recognition of a Civil Claimant

If a civil lawsuit was filed under a case, an investigator is obliged to issue a motivated resolution on recognition of a victim as a civil claimant or on the rejection to recognise.

A civil claimant or his/her representative shall be notified on issuance of the resolution. In the case of attendance of the civil claimant or his/her representative, he/she shall be explained his/her rights stipulated in Article 50 of this Code, and a relevant entry shall be made on the matter at the resolution, that shall be certified by signature of the civil claimant or his/her representative.

A person who suffered damages and requested redress of these damages, shall be recognised as a victim of crime and as a civil claimant. Such person shall be granted all the rights of a victim of crime and a civil claimant as stipulated by law (Decree of the SC, § 7).

The victim can claim compensation for damages either through joining a civil claim to the criminal case or through a civil law suit.

9.2 Civil Claim during Criminal Proceedings

The start for collecting information about the damages suffered by the victim and the willingness of the suspect to pay compensation to the victim lies with the police. To this aim the police should include in the record of the statement of the victim, or in an annex to the record, relevant and realistic information about the material and immaterial damages suffered by the victim.

In principle the police must give the victim the opportunity to submit to the police possible proof about the (scope of) damages suffered by her/him. This information should be added to the record, as well as information about a possible arrangement with the suspect for compensation of the victim. It is important to make a realistic estimation of the damages since unrealistic estimations can cause the victim to be seen as a fantasist in a later phase of the criminal proceedings, especially in court.

Article 28 CPC
A Civil Lawsuit in a Criminal Case

A person who suffered material damages from a crime, shall have the right, in the course of the examination of a criminal case, to submit a civil lawsuit against an accused or persons who bears material responsibility for the actions of the accused; the civil lawsuit shall be examined by a court jointly with the criminal case.

A civil lawsuit may be submitted both at the time of pre-trial investigation and inquiry, and at the time of the court examination of a case, but prior to initiation of the court investigation. A refusal to accept a civil lawsuit shall deny a suitor to submit the same lawsuit in a criminal case.

A person who has not submitted a civil lawsuit in a criminal case, as well as a person whose civil lawsuit was not proceeded, shall have the right to file the lawsuit under civil law procedures.

Although the law only speaks of material damages, it is also possible to claim compensation for immaterial (moral) damages. It has to be realised, however, that these are far more difficult to prove than material damages.

In deciding on moral damages the court should rely on the relevant provisions of the Civil Code and Decree No. 4 of the Plenary Session of the Supreme Court of March 31, 1995 'On Court Practices of Review of Cases on Redress of Moral (Intangible) Damages as amended by Decree No. 5 of May 25, 2001 (Decree of the SC on the Rights of Victims of Crime, par. 31).

If a crime caused (im)material damages to a victim, the investigator must notify the victim and her/his representative on the right to pursue a civil claim for damages and record this in a protocol of interrogation or send a written notification to the victim. A copy of the notification must be included in the case materials (Article 122 CPC).

If the victim has indicated that she/he wishes to claim damages and the public prosecutor decides to prosecute the suspect and to summon him/her in relation to the act through which the victim has suffered damages, the public prosecutor should timely inform the victim about the date, time and place of the session of the court.

The prosecutor has the obligation to support a claim for compensation of the victim.

Article 29 CPC
Ensuring Compensation of Damages Caused by a Crime, and Enforcement of a Sentence, Incorporating Confiscation of Property

Should there be sufficient evidence that a crime has resulted in material damages or in

expenses of a health care facility, associated with hospital treatment of the victim of the crime, a body of inquiry, an investigator, a prosecutor and a court shall be obliged to take measures to ensure compensation under a civil suit.

A prosecutor shall initiate a civil lawsuit or support a civil lawsuit, filed by a victim for compensation of damages caused by a crime, if it is so required for the protection of interests of the state and citizens, who cannot protect their rights themselves due to the state of their health or other reasonable excuses.

The Court has the right to refuse a claim for compensation if the victim/civil claimant does not appear at the court hearing or if there is no conviction (Article 291 CPC).

In setting the timeframe for summoning the suspect, the prosecutor takes, as much as possible, into account the interests of the victim in joining a civil claim to the criminal case and the right to inspection based thereon.

If the injured party is not present at the court session and the case is suspended or adjourned, the prosecutor informs the injured party of the date, time and place of the new court session.

In the decision to appeal against the verdict the prosecutor takes into account the interests of the victim.

9.3 Civil Law Suit

The other possibility is to claim damages through a civil law suit. In this case full compensation of all damages (material and immaterial) can be requested. However, this can be a rather lengthy and costly procedure.

A civil law suit is not possible any longer if the same claim has been denied in a civil law suit during criminal proceedings.

Article 28 CPC A Civil Lawsuit in a Criminal Case

A civil lawsuit may be submitted both at the time of pre-trial investigation and inquiry, and at the time of court examination of a case, but prior to initiation of court investigation. A refusal to accept a civil lawsuit shall deny a suitor to submit the same lawsuit in a criminal case.

A person who has not submitted a civil lawsuit in a criminal case, as well as a person whose civil lawsuit was not proceeded, shall have the right to file the lawsuit under civil law procedures.

9.4 Collecting the damages awarded

Already from the start of a criminal case, the investigator and prosecutor have the obligation to take measures to ensure the potential confiscation of property of the accused.

Article 29 CPC
Ensuring Compensation of Damages Caused by a Crime, and Enforcement of a Sentence, Incorporating Confiscation of Property

In the course of proceeding of a criminal case on an offence that can entail confiscation of property as an additional sanction, a body of inquiry, an investigator, a prosecutor shall take measures to ensure the potential confiscation of property of the accused.

Article 125 CPC
The Obligation to Ensure a Civil Lawsuit and Confiscation of Property Stipulated by Law

In cases of crimes for which criminal law stipulates the potential sanction of confiscation of property, an investigator is obliged to take the necessary measures to ensure fulfilment of a potential court sentence of confiscation of property by issuance of a resolution on these matters.

If the civil claim is granted, the court informs the special executive branch of the MOI. It is the responsibility of the MOI to collect the claim.

10. Protection

10.1 Ensuring Security of Persons who Participate in Criminal Justice

Before, during and after the criminal proceedings, all necessary and possible measures should be taken to protect the victim from intimidation, threats of reprisals and reprisals from the suspect(s) and/or their associates, including reprisals from persons in a position of authority. If necessary, similar protection should be provided to the family and/or friends of the victim.

Article 52-1 CPC
Identical Art 2 Law on Protection of Individuals Involved in Criminal Proceedings

If persons, who participate in criminal justice, are under a real threat to their lives, health, housing or property, they shall have the right to be granted security.

The following persons shall have the right to be granted security, provided relevant reasons:

(...)

2) a victim or his/her representative in a criminal case;

(...)

4) a civil claimant, a civil defendant and their representatives in a case on compensation of damages, caused by a crime;

5) a witness;

(...)

7) family members and close relatives of persons, listed in clauses 1-6 of this article, if they are under threats or other illegitimate actions to influence participants or criminal justice.

The same article provides that a body of inquiry, an investigator, a prosecutor or a court, after getting a statement or a notification on a threat to the security of the victim (or any of the other person entitled to protection), is obliged to check such statement or notification. He/she has to decide within three days (or immediately in urgent cases), to apply or refuse to apply security measures.

10.2 Security Measures

A body, authorised to enforce security measures, shall identify the range of necessary measures and means of their implementation, taking into account the specific circumstances and the need to eliminate existing threats. A person under protection must be informed on security measures, the conditions of their use and the rules for the use of property items or documents, issued for security purposes.

Security arrangements comprise (Protection Law, Article 7):

- body guards or guards watching home and property, e.g. by installing fire and burglar alarms and changing license plates of cars;
- in the presence of danger to the life and health of persons under protection: special individual protection means and warning devices;
- when threatened with acts of violence or other unlawful actions: listening in on telephone and other communication and visual surveillance;
- replacement of ID papers and other relevant documents, and changes of appearance;
- change of place of work or study;
- change of residence, temporarily or perpetually;
- court hearings in camera (see also supra § 8.3).

Apart from these measures – and others to be taken when found necessary –, an important measure regards the confidentiality of information on the person under protection, as arranged in Article 52-3 CPC and Article 15 of the Protection Law.

The Law of Ukraine

On Ensuring Security of the Persons who Participate in Criminal Legal Proceedings

Article 15

The confidentiality of information about persons under protection shall be secured by:

- (a) classifying data pertaining to such a person in the documents of verification (statements, letters of explanation, etc), as well as in investigating and court records, changing the first, middle and last name therein with pseudonyms – as resolved by the investigating authority, public prosecutor or court ruling. These decisions shall not be entered in the case file, but shall be kept separately by the authority conducting the criminal proceedings;
- (b) conducting line-ups with the identifying person unobserved by the suspect, in keeping with the criminal proceedings legislation;
- (c) not entering the genuine biographical data of a person under protection in their list of persons to be subpoenaed;
- (d) subpoenaing such persons only via the body responsible for their protection;
- (e) temporarily banning disclosure of information about a person under protection at public inquiry offices, passport desks, traffic control inspectorates, telephone enquiry services, and other government-run inquiry outlets.

Article 52-3.

Non-disclosure of Information on a Person under Protection

Non-disclosure of information on a person under protection can be made by minimising information on such person in inspection materials (statements, explanatory notes, etc.), as well as in protocols of investigation actions and court sessions. A body of inquiry, an investigator, a prosecutor, a court (a judge), after making decision on application of security measures, shall issue a motivated resolution, or a court order on replacement of the genuine name, family name and patronymic of a person under protection by a pseudonym. Later on, procedural documents shall refer to the pseudonym only, while the genuine name, family name and patronymic (date of birth, marital status, employment or position, place of residence and other identification data of the person under protection) shall be referred to only in the resolution (court order) on replacement of the genuine identification data. Such resolution (court order) shall not be incorporated into the case materials and shall be stored separately by a body, dealing with the criminal case. If the genuine name of a person under protection is replaced by a pseudonym, protocols of

investigation actions and other documents, containing genuine information on the person, shall be withdrawn and stored separately, while copies of the above documents, containing the pseudonym instead of the genuine name of the person shall be added to the case materials.

Information on security measures and persons under protection shall be treated as a limited assess information. Documents, that contain such information, shall not be covered by rules, stipulated by paragraph 2 of Article 48, articles 217 - 219 and 255 of this Code (1003-05).

The CPC, Decree No. 13 of 02-07-2004 and the Law on Protection of Individuals Involved in Criminal Proceedings of 23 Dec. 1993, contain a range of provisions on the protection of victims; see Annexes.

10.3 Appeal

A person to whom protection has been denied can appeal against this decision to a relevant prosecutor or to a local court.

Article 52-5 CPC
Appeals against Decisions on Refusal to Apply Security Measures or Decisions on their Cancellation

A resolution of a body of inquiry or an investigator on refusal to apply security measures or on cancellation of security measures can be appealed against to a relevant prosecutor or to a local court in location of investigation of a given case.

The same article stipulates that a judge shall immediately review such appeal and the materials on the case, interview the person in charge of inquiry, the investigator, review the opinion of the prosecutor and, depending on the underlying reasons of the decision, issue his/her resolution on the application of security measures, the cancellation of such measures or on the refusal to apply such measures.

C. DEFINITION AND INDICATORS OF TRAFFICKING IN HUMAN BEINGS

11. Trafficking in the Criminal Code of Ukraine

11.1 Article 149 CC: Trafficking in Human Beings

In January 2006 the article in the Criminal Code on trafficking in human beings was amended. The new Article 149, which entered into force 10 February 2006, reads:

Article 149
Trafficking in Persons or Other Illegal Agreement with Regard to a Person

1. Trafficking in persons or the execution of another illegal agreement concerning a person, or the recruitment, transfer, hiding, hand-over or receiving of a person by fraud, blackmail or by taking advantage of a persons' vulnerable status with the aim of exploitation - shall be punishable by a 3 to 8 year's jail term.

2. Actions provided by Part 1 of this Article and committed with regard to a minor or several persons or repeatedly, or subject to a prior group collusion by several persons, or by an employee who took advantage of his/her official position, or by a person on whom the victim was materially or otherwise dependent or actions involving violence which endangers the victim's or his relatives' life or health or the threat of resorting to such violence – shall be punishable by a 5 to 12 year's jail term with or without the seizure of property.

3. Actions provided by Part 1 or 2 of this Article and committed with regard to a minor, or by an organized group or actions involving violence which endangers the victim's or his relatives' life or health or the threat of resorting to such violence, or if they have led to grave consequences – shall be punishable by a 8 to 15 year's jail term with or without the seizure of property

Note

1. For the purposes of this Article, exploitation of human beings shall mean all forms of sexual exploitation, use in the porno business, forced labour or forced provision of services, slavery or practices similar to slavery, bondage, forcing into debt servitude, extraction of organs, experiments on a person without his/ her consent, adoption of a person for personal gain, forced pregnancy, forcing into criminal activities, using in military conflicts, etc.

2. For the purposes of articles 149 and 303 of this Code, the vulnerable status of a person shall mean the status of a person which results from his/ her physical or mental traits or external circumstances, makes it impossible for this person to take stock of his /her actions (inaction) or to control them, to make independent decisions of his/ her own free will, to resist violent or other illegal actions or restricts his /her ability to do so, concurrence of adverse personal, family or other circumstances.

3. Under this Article, the responsibility for the recruitment, transfer, hiding, hand-over or receiving of juveniles or minors shall arise regardless of whether or not such actions have been carried out by fraud, blackmail, or by taking advantage of the vulnerable status of the above-said persons or by force or under the threat of using force, by using one's official position, or by a person on whom the victim was materially or otherwise dependent.

11.2 Article 303 CC: Pimping

At the same time Article 303 Criminal Code was amended. An important change is that under the new article the prostitute her/himself is no longer criminally liable. Victims of trafficking for prostitution can therefore report the case to the authorities without having to be afraid for being prosecuted for prostitution themselves.

Article 303

Pimping or involving of a person into prostitution

1. Involving or forcing a person into prostitution by fraud, blackmail, or by taking advantage of the vulnerable status of this person or by force or under the threat of using force, or pimping – shall be punishable by a 3 to 5 year's jail term.
2. Actions provided by Part 1 of this Article and committed with regard to several persons or repeatedly, or subject to prior group collusion by several persons, or by an employee who took advantage of his/ her official position, or by a person on whom the victim was materially or otherwise dependent - shall be punishable by a 4 to 7 year's jail term.
3. Actions provided by Part 1 or 2 of this Article and committed with regard to a minor, or by an organized group – shall be punishable by a 5 to 10 year's jail term with or without the seizure of property.
4. Actions provided by Part 1, 2 or 3 of this Article and committed with regard to a minor, or if they have brought about grave consequences – shall be punishable by an 8 to 15 year's jail term with or without the seizure of property.

Note

1. For the purposes of this Article, pimping shall mean a person's actions aimed at facilitating another person's involvement in prostitution.
2. Under this Article, the responsibility for involving a juvenile or a minor in prostitution shall arise regardless of whether or not such actions have been carried out by fraud, blackmail, or by taking advantage of the vulnerable status of the above-said persons or by

force or under the threat of using force, by using one's official position, or by a person on whom the victim was materially or otherwise dependent.

Administrative provisions against prostitution should not be used against victims of trafficking.

12. The Crime Definition of Trafficking

The new definition of trafficking is based on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organised Crime, adopted by the General Assembly of the UN at 15 November 2000 (hereinafter referred to as UN Trafficking Protocol). This means that the UN Trafficking Protocol can serve as a tool to interpret the new provision on trafficking in the Criminal Code of Ukraine. For this reason the definition of the UN Protocol is discussed below (see for a broader discussion of the UN Protocol Part II, § 17).¹

12.1 Definition of Trafficking

The UN Trafficking Protocol contains the first internationally agreed, legally binding definition of trafficking. The Protocol provides a clear definition of trafficking in human beings.

Article 3 sub a

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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

The definition contains three distinct, but interconnected elements:

- the recruitment, transportation, transfer, harbouring or receipt of persons (the 'acts');

¹ See for an extensive discussion of the definition in the UN Trafficking Protocol also the *Report of the European Experts Group on Trafficking in Human Beings* (Brussels, December 2004). The report can be downloaded from the website of the European Commission:

http://europa.eu.int/comm/justice_home/doc_centre/crime/trafficking/doc/report_expert_group_1204_en.pdf See also: *Analysis of the definition of trafficking in human beings in the Palermo Protocol* October 2005, Marjan Wijers (LL.M, MA), written on the request of UNDP Belarus; and *The Annotated Guide to the complete UN Trafficking Protocol*, Ann D. Jordan, International Human Rights Law Group, 2002, www.globalrights.org. All three are used in writing this chapter.

- 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 payments or benefits to achieve the consent of a person having control over another person (the 'means');
- for the purpose of exploitation (the 'purpose'). Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Moreover:

- The consent of a victim of trafficking in persons to the intended exploitation is irrelevant if any of the deceptive or coercive means as listed in the definition have been used (Article 3, sub b);
- Any recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation is considered 'trafficking in persons' even without the use of any of the deceptive or coercive means as listed in the definition (Article 3, sub c);
- 'Child' shall mean any person under eighteen years of age (Article 3, sub d).

12.2 The Acts

The recruitment,² transportation, transfer, harbouring, and receipt of a person are not necessarily acts that have to be criminalised.³ The necessity of criminalising them only emanates firstly from the use of one of the means which indicate that the act was committed against the will or through any form of distortion of the free will of the person concerned, and secondly from the exploitative purpose for which they are committed. They will therefore not further be discussed here.

Discussion can arise over the fact of 'harbouring or receipt' can be used to also cover the actual exploitation of the victim (as opposed to the process through which the victim arrives in a situation of exploitation).⁴

² Recruitment can include job advertising, candidate canvassing, candidate selection, job brokerage, direct hiring or hiring by delegation. In general terms, recruitment can be defined as a free contractual agreement whereby one party commits itself to pay a pre-determined remuneration in exchange of which the other party commits itself to perform pre-determined tasks in a pre-determined time. For a legal definition of recruitment in the context of migration see ILO Convention No. 97, Article 2, Annex 1 (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 31).

³ 'Transportation', for example, may involve traffickers or may be carried out by airlines or other transport companies in good faith. Similarly, 'harbouring' and 'receipt' may be part of the crime of trafficking or may be done in good faith, depending on the knowledge of the accused person (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 10).

⁴ On a legal interpretation of Article 3(a) this question might be answered positive. However, this is a rather indirect way and might fail to target all those who are involved in the actual exploitation of the victim and profit from this exploitation. Moreover, it does not cover those forced labour and slavery-like situations in which the other elements of the Protocol's definition (movement and coercion) are not present. It would therefore be recommended to separately criminalise the actual forced labour or slavery-like exploitation of a person and the profiting thereof.

12.3 Fraud, Deception, Abuse of Power or of a Position of Vulnerability

The inclusion of fraud, deception and the abuse of power or of a position of vulnerability recognises that trafficking can occur without any use of (physical) force. According to the interpretative notes to the Protocol, 'abuse of a position of vulnerability' must be understood to refer to

'any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved' (para 63)⁵.

This can for example be the case if the victim does not speak the language, if her/his identity papers are taken away, if s/he does not know where s/he is, is prohibited from having contacts with friends, family or the outside world or is threatened with reprisals against her/himself, children or other family members.⁶ In this way the victim is brought in a situation of total dependency on the traffickers or others who control her with no real and acceptable alternative than to submit.

Deception or fraud can refer to the nature of the work (for example the woman is promised a job as domestic worker but forced to work as a prostitute) as well as to the conditions under which the person will be forced to perform this work or services (for instance the person is promised work as a domestic worker, sex worker or factory worker with proper payment and regular working conditions, but ends up with not being paid, is forced to work extremely long hours, is deprived from her/his identity papers, is locked up and threatened with reprisals when trying to escape).

Commonly the means which are used – along with deception and fraud – to have the victim submit to the intended or actual exploitation include debt bondage, isolation, removal of identification or travel documents, the threat or use of force or other forms of (psychological) coercion and/or the use or threat of reprisals against the victim's family. These can all be brought under one of the means listed in the Protocol. They can be used during all phases of trafficking, from the initial recruitment, transportation or transfer of the victim through to the harbouring or receipt of the victim and his/her actual exploitation. The common element of all means listed in the UN Protocol is the distortion of the free will of the person.

⁵ Crime Prevention and Criminal Justice, report of the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organized Crime on the work of its first to eleventh session, Addendum, *Interpretative notes for the official records (Travaux Préparatoires) of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto*, UN General Assembly, 3 November 2000 (A/55/383/Add.1), to be found at <http://www.odccp.org/crime-cicp-convention-documents.html>.

⁶ These examples are taken from Dutch jurisprudence. One of the means listed in the trafficking article in the Dutch Criminal Code is 'abuse of authority ensuing from actual relations', which is very comparable with 'abuse of power or of a position of vulnerability' as used in the Protocol. Judges have interpreted this to mean 'bringing a person in a situation of dependency', for example because the victim does not speak the language, has no legal residence permit, has no identity papers, is not allowed to dispose over her earnings, et cetera.

12.4 The Issue of Consent

With regard to the issue of consent, the Trafficking Protocol stipulates that the consent of the victim shall be irrelevant where any of the means listed in the definition is used. This is in line with existing international legal norms and does not take away the right of the accused to a full defence and to the presumption of innocence, as explicitly stated in the interpretative notes to the UN Protocol (para 68)⁷. Moreover, it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. However, once the elements of the crime of trafficking are proven, any allegation that the trafficked person 'consented' is irrelevant.⁸

Yet, in practice the issue of consent may cause confusion, because when a person has seemingly consented to what is actually forced labour or slavery-like practices, some may argue that the person is not trafficked. In this context, two questions need to be addressed: did the person concerned give her/his consent to the act and was the consent valid. In particular the second question is relevant if the person would not have given her/his consent if s/he had been informed about all relevant circumstances. When considering the relevance of actual or seeming consent, the following must be taken into account:

- A free decision, such as a freely given consent, implies the realistic possibility of not giving consent or, more precisely, of refusing to do or tolerate any individual act. If there is no option to refuse there is no free decision. The question, whether or not a decision was a free one, has to be asked and answered for each individual act.
- The consent of the victim must have been given with respect to all relevant circumstances of an act. Real consent is only possible and legally recognizable, when all relevant factors are known and a person is free to consent or not.

Moreover, it should be kept in mind that the initial recruitment can be voluntary and that the coercive mechanisms to keep a person in an exploitative situation only come into play at a later stage.

Thus, although a person can consent to migrate, to carry false papers, to work as a domestic worker, a construction labourer or a prostitute or to work illegally abroad, this does not imply the person's consent to the forced labour or slavery-

⁷ UN interpretative note: 'The *travaux préparatoires* should indicate that subparagraph (b) should not be interpreted as imposing any restriction on the right of the accused to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law. Further, the *travaux préparatoires* will refer to article 11, paragraph 6, of the Convention, which preserves applicable legal defences and other related principles of the domestic law of States Parties'.

⁸ See also *The Annotated Guide to the complete UN Trafficking Protocol*, Ann D. Jordan, International Human Rights Law Group, 2002, www.globalrights.org.

like conditions to which she or he is ultimately subjected and therefore does not exclude the person being a victim of trafficking.

In the case of children, that are persons below the age of 18, consent is not relevant as the Trafficking Protocol stipulates that in case of children none of the coercive or deceptive means needs to be used to qualify as trafficking. Any recruitment, transportation et cetera of children for the purpose of exploitation, with or without the consent of the child and with or without the use of coercive or deceptive means, must be considered trafficking.

12.5 The Purpose of Exploitation

A critical element of the definition is the purpose of trafficking, notably exploitation. It is important to note that the Protocol does not require that the intended exploitation has actually taken place. It is sufficient that (one of) the acts and (one of) the means have been employed 'for the purpose of exploitation' The intention to subject another person to one of the forms of exploitation therefore suffices.

12.5.1 'Exploitation of the Prostitution of Others' and 'Sexual Exploitation'

The Protocol only addresses the exploitation of the prostitution of others and other forms of sexual exploitation in the context of trafficking in persons, thus making a clear distinction between trafficking and prostitution as such.

The terms 'exploitation of the prostitution of others' and 'sexual exploitation' were intentionally left undefined in order to allow all states, independent of their domestic policies on prostitution, to ratify the Protocol.⁹ In particular in relation to prostitution, the element of coercion within the definition is crucial to distinguish that it is the forced, exploitative, or slavery-like conditions of the work or relationship and whether those conditions were freely and knowingly consented to by the person, which give rise to it falling under the Trafficking Protocol, rather than the type of work or services itself.¹⁰ The Protocol thus only addresses the exploitation of the prostitution of others and sexual exploitation in as far as the other elements of the definition are fulfilled: that is the presence of one of the acts and the use of one of the coercive or deceptive means.

12.5.2 Other Forms of 'Exploitation': Slavery or Practices similar to Slavery, Servitude, Forced Labour or Services

⁹ The interpretative note to the UN Protocol reads that 'The Travaux Préparatoires should indicate that the Protocol addresses the exploitation of prostitution of others and other forms of the sexual exploitation only in the context of trafficking in persons. The terms 'exploitation of the prostitution of others' and 'sexual exploitation' are not defined in the Protocol, which is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.'

¹⁰ The same goes for the purpose of 'removal of organs' in the Trafficking Protocol definition. Also this purpose is not inherently coercive but only becomes trafficking if one of the means listed in the definition is used (plus the element of movement).

Although the UN Trafficking Protocol does not give a definition of 'exploitation', the concepts of 'forced labour or services', 'slavery', 'practices similar to slavery' and 'servitude' are elaborated in international instruments to which regard must be taken in the implementation and application of the Protocol.

Slavery

Article 1(1) of the 1926 Slavery Convention as amended by the 1953 Protocol defines *slavery* as:

'The status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.'

Article 8 of the International Covenant on Civil and Political Rights (ICCPR) of 1966 and Article 4 of the European Convention on Human Rights state that no one shall be held in slavery or servitude or be required to perform forced or compulsory labour. In the context of these instruments slavery is not only understood to mean the exercise of all or any powers attached to ownership, but also the actual *de facto* destruction of the legal personality of a person. Nonetheless, the concept of slavery is generally interpreted as to refer to slavery in its classic sense.

Slavery-like practices

The 1956 UN Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery specifically prohibits debt bondage, serfdom, servile forms of marriage and the exploitation of children and adolescents. States Parties commit themselves to take all necessary measures to abolish the following practices:

Debt bondage

'The status or condition arising from a pledge by a debtor of his personal services or those of a person under his control as security for a debt, if the value of those services as reasonable assessed is not applied towards the liquidation of the debt or the length of those services are not respectively limited and defined';

Serfdom

'The condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status';

Servile forms of marriage

'Any institution or practice whereby:

- a woman without the right to refuse, is promised or given in marriage on payment of a consideration in money or in kind to her parents, guardian, family or any other person or group; or*
- the husband of a woman, his family, or his clan, has the right to transfer her to another person for value received or otherwise; or*
- a woman on the death of her husband is liable to be inherited by another person';*

Exploitation of children

'Any institution or practice whereby a child or young person under the age of eighteen years is delivered by either or both of his natural parents or his guardian to another person, whether for reward or not, with a view to the exploitation of the child or young person or of his labour.'

Servitude

Servitude represents a broader concept, covering conditions of work or service, which the individual cannot change or from which she/he cannot escape. In its recent judgement in the case *Siliadin v. France*, the European Court of Human Rights specified the concept of 'servitude' as contained in Article 4 of the European Convention on Human Rights.¹¹ The case concerned a Togolese national who was brought to France in 1994, when she was fifteen and a half years old, under the promise of regularisation of her immigration status and to arrange for her education. Subsequently she was first used as a housemaid by the family she was brought to and then by another couple (Mr. and Mrs. B) for more than four years. She was not paid, her passport was confiscated and she was made to work 15 hours a day with no days off. She slept on a mattress on the floor and wore old clothes.

Criminal proceedings were brought against Mr. and Mrs. B but, after being convicted in first instance, they were acquitted on appeal.

In order to qualify the state in which Ms. Siliadin was held the Court noted that:

'Ms Siliadin had worked for years for Mr and Mrs B., without respite, against her will, and without being paid. The applicant, who was a minor at the relevant time, was unlawfully present in a foreign country and was afraid of being arrested by the police. Indeed, Mr and Mrs B. maintained that fear and led her to believe that her status would be regularised.'

¹¹ *Siliadin v. France*, ECtHR, application no. 73316/01, 26 July 2005. The Court's judgements are accessible on its internet site <http://www.echr.coe.int>. The quotes are taken from the press release issued by the Registrar of the Court.

In those circumstances the Court considered that Ms. Siliadin had been subjected to forced labour within the meaning of Article 4 of the European Convention on Human Rights.

With regard to servitude, which, according to the Court, should be regarded as 'an obligation to provide one's services under coercion, and was to be linked to the concept of "slavery"', the Court noted that

'the forced labour imposed on the applicant lasted almost 15 hours a day, seven days a week. Brought to France by a relative of her father's, Ms Siliadin had not chosen to work for Mr and Mrs B. As a minor, she had no resources and was vulnerable and isolated, and had no means of subsistence other than in the home of Mr and Mrs B., where she shared the children's bedroom. The applicant was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated and she had been promised that her immigration status would be regularised, which had never occurred. Nor did Ms Siliadin, who was afraid of being arrested by the police, have any freedom of movement or free time. In addition, as she had not been sent to school, despite the promises made to her father, the applicant could not hope that her situation would improve and was completely dependent on Mr and Mrs B.'

In those circumstances, the Court considered that Ms Siliadin, a minor at the relevant time, had been held in servitude within the meaning of Article 4.

Considering that slavery and servitude were not as such classified as criminal offences in the French criminal law-legislation, that Mr. and Mrs. B were prosecuted but not convicted under criminal law and that the existing provisions in the Criminal Code were open to very differing interpretation from one court to the other, the Court concluded that the French legislation had failed to offer Ms. Siliadin sufficient protection in the light of the positive obligation incumbent on France under Article 4. Consequently, the Court concluded that France had not fulfilled its positive obligations under Article 4.

Forced Labour or Services

ILO Convention No. 29 Concerning Forced Labour (1930) and No. 105 on the Abolition of Forced Labour (1957), prohibit the use of forced labour.¹² This encompasses forced labour exacted by the public authorities as well as by private persons. Article 2(1) defines forced labour as:

All work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily.'

¹² Other relevant ILO conventions are the Worst Forms of Child Labour Convention, 1999 (No. 182), the Migration for Employment Convention (revised), 1949 (No. 97), the Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143) and the Private Employment Agencies Convention, 1997 (No. 181).

Forced labour is considered to be a violation of human rights (Preamble ILO Abolition of Forced Labour Convention, No. 105). As such, forced labour cannot be equated simply with low wages or poor working conditions, nor 'does it cover situations of pure economic necessity, as when a worker feels unable to leave a job because of the real or perceived absence of employment alternatives' (ILO, Global Report 2005, p. 5¹³). For example, 'the failure to pay a worker the statutory minimum wage does not constitute forced labour. However, any action to prevent a worker from leaving the workplace will normally come within the ambit of forced labour' (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 19). This does not take away that the line dividing forced labour in the strict legal sense of the term from extremely poor working conditions can at times be very difficult to distinguish (ILO, Global Report 2005, p. 8).

The definition of forced labour contains two basic elements: the work or service is exacted under the menace of a penalty and it is undertaken involuntarily. Both elements are clarified in the case law of the ILO supervisory bodies over the last 75 years.

According to ILO case law, the penalty does not need to be a form of penal sanction, but may also take the form of a loss of rights or privileges. Moreover, the menace of a penalty can take multiple forms, ranging from physical violence or restraint, or even death threats to the victim or his/her relatives, to more subtle forms of menace, sometimes of a psychological nature. These can include threats to denounce the victim to the police or immigration authorities when her or his employment or residence status is illegal, or denunciation to village elders or family members in the case of girls or women forced to prostitute themselves. Other penalties can be of a financial nature, including economic penalties linked to debts, the non-payment of wages, or the loss of wages accompanied by threats of dismissal if workers refuse to do overtime beyond the scope of their contract or national law. Employers can also require workers to hand over their identity papers or may use the threat of confiscation of these documents to exact forced labour (ILO, Global report 2005, p. 5-6).

With regard to the freedom of choice, different aspects must be taken into consideration, e.g. the form and subject matter of consent, the role of external restraints or indirect coercion and the possibility of revoking freely given consent. Also here, there can be many subtle forms of coercion:

'Many victims enter forced labour situations initially of their own accord, albeit through fraud and deception, only to discover later that they are not free to withdraw their labour. They are subsequently unable to leave their work owing to legal, physical or psychological coercion. Initial consent may be considered irrelevant when deception or fraud has been used to

¹³ ILO, A global alliance against forced labour, Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work 2005, International Labour Conference, 93rd Session 2005, Report of the Director-General, Geneva: ILO 2005.

obtain it.¹⁴

This means that also in cases where an employment relationship is originally the result of a freely concluded agreement, the worker's right to free choice of employment remains inalienable, that is, a restriction on leaving a job, even when the worker freely agreed to enter it, can be considered forced labour.

It is important to note that a forced labour situation is determined by the nature of the relationship between a person and an 'employer', and not by the type of activity performed. Nor is the legality or illegality under national law of the activity relevant to determine whether or not the work is forced. Similarly, an activity does not need to be recognised as an 'economic activity' for it to fall potentially within the ambit of 'forced labour' (ILO, Global Report 2005, p. 6). Forced labour, thus, applies as much to, for example, construction or factory labour as to prostitution (also when illegal) or begging when performed under coerced conditions.¹⁵ This should be kept in mind when interpreting and applying the elements of forced labour as elaborated below.

Child prostitution and pornography always constitutes forced labour and is one of the worst forms of child labour under Convention No. 182: 'Children are not considered to be capable of making a voluntary decision to engage in such work' (ILO, Human Trafficking and Forced Labour Exploitation 2005, p. 25).

In its Global Report 2005 (p. 6), the ILO gives the following elements or characteristics to identify forced labour situations in practice:

Identifying forced labour	
Lack of consent to (involuntary nature of) work (the 'route into' forced labour)	Menace of penalty (the means of keeping someone in forced labour)
<ul style="list-style-type: none"> • Birth/descent into 'slave' or bonded labour • Physical abduction or kidnapping • Sale of person into the ownership of another • Physical confinement in the work location – in prison or in private detention • Psychological compulsion, i.e. an order to work, backed up by a credible threat of a penalty for non- 	<ul style="list-style-type: none"> • Physical violence against the worker or family or close associates • Sexual violence • (Threat of) supernatural retaliation • Imprisonment or other physical confinement • Financial penalties • Denunciation to the authorities (police, immigration, etc.) and deportation • Dismissal from current employment

¹⁴ ILO, Global Report 2005, p. 6.

¹⁵ Forced labour is also one of the worst forms of child labour, as defined in the 1999 ILO Worst Forms of Child Labour Convention (No. 182).

<p>compliance</p> <ul style="list-style-type: none"> • Induced indebtedness (by falsification of accounts, inflated prices, reduced value of goods or services produced, excessive interest charges, etc.) • Deception or false promises about types and terms of work • Withholding or non-payment of wages • Retention of identity documents or other valuable personal possessions 	<ul style="list-style-type: none"> • Exclusion from future employment • Exclusion from community and social life • Removal of rights or privileges • Deprivation of food, shelter or other necessities • Shift to even worse working conditions • Loss of social status
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In its guidelines on human trafficking and forced labour exploitation,¹⁶ the ILO identifies six major elements that point to a forced labour situation. Evidently, not all of the elements need to be present to speak of a forced labour situation. Usually two or more of the elements are imposed in a combined fashion. Furthermore, it is noted that each of these acts, when committed intentionally or knowingly, is likely to be a criminal offence within existing criminal of most countries.¹⁷

- *Physical or sexual violence: Forced labour is frequently exacted from workers by the threat and application of physical or sexual violence. Violence against the individual will come within the scope of the criminal offence of assault. In many jurisdictions, assault is defined as any act which is committed intentionally or recklessly, which leads another person to fear immediate and unlawful personal violence. The severity of the act of violence can place it in a the category of aggravated assault with more severe penalties on conviction;*
- *Restriction of movement of the worker: A common means by which labour is extracted by duress from workers is through their confinement. The workers are locked into the workplace or their movement is restricted to a very limited area, often with the objectives of preventing contact with the host community, and extracting the maximum amount of labour from the individuals. Restriction of movement corresponds to the common law offence of false imprisonment, which is any restraint of liberty of one person under the custody of another.*
- *Debt bondage/bonded labour: Occurs when a person becomes a security against a debt or loan. It is a situation that lies on the borderline between forced labour and slavery. The individual works*

¹⁶ ILO, Human Trafficking and Forced Labour Exploitation, Guidance for legislation and Law Enforcement, Geneve: ILO 2005.

¹⁷ ILO Human Trafficking and Forced Labour Exploitation 2005, p. 20-21.

partly or exclusively to pay off the debt which has been incurred. In most cases the debt is perpetuated because on the one hand, the work or services provided are undervalued and on the other hand, the employer may provide food and accommodation at such inflated prices that it is extremely difficult for the worker to escape from debt. Debt may also be incurred during the process of recruitment and transportation, which affects the degree of freedom of the employment relationship at the final stage. The key to the hold of the employer over the employee is the appearance of lawfulness of the contract. So long as the contract is unlawful, which in many jurisdictions will be the case either as a result of the unlawfulness of the taking of a human beings as security for a debt or the unfair contract terms of the agreement regarding food and accommodation, the hold of the employer over the worker is the result of deception as to the rights of the worker. This falls under the offence of obtaining pecuniary advantage or services by deception which is unlawful in virtually all countries.

- *Withholding wages or refusing to pay the worker at all: Workers are found in situations where they work in the expectation of payment but the employer either has no intention of paying the individual for the work performed or intends to withhold, unreasonably and without just cause, substantial sums from the worker's wages. The withholding of wages – where a person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it – is theft in criminal law. The fact that the property is in the form of wages due does not remove it from the scope of the offence, even if withholding of wages may form other offences under labour law.*
- *Retention of passports and identity documents: It is not uncommon in particular in the case of migrant workers, that the employer takes the worker's identity documents and/or passport, often on the excuse of arranging some immigration matter and refuses to return them to the individual unless he or she continues to work for the employer. The inability to prove identity or indeed even nationality often creates sufficient fear that the workers feel they are obliged to submit to the employer.*
- *Threat of denunciation to the authorities: This is a form of menace or penalty that applies primarily to irregular migrant workers. While it may, depending on the circumstances of the work, also apply to nationals of a State, this is less frequent. The threat of denunciation to the authorities comes within the legal definition of blackmail in many jurisdictions. The standard definition is that a person is guilty of blackmail if, with a view to gain for him or herself, or another or with the intent to cause loss to another, he or she makes any unwarranted demand with menaces. A demand with menaces is unwarranted*

unless the person making it does so in the belief that he or she has reasonable grounds for making the demand and that the use of menaces is a proper means of reinforcing the demand. For the offence to be committed it may be immaterial that the menace relate to action to be taken by the person making the demand.'

Bonded labour or debt bondage – in more informal terminology: the system by which workers are kept in bondage, simply by making it impossible for them to pay off their (real, imposed or imagined) debts – falls under several prohibitions. It is considered a form of forced labour (see e.g. the case law of the ILO Committee of Experts) as well as a slavery-like practice (Article 1, 1956 Supplementary Slavery Convention).

Since the coming into force of Convention No. 29, the ILO Committee of Experts has treated trafficking for the purpose of commercial sexual exploitation as one form of forced labour.

With regard to the interpretation of forced labour under Article 4 of the European Convention on Human Rights, also the previously discussed judgement of the European Court of Human Rights in the case *Siliadin v. France* is relevant (see 'servitude').

Children

In the case of children, the UN Convention on the Rights of the Child provides for further specification of the concept of exploitation in Article 32:

'States Parties recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's education, or to be harmful to the child's health or physical, mental, spiritual, moral or social development'

Also, ILO Convention no. 182 Concerning the Prohibition and Immediate Elimination of the Worst Forms of Child Labour (1999) provides for further specification.

12.6 Removal of organs and illegal adoption

Similar to the purpose of exploitation of prostitution and sexual exploitation, also with regard to the removal of organs it is the coercive conditions that give rise to its falling under the definition of trafficking. Since for children the use of one of the means is no requirement, the *Travaux Préparatoires* state that:

'the removal of organs from children with the consent of a parent or guardian for legitimate or therapeutic reasons should not be considered exploitation'

Finally, it deserves mentioning that, according to the *Travaux Préparatoires*, illegal adoption where it 'amounts to a practice similar to slavery as defined in Article 1, paragraph (d) of the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery', will also fall within the scope of the Protocol.

13. Indicators of Trafficking

An effective combat of trafficking starts with an open eye for indicators of trafficking. The following indicators, which are based on criminal investigations, can play a role in identifying possible trafficking cases. The list below contains a summing up of possible indicators. It should be evident that not all indicators need to be present in order to raise suspicions that one might deal with a case of trafficking.

13.1 General Indicators

As general indicators of trafficking in human beings may be mentioned:

- The possible victim does not get paid for her/his work or gets paid only a fraction of what s/he should get paid or is promised to get paid;
- The possible victim cannot dispose over her/his own earnings or has to hand over (the largest part of) her/his earnings to a third party. This can be the mediator, agency, employer, or, in the case of trafficking for prostitution, the brothel keeper or the pimp;
- Debts: the possible victim is under the obligation to pay an (excessively) high amount of money to a third person or party (for example for the costs of 'recruitment', 'mediation', identity papers, the journey, food, lodgings, clothing or other utilities for the job), before s/he can dispose over her/his own earnings and/or before s/he is allowed to stop working or to leave the job;
- Limitation or deprivation of freedom of movement: the possible victim is not allowed to leave the premises for a longer period or to leave the premises unaccompanied or is kept under constant surveillance;
- The possible victim is not allowed to leave the job;
- Isolation/ limitation of freedom to maintain contacts with others, such as family, friends and colleagues;
- The withholding of medical aid, adequate food, etc;
- Blackmail or threats to the family or children of the possible victim if s/he does not comply or shows resistance;
- (Threats with) the use of violence; the possible victim shows signs of physical violence;
- The possible victim has to work under extremely bad conditions and/or has to work excessively long hours;

- The possible victim has not paid or arranged her/himself for her/his journey, visa, passport, etc.;
- The possible victim is not in the possession of her/his own travelling or identity documents;
- The possible victim has a false or falsified passport or ID card, which is arranged for by other persons;
- The possible victim is afraid for deportation.

13.2 Specific Indicators

Specific indicators in the case of trafficking for prostitution are:

- The possible victim is paid a lesser percentage of her earnings than is usual in prostitution;
- The possible victim is obliged to earn a minimum amount of money per day;
- The brothel keeper or another third person has paid a transfer sum for the possible victim and/or hands over (part of) the earnings of the possible victim to a third party;
- The venue where the possible victim is set to work changes repeatedly.

Indicators can also be deduced from analysing money flows or can come from foreign law enforcement authorities.

An indication of trafficking can be a statement of a possible victim or witness of trafficking or a statement of friends or family members of a possible victim, but also the concrete circumstances in which a worker is found in the framework of labour inspections, inspections of brothels, police investigations, et cetera.

The fact that a possible victim agreed to migrate to another country for work or agreed with the type of work (e.g. to work as a domestic helper or as a prostitute) does not mean that she/he cannot be a victim of trafficking. Also illegal entry or stay not necessarily makes part of trafficking. Although many victims enter or stay a country illegally or irregularly, victims can also have a legal staying permit or have entered the country legally.

II. NATIONAL AND INTERNATIONAL LEGAL FRAMEWORK

14. The Rule of Law

One of the main questions when reviewing and considering (legal) measures to counter a particular societal problem is the legal and social context in which these measures will – or have to – function. This is especially important when penal measures are considered. The criminal law is one of the most intruding instruments in the hands of state authorities regarding citizen's lives. Many powers that the state authorities possess within the context of criminal law in fact constitute a breach of human rights, albeit allowed by the law.

In this respect especially two concepts are of main importance: the *Principle of Legality*, which is basic to criminal law, and the concept of the *Trias Politica*. Another aspect which should be carefully taken into account is, that the 'law in the books', i.e. the law as it has been written down in code books and other legislative products, can be entirely different from everyday practice, often called the 'law in action'. These aspects taken together determine as to whether or not a state is governed by the Rule of Law.

The '**Rule of Law**' can be defined as

*'a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.'*¹⁸

15. Principle of Legality, Trias Politica

15.1 Principle of Legality

One of the leading principles of criminal law is the Principle of Legality, often summarised in the Latin maxim *nullum crimen, nulla poena sine praevia lege poenali*, or in English: no offence and no punishment without a previous law. It is also referred to as 'the Rule of Law' – be it in its strict sense –, meaning that a society is governed by rules which are fixed, knowable and certain.¹⁹

The Principle of Legality forms an undisputed part of international human rights law, as codified e.g. in the *Universal Declaration on Human Rights* (Article 11.2),

¹⁸ Report of the Secretary-General to the Security Council, *The rule of law and transitional justice in conflict and post-conflict societies*, S/2004/616, para 6.

¹⁹ The Principle of Legality became especially important at the end of the 19th century, in the US through the constitutions of 1783, on the European continent after the French revolution through the *Déclaration des droits de l'homme et du citoyen* (1789), in which it was stated that '*Nul ne peut être puni qu'en vertu d'une loi établie et promulguée antérieurement au délit et légalement appliquée*', or in English: no man can be punished than according to a law preceding the offence. It was the German scholar on criminal law Anselm von Feuerbach who later gave this rule its Latin wording: *Nullum crimen, nulla poena sine praevia lege poenali*.

the *International Covenant on Civil and Political Rights* (ICCPR, Article 15.1), and both the *American* and the *European Convention on Human Rights* (Article 9 resp. Article 7.1).

The Principle of Legality is applicable to both substantive criminal law and procedural law. The procedural aspect deals with all the rules that govern criminal procedure, from the moment a suspicion arises – even sometimes before that moment – until the judgement in last instance. The substantive criminal law aspect deals with the definition of crimes, the penalties and the execution thereof.

Four aspects can be distinguished:²⁰

- 1) *Lex scripta*: punishability based on written law.²¹ This implies a ban on custom as a direct source of punishability. It is a statute – a written law – that makes certain behaviour punishable; without a statutory definition of certain behaviour as a crime, this behaviour is not punishable.
- 2) *Lex certa*: clarity of the elements that constitute crimes – or: the principle of maximum certainty – which is especially directed to the legislature. The legislator must define as clearly and unequivocally as possible the boundaries of punishability. By a clear definition the line between punishable and not-punishable behaviour is drawn.²²
- 3) *Praevia lege or non-retroactivity*: the act for which someone is punished must already, and without doubt, have been a crime according to a clear and written law at the moment this person committed his act. A vague definition, either because it is unwritten and/or because the (written) wording is ambiguous, may in practice lead to retroactive punishability.
- 4) *No interpretation by analogy*: a certain subject matter which is not covered by the law may not be brought under the heading of an existing rule which was created for another subject matter.

The rationale of the Principle of Legality is twofold: deterrence and legal protection.

The deterrent function of the law implies that a person has to know what conduct is punishable in order to be able to live up to this. A threat of punishment will only be effective from the moment it is (or can be) known to the person who is addressed by this threat. The citizen cannot know that his behaviour is against the law when the law does not define it as such. The definition therefore has to be clear and unequivocal.

²⁰ Comp. the ECtHR in the *Kokkinakis-case*, 25 May 1993, para. 52.

²¹ In common law judiciaries, the requirement of the law be written is a little bit less important, considering the fact that in its traditional form it is not the legislature but rather the judiciary which creates the law. Although nowadays this creative power of judges still exists only in a few jurisdictions, it strongly colours the way of reasoning in the common law tradition (as the way of thinking in civil law tradition has been strongly influenced by its past features). Considering the fact that the penal system of Ukraine has been established within the tradition of the civil law, not of the common law, we leave this aspect out of discussion.

²² Comp. the 'void-for-vagueness-doctrine' in legal thinking in the USA.

Secondly, the law defines the limits of the power of the state: the state may only intervene in a person's life – in other words, may only violate his (human) rights as a citizen – when and insofar as the law allows the state to do so. It is often thought that this aspect of the Principle of Legality especially concerns procedural law, regulating for instance for how long a person may be deprived of his liberty without being sentenced.

This aspect of the Principle of Legality is no less important, however, with regard to substantial criminal law, the definitions of crimes, as these crimes definitions describe as clearly as possible the limits of the conduct of citizens with regard to which the police and other judicial authorities are authorised to act. It defines the power of the state authorities with respect to conduct of citizens.

Strict crimes definitions, laid down in a written law, are one of the most important guarantees against arbitrary exercise of power by the authorities, and thus a guarantee against a violation of human rights of people, either or not suspected of crimes.

Definitions of procedural powers and of crimes that are too broad provide the authorities within the criminal justice system with too great discretionary powers, with many openings for abuse of these powers as a result.

15.2 Separation of Powers

The protective function of the Principle of Legality becomes particularly clear when combined with the doctrine of the separation of powers, *Trias Politica*. In a democratic society that is governed by the Rule of Law, there are three powers in the state, to be distinguished carefully.

Firstly, there is the power of law-making, to be distributed to parliament, as the representation of the people: the *legislature*. Secondly, there is the executive power, which takes care of the effectuation of the laws: the *executive*. Thirdly, at last there is the judging power, which takes care of the settlement of disputes: the *judiciary*.

All three powers in the state have their own exclusive competencies, not to be exceeded.

Through this separation of competencies a balance of power is established within the state, in order to create a guarantee against abuse of power by the state.

In civil law tradition, it is the legislator – government, parliament – who in general defines crimes. Subsequently it is the judge who in a concrete case may qualify certain behaviour of a certain person as criminal, however only when this behaviour meets the general description of the statutory crime as previously

defined by the legislature. For the judge, the main source of the law is the statute.²³ The judge is not allowed to fill in gaps in the rules that are left by the legislator.

A more modern, constitutional, adaptation of this idea states that the criminalisation of particular behaviour is part of the social policies in general of the legislator, who therefore deliberately may decide against criminalizing certain behaviour, notwithstanding its improper²⁴ character. The judiciary exceeds its competence when criminalizing certain behaviour despite the fact that the democratically chosen legislator found no reasons to do so.

15.3 Methods of Interpretation of the Law

As long as the law is not written for special concrete cases but crimes definitions are formulated in more abstract general terms, interpretation by the judge of these terms is indispensable, especially with respect to the question as to whether or not a certain concrete act can be said to fall within the general definition.

Rules of interpretation are especially directed towards the judiciary, being the persons to explain the meaning of the law. It may be seen as the judicial counterpart of the *lex certa*-requirement which is directed towards the legislator.

There are various methods of interpretation, some restrictive, others extensive in effect. In the context of the Principle of Legality, problems arise especially with respect to the extensive modes of interpretation. Extensive interpretation may in practice result in retroactivity, by including conduct that until then was deemed not punishable under the provision in question.

First and foremost the 'grammatical' or 'textual' interpretation is important. The focus is on the common meaning of the wording of the crime definition, which includes the common judicial meaning, seen in the context in which the words are used. At least this defines the outer borders of the crime definition: the crime can never include conduct that is contrary to the wording.

Another important method of interpretation is the 'law-historical' one. Here the judge goes back to the intention of the legislator, using for instance explanatory memoranda and reports of the parliamentary debates to explain the meaning of a law term. After all, it is the legislator who decided to criminalize certain conduct, and who therefore should be the first to explain what the meaning of his words are. Again the constitutional argument may be highlighted here, in the sense that the judiciary is not allowed to criminalize by interpretation what the legislator decided to leave untouched.

²³ And, if necessary though in no sense binding, explanatory memoranda and reports of the parliamentary debates.

²⁴ Indecent, anti-social, unseemly, impertinent, heinous, atrocious or whatever adjective one might choose.

As a third method,²⁵ the systematic interpretation may be mentioned in which the elements of crimes are explained within the system of the law as a whole. The meaning of crime elements can be discovered by looking at the same words in other parts of the law. This of course presupposes that the legislator is aware of this system.

15.4 Law in the Books vs. Law in Action

In order to assess the effectiveness of legislation, and to review key legislative provisions in a number of areas to ensure that they are both comprehensive and complementary, it is of course important to review the law as it has been written down in code books and other regulations, though it certainly is not sufficient. The 'law in the books', i.e. the law as it has been written down in code books and other legislative products, can be entirely different from everyday practice, often called the 'law in action'.

This aspect too can be seen as a function of the Rule of Law. For instance, the law in the books may provide for strict rules on pre-trial detention, but this does not guarantee that in practice these rules are followed. Whether a state is governed by the Rule of Law is of course not only dictated by the letter of the law, but at least as much – maybe even more – by the way the letter of the law is applied in practice.

Another example: the fact that the constitution of a certain country says that 'the principle of Rule of Law is recognised and exists', does not mean that in practice indeed the Rule of Law exists in this country.

The difference between the law in the books and the law in action can be caused by judicial decisions in which the law is explained; these decisions become part of 'the' law, sometimes even to an extent that it can be considered part of the law in the books.

Another reason for a difference between law in the books and law in action is less 'innocent': corruption for instance can make a legal system, which as it shows in the books may be considered to be of high quality, entirely worthless from a constitutional – Rule of Law – point of view.

15.5 Conclusion

When reviewing and considering (legal) measures to counter a certain societal problem, the legal and social context in which these measures (will) function are crucial. This is especially important when penal measures are considered. The criminal law is one of the most intruding instruments in the hands of state

²⁵ Apart from those mentioned, other methods of interpretation are: 'teleological', 'rational', 'anticipating', 'creative', 'traditionalistic', 'harmonising' and the 'law comparing' interpretation. As will be clear, there is a huge overlap between various methods.

authorities with respect to citizens. The question is not only as to whether or not a certain criminal provision is effective, in the sense that the problematic behaviour is combated adequately, but also – first and foremost – as to whether this fits into the Rule of Law.

In this respect, two concepts are of main importance:

- the *Principle of Legality*, which is basic to criminal law, and requires that crimes are defined as unequivocally and concretely as possible; through strict crimes definitions citizens know exactly what kind of behaviour is punishable, whilst the limits of state power are defined;
- the concept of *Trias Politica*, through which a balance of powers in a state is established, as a guarantee against abuse of power within the state.

Last but not least, it is important to distinguish between the law in the books – the law as it has been written down in code books and other legislative products, stating how the law ‘ought’ to be – and the law in action, which is the law as it is applied in everyday practice, showing how the law ‘is’.

16. International Human Rights Law²⁶

Measures against trafficking must conform to existing obligations of States under international human rights law. At a minimum they must not conflict with or otherwise undermine human rights law. Measures should be in compliance with UN Standards in the area of trafficking, in particular the UN Trafficking Protocol. An important instrument in the development of a human rights approach are the Principles and Guidelines on Human Rights and Human Trafficking elaborated by the UN High Commissioner on Human Rights.²⁷

16.1 Human Rights as a Normative Framework

It is a recognised principle of international human rights law, reflected, for example, in the International Covenant on Civil and Political rights (ICCPR), Article 2, and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Articles 2 and 3, that States have a duty to respect, protect and promote the human rights of all persons within their jurisdiction. This obligation includes the duty to prevent, investigate and punish human rights violations and to provide effective remedies to victims of such violations.²⁸ All

²⁶ In writing this chapter use is made of the Report of the European Experts Group on Trafficking in Human Beings (2004), in particular the chapter on a human rights-based approach,

²⁷ United Nations High Commissioner for Human Rights (UNHCHR), *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, New York and Geneva, 2002.

²⁸ See e.g.: *Recommended Principles and Guidelines on Human Rights and Human Trafficking* of the UNHCHR, p. 3; and *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, ms. Radhika Coomaraswamy, on trafficking in women, women’s migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, ECOSOC, Commission on Human Rights, Fifty-sixth session, 29 February 2000 (E/CN.4/2000/68).

elements carry equal value and are prerequisites to achieve a balanced and effective approach to trafficking.

In addition measures should comply with existing obligations of States under international human rights law, as set forth in the major human rights instruments, including the principle of non-discrimination.²⁹

Moreover, it should be ensured that anti trafficking measures do not undermine, adversely affect or infringe upon the human rights and dignity of the groups affected, e.g. the freedom of movement, the right to leave one's country, the right to legally migrate or the right to privacy. This is, for example, reiterated by the former UN High Commissioner for Human Rights (UNHCHR), Mary Robinson, where she urges for the integration of human rights into the analysis of the problem of trafficking and the development of an effective international legislative response, as, in her view, that is the only way

'(...) to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order or a problem of organized crime. It is also the only way to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously held rights of individuals working in prostitution'.³⁰

Guiding principle is that anti-trafficking instruments should not only be consistent with the respect for and the protection of human rights but should also be careful not to create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and practices that further undermine the rights of the concerned groups, in particular the rights of trafficked persons, women, migrants, asylum seekers or prostitutes.

As pointed out by, among others, the UNHCHR, violations of human rights are both a cause and a consequence of trafficking.³¹ Trafficking is a cause of human rights violation because it violates fundamental human rights, such as the right to life, to freedom of movement, to dignity and security of the person, to just and favourable conditions of work, to equality and to be recognized as a person before the law. It is a consequence because it is rooted in poverty, inequality and

²⁹ See, *inter alia*, the *International Covenant on Civil and Political Rights*, the *International Covenant on Economic, Social and Cultural Rights*, the *Convention on the Elimination of All Forms of Discrimination of Women*, the *International Convention on the Protection of the Rights of All Migrant Workers and their Families*, the *Slavery Convention*, the *Supplementary Convention on the Abolition of Slavery, the Slave Trade and Practices similar to Slavery*, the *Forced Labour Convention*, the *Abolition of Forced Labour Convention* and the *Convention on the Rights of the Child*. In this context are also of relevance: *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 of 29 November 1985; *Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice*, adopted by General Assembly Resolution 52/86, 2 February 1998; the various Resolutions of the Commission on Human Rights on the Traffic of women and girls and the Elimination of violence against women.

³⁰ *Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, Fourth session, Vienna 28 June-9 July, 1999. See also UNHCHR Guidelines, guideline nr. 1.

³¹ UNHCHR Recommended Guidelines, nr. 1.

discrimination.³²

Both the former UN High Commissioner for Human Rights (UNHCHR) and the former Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, have at several occasions pointed out the link between the prevention and eradication of trafficking and the protection of the human rights of trafficked persons.³³

Accordingly it is crucial to place the protection of human rights at the centre of any measures taken to prevent and end trafficking.

Essentially, a human rights-based approach integrates the norms, standards and principles of the international human rights system into legislation, policies, programs and processes. The norms and standards are those enshrined in the range of international treaties and declarations, including the principle of non-discrimination. The principles include the recognition of human beings as subjects and holders of rights, equality and equity, standard setting and accountability, empowerment and participation.³⁴

As such a human rights-based approach offers a conceptual and normative framework that can give direction to the further development of policies in the area of trafficking. At the same time it offers a framework to monitor and evaluate anti-trafficking policies, practices and actions for their real and potential impact on trafficked persons and other groups affected, such as domestic workers, prostitutes, migrants, asylum seekers, et cetera.

³² Ann Gallagher, *Trafficking and the Global Sex Industry: The need for a human rights framework*, edited extract from an address delivered by the High Commissioner on Human Rights Mary Robinson to an NGO/IGO consultation on trafficking, Geneva, June 21 1999, in: *Women's Rights are Human Rights*, Special issue on Women's rights – Spring 2000, OHCHR, www.unhchr.ch/html/menu2/womenpub2000.html

³³ See for an extensive discussion of the relation between human rights protections and the repression of trafficking in persons: *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, ECOSOC, Commission on Human Rights, Fifty-sixth session, 29 February 2000 (E/CN.4/2000/68); *Remarks by the Special Rapporteur on Violence Against Women, Ms. Radhika Coomaraswamy, to the Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime*, Fourth session, Vienna, 7 July 1999; *Position paper on the draft protocol to Prevent, Suppress and Punish Trafficking in Women and Children, submitted by the Special Rapporteur on Violence Against Women*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 20 May 1999 (A/AC.254/CRP.13); *Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, Fourth session, Vienna 28 June-9 July, 1999; *Informal Note by the United Nations High Commissioner for Human Rights*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, 1 June 1999 (A/AC.254/16); *Note by the International Labour Organization for the Ad Hoc Committee on the Elaboration of a Convention against Transnational organized Crime on the additional legal instrument against trafficking in women and children*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Fourth session, Vienna 28 June-9 July 1999, 16 June 1999 (A/AC.254/CRP.14); *Note by the Office of the United Nations High Commissioner for Human Rights, The United Nations Children's Fund and the International Organization for Migration on the draft protocols concerning migrant smuggling and trafficking in persons*, Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime, Eighth session, Vienna, 21 February-3 March 2000, 8 February 2000 (A/AC.254/27). The present text is based upon these documents.

³⁴ See for a more extensive elaboration of the meaning of a human rights based approach, among others, the draft report of the European Experts Group on Trafficking in Human Beings, Brussels, 26 October 2004, to be found at http://europa.eu.int/comm/justice_home/fsj/crime/forum/fsj_crime_forum_en.html. The Experts Group was set up following the recommendations of the Brussels Declaration.

In this context, independent non-governmental organisations play a particularly important role, not only in providing assistance to trafficked persons, but also in maintaining and strengthening democratic processes in societies and in monitoring and advocating implementation of human rights commitments by states. This is reflected in the UNHCHR Guidelines, which state that non-governmental organisations working with trafficked persons should be encouraged to participate in monitoring and evaluating the human rights impact of anti-trafficking measures.³⁵

16.2. Principle of non-Discrimination

A fundamental rule of international human rights law, which is of particular importance to the situation of irregular or illegal migrants and other vulnerable groups, is respect for the principle of non-discrimination.³⁶

Following this principle, it should be ensured that anti-trafficking measures, especially, but not only, those aiming at prevention, cannot be used to directly or indirectly discriminate against particular groups, such as female migrants, or sex workers, or infringe upon the human rights of individuals as set forth in the major international instruments, such as the basic right of an individual to leave her or his country, to migrate legally or to earn an income.

Moreover, it must be ensured that trafficked persons are not subjected to discriminatory treatment in practice or law and that protections for trafficked person are applied without discrimination, particularly with respect to gender, ethnicity, immigration status, and/or the fact of a trafficked person's having been trafficked formerly or having participated in the sex industry.

16.3. Integration of a Gender and Ethnic Perspective

Although trafficking affects both men and women, it is not a gender-neutral phenomenon. Women are affected in different ways than men in terms of the sectors into which they are trafficked (in particular domestic work and sex work), the forms of abuse they suffer and the consequences thereof. To understand the specific ways in which women are affected, trafficking should be placed in the perspective of gender-inequality, traditional female roles, a gendered labour market and the world-wide feminisation of poverty and labour migration. Also in other aspects, trafficking is not a 'neutral' phenomenon, but is closely related to and generated by discriminatory practices and unequal power relations, including those based on race, ethnic or cultural background. The integration of a gender and ethnic perspective is therefore essential to both the analysis of trafficking, the development of counter policies and the provision of protection and assistance.

³⁵ UNHCHR Recommended Guidelines, nr.1.7.

³⁶ See *inter alia* Article 2 and 7 UDHR, Article 2 and 26 ICCPR and Article 2 ICESR, but also the Statute of the International Criminal Court, Article 21 (3).

16.4 Prevention

The root causes of trafficking can be found in economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women, gender discrimination, traditional practices and other forms of discrimination; legal factors such as a lack of appropriate legislation and corruption in the public sector; and international factors such as the globalisation of labour and the growing feminisation of labour migration on the one hand and restrictive or discriminatory immigration policies of recipient countries on the other hand, in combination with the demand for cheap, unprotected and exploitable migrant labour and services.

Apart from addressing these factors, there is a clear link between the lack of rights and inadequate or only marginal legal protection on the one hand and an increased vulnerability for abuse and exploitation on the other hand.

Preventive measures should therefore primarily aim at strengthening the position of the affected groups, and at providing them with the (legal) instruments to defend themselves against coercive and abusive practices. Repressive measures and measures that can add to the marginalisation or stigmatisation of the concerned groups must be avoided, as they can easily be at odds with the protection of human rights and may create or exacerbate existing situations that cause or contribute to trafficking in persons.

16.5 Assistance and Protection of Victims of Trafficking

A critical component in the effective detection, investigation and prosecution of traffickers is the willingness of trafficked persons to assist in prosecutions. This willingness is strongly related to the protection of the safety and privacy of victims, the availability of assistance, their general treatment by the police and judicial authorities, and the risk they incur of being arrested, detained, deported or prosecuted for offences arising out of their status of being trafficked, such as illegal entry or stay, involvement in the sex industry and/or the use of false documents.

Of special importance is the issue of confidentiality of legal proceedings relating to trafficking in persons. The right to privacy is enshrined in international human rights law and its protection is especially important in trafficking situations where the continued safety of the trafficked person must be a primary consideration. A related aspect is the confidentiality of the relation between NGOs and other service providers and the trafficked person.

The absence of adequate procedural safeguards, assistance and protection may prevent trafficked persons from reporting to the authorities and may inadvertently expose trafficked persons to further trauma and the risk of reprisals by traffickers, including the risk of being re-trafficked. A neglect of victim issues is therefore not

only not in accordance with international human rights law, which clearly provides that victims of human rights violations such as trafficking should have access to adequate and appropriate remedies,³⁷ but may also compromise the effective implementation of anti-trafficking legislation.

Recognition and protection of the rights of trafficked persons, on the other hand, provide an important incentive to trafficked persons to report to the authorities and act as witnesses, and thus contribute significantly to achieving law enforcement objectives.

From a human rights perspective all trafficked persons should have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers. Moreover, victim protection and assistance should be considered separately from witness protection, as not all victims will act as witnesses in criminal proceedings, e.g. because the victim does not want to testify out of fear for reprisals, because s/he possesses no relevant information or because the perpetrator is not prosecuted due to evidentiary or other problems.

Assistance and protection provisions must, at minimum, meet basic international human rights standards. Special attention should be given to the specific position, rights and needs of children. All actions with regard to children should be based on the principles as set out in the Convention on the Rights of the Child, in particular the 'best interests' principle, the right to participate and the 'non discrimination' principle.

Concrete examples of a set of state responsibilities which ensure the protection of the human rights of trafficked persons are the already mentioned Recommended Principles and Guidelines on Human Rights and Human Trafficking of the Office of the High Commissioner for Human Rights and the Standards for the Treatment of Trafficked Persons, developed by the Global Alliance Against Trafficking in Women (GAATW), the International Human Rights Law Group and the Dutch Foundation Against Trafficking in Women. Also the IOM developed a Best Practice Counter-Trafficking Manual for Law Enforcement Officers of Ukraine and the Interactive Human Trafficking Investigation Course.³⁸ These documents contain an extensive list of assistance and protections that should be provided to trafficked persons based on international human rights law and best-practice. These include access to justice, private actions and reparations, including compensation; procedural protections in court cases and

³⁷ See e.g. *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by General Assembly Resolution 40/34 of 29 November 1985; *Model Strategies and Practical Measures on the Elimination of Violence Against Women in the Field of Crime Prevention and Criminal Justice*, adopted by General Assembly Resolution 52/86, 2 February 1998.

³⁸ OHCHR, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, United Nations, New York and Geneva, 2002; *Human Rights Standards for the Treatment of Trafficked Persons* (1999), developed by the Global Alliance Against Trafficking in Women, the Foundation against Trafficking in Women and the International Human Rights Law Group (online available: <http://www.inet.co.th/org/gaatw/ISMR99.htm>); *A Best Practice Counter-Trafficking Manual for Law Enforcement Officers of Ukraine*, IOM 2003 (Available to Ukrainian Law Enforcement only); *Interactive Human Trafficking Investigation Course*, IOM, 2005.

during investigation, witness protection and legal assistance; access to temporary and, if necessary, permanent residence status; access to social, psychological and medical care and help with a safe, and to the extent possible voluntary, return to their country of origin.

Important to note is that the right to a safe return includes the right *not* to be repatriated if such repatriation would expose the trafficked person to a real risk of further human rights abuses, such as the risk of reprisals by the traffickers, of being re-trafficked, of oppressive or discriminatory measures from the authorities and/or of being subjected to inhuman or degrading treatment (principle of *non-refoulement*).

With regard to the provision of support services to trafficked persons, the importance of the role of NGOs and of co-operation between governmental bodies and NGOs should be stressed.

17. United Nations: The Trafficking Protocol

The most relevant and recent instrument at the UN level is the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the UN Convention Against Transnational Organized Crime, as adopted by the General Assembly of the UN at 15 November 2000.³⁹ The Convention and the Protocols were opened for signature in December 2000. They are primarily law enforcement instruments to promote cross border co-operation by governments and to ensure that all countries have adequate laws to address these crimes.

The Protocol enjoys wide international support. This applies in particular to the definition. The preamble, for example, of the EU Framework Decision on combating trafficking in human beings⁴⁰ mentions the UN Protocol as a decisive step forwards towards international cooperation, and adopts a definition that heavily leans on the Protocol's definition. Also the OSCE Action Plan adopts the Protocols definition.⁴¹

17.1 Purposes of the Protocol

Until recently, one of the fundamental problems in responding to trafficking in human beings was the lack of international consensus on the definition of trafficking. Moreover, there was a persistent confusion about the distinction between trafficking, prostitution, smuggling and illegal migration. At international level these problems have largely been addressed by the UN Trafficking

³⁹ Together with the *Protocol against Smuggling of Migrants by Land, Sea and Air*.

⁴⁰ Decision of 19 July 2002 (2002/629/JBZ), OJ 1.8.2002 L 203, coming into force the same day. The Framework Decision obliges Member States to criminalise trafficking as defined in the FD, and to adopt a minimum/maximum sanction of 8 yrs imprisonment if certain aggravating circumstances apply. Member States must comply to the FD before 1 August 2004. The purpose of Framework Decisions is to harmonise the legislation and regulations of the EU Member States. They are binding as to the result, but Member States are free to choose the forms and means by which they achieve this result.

⁴¹ Decision No. 557, OSCE Action Plan to Combat Trafficking in Human Beings (PC.DEC/557, 24 July 2003).

Protocol, which provides an international, legally binding, definition of trafficking. It contains provisions on the criminalisation of trafficking in persons, the protection of victims, as well as on prevention and co-operation. The purposes of the Trafficking Protocol, as stated in Article 2, are 'to prevent and combat trafficking in persons, paying particular attention to women and children; to protect and assist the victims of such trafficking, with full respect for their human rights; and to promote co-operation among States Parties in order to meet the above objectives'.

The Protocol applies to the offences defined as trafficking where they are transnational in nature and involve a criminal group (Article 4), and obliges State Parties to penalise the conduct set forth in Article 3 when committed intentionally (Article 5, para 1) as well as to penalise attempting to commit, participating as an accomplice and organizing or directing other persons to commit an offence established in accordance with the first paragraph (Article 5, para 2, sub a, b & c).

17.2 Trafficking and prostitution

The Protocol does not imply a specific positive or negative position regarding prostitution as such, but leaves it to the discretion of individual states how to address prostitution in their domestic laws. Against this background, different legal systems, whether decriminalising, legalising, regulating or tolerating (non-coerced adult) prostitution as well as systems criminalizing (the exploitation of) prostitution, prostitutes or the use of the services concerned, comply with the Protocol.

However, in this context it should be mentioned that in particular the term 'sexual exploitation' is problematic. According to the former UN-Special Rapporteur on Violence Against Women the term is 'problematic because it is subject to a wide range of divergent interpretations, according to whether all activities in the sex industry constitute 'sexual exploitation' per se, or whether only sex work under exploitative or slavery-like conditions could qualify as 'sexual exploitation''. She continues: 'In order to highlight the commonality between the different purposes for which people are trafficked, the focus of the Protocol should be on the forced, exploitative, or slavery-like conditions of the work or relationship and whether those conditions were freely and knowingly consented to by the person'.⁴² In the same line are the comments of the former High Commissioner on Human Rights, Mary Robinson, who noted during the negotiations on the Trafficking Protocol that

'A preferable and more accurate description of purposes would include reference to forced labour and/or bonded labour and/or servitude. (...) Such a reference would be consistent with existing international law (...). It would also serve to avoid the implementation difficulties inherently associated with undefined, imprecise and emotive terms such as 'sexual exploitation' when

⁴² Radhika Coomaraswamy, Position Paper on the UN Protocol (A/AC.254/CRP.13) , p. 10 & 17.

used in connection with adults.⁴³

17.3 Trafficking and smuggling

The Convention and its Protocols make a clear distinction between trafficking and smuggling, which is the subject of another Protocol.⁴⁴ The purpose of smuggling is the illegal crossing of borders, whereas the aim of trafficking is the exploitation of the trafficked person. In other words, smuggling concerns primarily the protection of the state against illegal migration, while trafficking primarily concerns the protection of the individual person against exploitation and abuse.

However, it must be kept in mind that, although trafficked persons may enter a country completely legally,⁴⁵ in practice there are links between trafficking, smuggling and illegal migration and that an act that started as smuggling or illegal migration may very well change into trafficking in the course of the process. Moreover, at the time of movement it is often unclear whether a person is trafficked or smuggled. Neither the victims themselves, nor border officials, may know the ultimate purpose for which the person is moving, nor the ultimate conditions they will find themselves in. From a human rights perspective, the primary concern is to combat the exploitation of human beings under forced labour or slavery-like conditions, no matter whether such exploitation concerns a trafficking victim, a smuggled person or an illegal migrant.

17.4 Assistance and Protection of Victims

With regard to the protection of the victims of trafficking, the Protocol provides for provisions on:

- Assistance to and protection of victims in appropriate cases, including the protection of the privacy and identity of victims (to the extent possible); information on relevant court and administrative proceedings; assistance to enable the victims' views and concerns to be represented and considered during criminal proceedings; measures to provide for the physical, psychological and social recovery of victims, including adequate housing, counselling and information, medical, psychological and material assistance, employment, educational and training opportunities, in accordance with the age, gender and special needs of victims; the protection of the physical safety of victims; the possibility to obtain compensation for damage suffered (Article 6);
- The possibility of temporary or permanent residence permits (Article 7);

⁴³ Informal note UNHCHR (A/AC.254/16), p. 3, sub 8.

⁴⁴ Article 3(a) of the Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime: '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 permanent resident.'

⁴⁵ For instance, female migrants may legally enter as wives or domestic workers and then be subjected to forced labour or slavery-like practices. In this case, they only become illegal when they remove themselves from the power of their husbands or employers.

- The (preferably voluntary) repatriation of victims, with due regard to the safety of that person, and to the status of any legal proceedings related to that person being a victim of trafficking (Article 8).

Whereas the Protocol enumerates a wide range of measures with respect to assistance and protection of victims, it leaves wide discretion to the State Parties by using language such as ‘in appropriate cases’.

States are required to prevent trafficking in persons and to protect victims from re-victimisation by research, information, mass media campaigns, as well as by undertaking measures to alleviate the root causes of trafficking, such as poverty, underdevelopment and lack of equal opportunity (Article 9).

Article 10-13 require States to undertake measures in the field of information exchange and training of officials, border controls as well as to ensure the integrity and security of travel or identity documents.

Article 14 contains a saving clause, including a non-discrimination clause, holding that the measures set forth in the Protocol shall be interpreted and applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons, and that the interpretation and application of those measures shall be consistent with internationally recognised principles of non-discrimination.

17.4 Organized Crime

The definition of organized crime can be found in the parent convention, to which the Protocol is supplementary. Article 2 of the UN Convention Against Organized Crime defines an ‘organized criminal group’ as follows:

‘Organized criminal group’ shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit;

‘Serious Crime’ shall mean conduct constituting an offence punishable by a maximum deprivation of liberty of at least four years or a more serious penalty;

‘Structured group’ shall mean a group that is not randomly formed for the immediate commission of an offence and that does not need to have formally defined roles for its members, continuity of its membership or a developed structure.

18. Council of Europe Convention on Action against Trafficking in Human Beings

The most recent European instrument is the Convention on Action against Trafficking in Human Beings, adopted by the Council of Europe in 2005. Contrary to the UN Trafficking Protocol, the Council of Europe Convention is strongly focused on the position of victims.

18.1 Introduction

In its Preamble the convention explicitly addresses trafficking in human beings as a violation of human rights and stresses the need for a comprehensive international legal instrument focusing on the human rights of victims of trafficking. The purposes of the convention, as listed in Article 1, are threefold:

- a) to prevent and combat trafficking,
- b) to protect the human rights of victims of trafficking as well as to ensure effective investigation and prosecution and
- c) to promote international cooperation on action against trafficking.

In order to ensure the effective implementation of the convention and its provisions it sets up a specific monitoring mechanism (Chapter VII). The convention follows the definition of trafficking in human beings as contained in the UN Protocol (Article 4). It explicitly applies to all forms of trafficking in human beings, whether national or international, and whether or not connected with organised crime (Article 2). In this sense it is wider than the UN Protocol which only addresses trafficking in relation to transnational organised crime.

The Convention contains an extensive list of victim provisions relating to the identification of victims (Article 10), the protection of private life (Article 11), assistance measures (Article 12), recovery and reflection period (at. 13), residence permit (Article 14), compensation and legal redress (Article 15), repatriation and return of the victim (Article 16). A basic provision is the exemption of criminal liability of victims for acts they committed as a consequence of being trafficked (Article 26). In addition, the convention contains a number of general principles, such as the non-discrimination principle (Article 3) and the principle of gender equality (Article 17), promotes the use of a human rights-based approach, gender mainstreaming and a child sensitive approach in the development of prevention policies (Article 5), and explicitly encourages the involvement of NGOs working in the field of prevention and victim assistance and protection as well as cooperation between state authorities, NGOs and civil society (Article 5, 10, 16, 35 and others). Apart from these provisions the convention contains a number of obligations relating to prevention, border measures, security and control of documents, legitimacy and validity of documents, substantive criminal law, investigation, prosecution and procedural law, jurisdiction, international cooperation, measures relating to endangered or

missing persons, the exchange of information and its relation to other international instruments. The provisions which directly relate to the position of victims are discussed below (see for the full text of the convention annex).

18.2 Non-discrimination clause

In line with other international instruments, the convention obliges to implement its provisions to all victims of trafficking without discrimination. This includes discrimination on 'other status', for example the status of being a prostitute.

Article 3
Non-discrimination principle

The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

18.3 Non-punishment provision of victims

One of the barriers for victims to seek help is the fear to be punished themselves, for example for illegal border crossing, the use of false papers or prostitution. A basic provision is therefore the non-punishment clause, holding that victims of trafficking should not be punished for any unlawful activities which they committed as a consequence of being trafficked.

Article 26
Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

18.4 Identification of victims

Article 10 obliges state parties to adopt measures to properly identify victims, to provide for officials who are trained and qualified in identifying and helping victims and to ensure adequate collaboration among the various authorities concerned and between the authorities and NGOs.

Article 10
Identification of victims

- 1 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

In the case of foreign victims, state parties are obliged to ensure that, if there are reasonable grounds to believe that a person is victim of trafficking, that person will not be evicted until the identification process is completed. During this period the victim shall receive the assistance provided for in Article 12, para 1 and 2.

- 2 Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.

Furthermore Article 10, para 3 and 4, contain a number of specific provisions with regard to children.

18.5 Protection of private life

According to Article 11 state parties are obliged to protect the private life and identity of victims. Personal data of victims should be stored in accordance with the Convention for the Protection of Individuals with regard to Automatic Processing of personal Data (ETS No. 108). Special care should be taken to ensure that the identity of child victims does not become publicly known. In addition, measures should be considered to encourage the media to protect the private life and identity of victims.

18.6 Assistance to victims

Article 12 establishes minimum standards of assistance which state parties are obliged to provide victims with, in cooperation with NGOs, and independent of the willingness of the victim to act as witness. These include at least appropriate

and secure accommodation, psychological and material assistance, emergency medical treatment, translation and interpretation services, counselling and information with regard to their legal rights and the services available to them, assistance to defend their rights and interests during criminal proceedings and, in the case of children, access to information.

Article 12
Assistance to victims

1. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
 - a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b access to emergency medical treatment;
 - c translation and interpretation services, when appropriate;
 - d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f access to education for children.

Moreover, state parties shall take due account of the victim's safety and protection needs (para 2). In addition, state parties are obliged to provide victims who are lawfully resident on their territory with the necessary medical and other assistance if they need such help and do not have adequate resources (para 3) and with access to the labour market, vocational training and education (para 4).

- 2 Each Party shall take due account of the victim's safety and protection needs.
- 3 In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.
- 4 Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.

Assistance should be provided on a consensual and informed basis (para 7) and regardless of whether or not the victim is willing to act as witness (para 6).

- 6 Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.
- 7 For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Special attention is paid to cooperation with NGOs and other relevant civil society actors.

5. Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.

18.7 Recovery, reflection period and residence permit

In order to enable foreign victims to recover and take an informed decision on cooperating with the authorities, state parties are obliged to provide for a recovery and reflection period of at least 30 days in their domestic laws. During this period the victim should be entitled to lawfully stay in the country concerned and have access to the assistance measures listed in Article 12 para 1 and 2 (Article 13). If the (prolonged) stay of the victim is deemed necessary because of her/his personal circumstances or for the purpose of the investigation or the criminal proceedings, the victim should be issued a renewable residence permit. The granting of a temporary residence permit shall be without prejudice to her/his right to seek and enjoy asylum (Article 14).

18.8 Compensation and legal redress

According to Article 15, victims should be informed as from their first contact with the authorities on the relevant judicial and administrative proceedings. Moreover, it should be ensured that they have the right to legal assistance, to free legal aid and to compensation from the perpetrators. State parties should take the necessary measures to guarantee compensation, for example by establishing a victim fund or by assistance programmes which could be funded by the confiscation of the criminal proceeds of trafficking. In this context also Article 23, para 3, is relevant, which obliges state parties to adopt any measures necessary to enable the confiscation of the proceeds of trafficking or of property the value of which corresponds to such proceeds.

Article 15

Compensation and Legal Redress

- 1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
- 2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
- 3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
- 4 Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

18.9 Repatriation and return

Both the country of destination and the country of origin are obliged to facilitate the, preferably voluntary, return of the victim with due respect for her/his rights, safety and dignity, including the issuing of travel and other documents if needed (Article 16 para 1-4). Moreover, state parties should take the necessary measures to establish repatriation and reintegration programmes in cooperation with (inter)national institutions and NGOs and to inform victims about organisations which can assist them on their return. Such programmes should avoid re-victimisation and include reintegration into the education system and the labour market (Article 16 para 5 and 6).

Article 16 Repatriation and return of victims

5. Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.
6. Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental

organisations, legal professions able to provide counselling and social welfare agencies.

Child victims should not be returned if there are indications that this is not in their best interest (para 7).

18.10 Investigation and prosecution

According to Article 27 prosecution should not be dependent of a complaint of the victim, at least when the offence was committed in whole or in part in its territory (para 1).

Article 27 ***Ex parte and ex officio applications***

- 1 Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.

Moreover, state parties should ensure that NGOs have the possibility to assist victims during criminal proceedings.

- 3 Each Party shall ensure, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, to any group, foundation, association or non-governmental organisations which aims at fighting trafficking in human beings or protection of human rights, the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention.

18.11 Protection of victims and witnesses

State parties should take all necessary measures to provide victims and witnesses, including their family members when needed, as well as other persons who cooperate with the authorities and NGOs in the field of combating trafficking and the protection of human rights with effective and appropriate protection from potential retaliation and intimidation, in particular during and after investigation. Such protection may include physical protection, relocation, identity change and assistance in obtaining jobs (Article 28). Child victims should be offered special protection, taking into account their best interest.

During judicial proceedings measures should be taken to ensure the protection of the safety and privacy of victims and, where appropriate, their identity.

Article 30
Court proceedings

In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

- a the protection of victims' private life and, where appropriate, identity;
- b victims' safety and protection from intimidation,

in accordance with the conditions under its internal law and, in the case of child victims, by taking special care of children's needs and ensuring their right to special protection measures.

18.12 Specialisation and coordination

An important element of the convention is the need for specialisation and coordination. Article 29 obliges state parties to adopt measures necessary to ensure that persons or entities are specialised in combating trafficking and the protection of victims. Such persons or entities should dispose of adequate training and financial resources. Moreover, they should be sufficiently independent to carry out their tasks without undue pressure (para 1). Relevant officials should receive training in methods of prevention, prosecution and the protection of victims' rights. Such training may be agency-specific and should include human rights training (para 3). In addition co-ordination bodies should be set up to ensure coordination of policies and actions (para 2) and the appointment of a National Rapporteur (or a comparable mechanism) to monitor the implementation of anti-trafficking policies should be considered (para 4).

Article 32 obliges state parties to co-operate with each other for the purpose of preventing and combating trafficking, investigation and prosecution and the protection and assistance of victims. Special attention is paid to cooperation with civil society in Article 35, which obliges state parties to encourage state authorities and public officials to co-operate with NGOs and other relevant civil society actors in establishing strategic partnerships.

19. Corruption⁴⁶

Research shows that trafficking globally is persistently connected with corruption. Anti-corruption policies should therefore make an integral part of any policy to prevent and combat trafficking. This is particular the case in Ukraine, which, as all respondents express, is largely affected by this problem.

In the wider sense, corruption is generally defined as a deviation or an abuse of power. This is the case when a person is a civil servant or works in an organisation and serves other objectives or other interests than those according to the law. When one belongs to an organisation, in the private or in the public sphere, and enjoys a certain decisional competence within that organisation, that competence is always linked to objectives and standards of good professional behaviour. If that competence is exercised while neglecting these objectives in order to favour other interests, this implies by definition a behaviour that deviates from the norm. When corruption is formulated as a deviation of the normal exercise of power, a whole series of behaviours fall within the province of that definition. Corruption is thus not restricted to the public sphere, it can also affect private organisations.

Corruption has to be seen as a process that often starts with a 'blurring of the norm'. If there is no appropriate reaction to that behaviour from the competent authorities, it paves the way for a second stage in the process, which is corrupt behaviour, even if, according to criminal law not yet all elements are present or can be proved. The last stage of the whole process of corruption is when according to the criminal law all the elements are present and can be proved. This makes clear that criminal law makes up just one of the many instruments enabling a reaction against the emergence of corruption and only serves as an ultimate remedy.

19.1 Causes of Corruption

The causes of corruption can be situated at different levels: macro, meso and micro.

At the macro level the risk of corruption increases as soon as there are more contacts between the administration and the citizens (more possibilities) and the power of the administration is more significant (more possibilities and more important interests). In that sense decentralisation, wide discretionary competences of public servants, economic globalisation and increasing intervention of the authorities in the economic organisation are factors that increase the risks of corruption.

⁴⁶ This part is based on the chapter on the prevention of corruption of the Report of the Experts Group on Trafficking in Human Beings, Brussels 22 December 2004, European Commission, DG Justice, Freedom and Security.

Another macro cause of corruption is a lack of coherence and transparency of laws and regulations. If there is an excess of often complex rules decreed at different levels, citizens do not know any longer what they should stick to. This considerably favours the process of a blurring of the norm and of corruption. Moreover, it affects the confidence of citizens in the law in general, which makes corruption to be perceived as less risky and less unacceptable.

Causes of corruption located at the meso level are those that ensue from the direct professional environment. Both the internal regulation (or the absence of it) of the organisation and its structure and culture can become fertile grounds for corruption. Individuals, public servants and private persons need points of reference to carry out correctly the tasks they have been given without being influenced.

A distinction can be made between the causes of corruption within the structure and within the culture of an organisation. With regard to the first category, lack of clarity regarding responsibilities, insufficient remuneration and an extensive bureaucracy can all be considered as risk factors. At the cultural level of the organisation, the source of corruption can be located at the management level, when it does not assume its responsibilities and refuses to follow a clear policy concerning the corruption practices. A lack of encouragement of the staff, a negative work climate, a blind confidence in subordinates and a lack of reaction to behaviour that serves other interests than that of the organisation may become fertile grounds for corruption.

At the micro level, some persons can find themselves in specific situations that invite or lead to corruption. Here also personal attitudes and norms play a role.

19.2 Strategies to Counteract Corruption

Since the causes of corruption are located at different levels, an efficient strategy for fighting corruption addresses as many causes as possible and should be based on a multi disciplinary and integrated approach. This implies a focus on preventive as well as repressive strategies.

19.2.1 Preventive Strategies

At the macro level, any genuine policy to fight corruption can only be implemented when authorities assume their responsibilities and have clearly delimited and verifiable competences. As concluded in the 1997 Anti-Corruption Conference (IAAC) in Lima: 'All governments should operate in a transparent and accountable manner at all levels, with the public having access to information to the maximum extend possible. They should ensure that public accounts are open to public scrutiny. The role of civil society is most crucial at the national and local levels, where participation should be fostered by providing open access to decision-makers and the holding of public hearings in matters of importance.'

Important elements are here reliable control mechanisms, mechanisms to make corruption visible, and a vibrant civil society enabling accountability and scrutiny of public policy and officials.

At the meso and the micro level the following elements offer important instruments to counteract corruption.

Selection and Training

The first step within an organisation or a service to prevent corruption and corruptive behaviour is the application of particular selection criteria while recruiting and selecting staff. These criteria should not exclusively aim at experience, but should also focus on integrity, especially when the persons involved will have to take up a post of confidence or accomplish tasks sensitive to corruption. A selection procedure may include an inquiry about the antecedents of the candidate, even with regard to its private life. Under certain conditions, introducing a system of transparency concerning the financial situation of the person can also be considered.

As far as training is concerned, it is important that the rules and procedures concerning the functioning of the organisation be accessible for everyone. Within that context, the ethical training and the creation of a balanced professional attitude deserve a particular attention; it is important that that training is not limited to the training phase but is followed up afterwards.

Optimisation of the Organisational Structure

The administrative organisation or the organisational structure constitutes a major link. The members of an organisation or a public service should have an accurate description of their competences as well as a clearly elaborated description of their function. Everyone thus knows which are their own responsibilities, tasks and competences.

In order to delimit, as far as possible, the seduction factor, it is appropriate to introduce in certain cases a rotational system (rotation of the location or of the function) for public servants. Thanks to these measures lasting contacts with dishonest people, trying to subject people to inadmissible forms of influence (such as intimidation or financial corruption) would become more difficult. The rotational system is also a guarantee for the public servant.

Other methods include the reinforcement of the social control within the organisation (pride and peer control) and the use of teamwork. Both methods reduce the seduction factor and prevent public servants to work in an isolated way.

Finally, a closer look could be taken at the detection of corruption thanks to the spontaneous denunciation of citizens. A mediation service could be created in order to control the correct application of the rules of the administrations and its abuse of power. Moreover, this service could also assume the communication with the citizen and take on the role of first filter. In order to guarantee the confidentiality of the citizen, the independence of the mediation service needs to be guaranteed.

Optimisation of the Culture of the Organisation

A first condition is to recognise, within the organisation, the possibility of corruption and the need to counteract this. In the context of transparency it is important to be open, internally and externally, about information concerning corruption and the treatment of these files. It is in the interest of the organisation to inform citizens as much as possible of the recorded misdeeds.

The management of the organisation plays a key role. It is essential that the management feel that it is responsible for everything that is going on within its sphere of competences and that the organisation can easily designate it as responsible (management accountability). The leaders must implement a clear policy regarding the appropriate behaviour and set an example. At the same time, State employees could receive positive incentives such as a material reward. The absence of recognition of correct behaviour often leads to frustrated and deceived State employees that initially were motivated.

The Elaboration of Codes of Conduct

Besides clarity about functions, competences and responsibilities, it is important to elaborate codes of conduct that establish in a clear and simple way the rules of an upright behaviour and specify the meaning of the legal dispositions that determine this theme.

Lines of conduct can overcome the problem of discrepancy between the law and its specific application in practice – the law in the books and the law in action – and generate the required clarity. Such lines of conduct will only have a positive effect when their elaboration implies an open discussion with those who are obliged to abide by these rules. They should constitute an indication concerning the behaviour that a public servant is expected to adopt both within the context of his or her relations with colleagues as with the population. Agreements on extra's and donations could, for instance, be part of the lines of conduct.

19.2.2 Repressive Strategies

At the macro level, an important role of criminal law is to ensure that corruption is detected, pursued and punished. Criminal law is the ultimate remedy, even

though it is a precious instrument in the context of the establishment of norms and their upholding. Moreover, criminal law also has a repressive function.

In order to improve the quality of investigations, a special service within the police could be established to deal with corruption cases. This service should extensively work together with all internal and external partners involved.

At the meso level, besides the implementation of preventive social control systems, the presence of a normal control system within the organisation is basic. Internal horizontal control systems based upon the distribution of tasks between colleagues, as well as a vertical internal control carried out by supervisory services or functions are thus necessary. In the latter context, internal and external control services play an important role. These services must be provided with power, must be familiarised with the organisation, show independency and have the necessary means and competences.

Internal contact points can turn out to be useful at that level, as they allow managing internal intolerable situations without necessarily reporting it to the superiors. It may even be envisaged to offer a certain form of protection to persons involved in corruption but who are yet disposed to reveal information about corrupt practices (whistle blowing).

Finally, the importance of disciplinary measures must be underlined. An administrative and disciplinary reaction to corruption offers more possibilities than a strictly criminal law approach, as the criminal incriminations must not necessarily be proved. It is important to react rapidly and carefully to possible situations of abuse. The elaboration of an efficient disciplinary policy needs to be incorporated in an overall approach to corruption. Disciplinary measures often get stuck because of a lack of general vision concerning corruption and concrete measures at the organisation level.

19.3. Conclusion

Anti-corruption strategies require simultaneous action at macro, meso and micro level, a multidisciplinary approach and preventive as well as repressive measures. While some elements are dependent on a clear government policy, other elements can be developed on lower levels, such as selection and training of personnel, clear task descriptions, team work, the elaboration of Codes of Conduct and Guidelines, the establishment of internal and external control mechanisms, including mechanisms to make corruption more visible, and the strengthening of the role of civil society in counteracting corruption.

III. NATIONAL UKRAINIAN ANALYSIS

20. National Ukrainian Analysis

In the previous part of the report we have described the national and international framework in which the theory and practice of trafficking in human beings has to be discussed. In particular three topics are relevant: the Rule of Law, Corruption and Human Rights. In addition the UN Trafficking Protocol and the recent Council of Europe Convention on Action against Trafficking in Human Beings present important anchor points. Following a summary of these issues, we will give an analysis of the current situation in Ukraine regarding trafficking in human beings and in particular the position of victims of trafficking.

20.1 Summary on the Rule of Law

20.1.1 State organisation

When reviewing and considering (legal) measures to counter a certain societal problem, the legal and social context in which these measures (will) function are crucial. This is especially important when penal measures are considered. The criminal law is one of the most intruding instruments in the hands of state authorities with respect to citizens. The question is not only as to whether or not a certain criminal provision is effective, in the sense that the problematic behaviour is combated adequately, but also – first and foremost – as to whether it fits into the Rule of Law.

In this respect, two concepts are of major importance:

- the *Principle of Legality*, which is basic to criminal law, and requires that crimes are defined as unequivocally and concretely as possible; through strict crimes definitions citizens know exactly what kind of behaviour is punishable, whilst the limits of state power are defined;
- the concept of *Trias Politica*, through which a balance of powers in a state is established, as a guarantee against abuse of power within the state.

Last but not least, it is important to distinguish between the law in the books – the law as it has been written down in code books and other legislative products, stating how the law ‘ought’ to be – and the law in action, which is the law as it is applied in everyday practice, showing how the law ‘is’.

20.1.2 Corruption

Anti-corruption strategies require simultaneous action at macro, meso and micro level, a multidisciplinary approach and preventive as well as repressive measures. While some elements are dependent on a clear government policy, other elements can be developed on lower levels, such as selection and training of personnel, clear task descriptions, team work, the elaboration of Codes of Conduct and Guidelines, the establishment of internal and external control

mechanisms, including mechanisms to make corruption more visible, and the strengthening of the role of civil society in counteracting corruption.

20.1.3 Human Rights

Under international human rights law states have an obligation to prevent, investigate and punish trafficking and to provide the victims thereof with adequate remedies. All elements carry equal value and are prerequisites to achieve a balanced and effective approach to trafficking.

Preventive measures should primarily aim at strengthening the position of women and other vulnerable groups, including those working in prostitution. Care should be taken that anti-trafficking measures do not further marginalize or stigmatise trafficked persons and/or groups at risk as this can easily create and exacerbate existing situations that cause or contribute to trafficking. The protection of human rights should be at the core of any anti-trafficking policies.

Moreover, measures should observe the principle of non-discrimination. This means that it should be ensured that anti-trafficking measures cannot be used to discriminate against women or other specific groups, or infringe upon the human rights of individuals as set forth in the major international instruments, such as the freedom of movement, the right to leave one's country and the right to privacy. In addition, it must be ensured that trafficked persons are not subjected to discriminatory treatment in practice or law and that protective measures for trafficked persons are applied without discrimination, particularly with respect to gender, immigration status, and/or the fact of a trafficked person having been trafficked formerly or having participated in the sex industry.

A critical component in the effective detection, investigation and prosecution of traffickers is the willingness of victims to assist in prosecutions. This willingness is directly related to the level of assistance and protection offered to victims. A neglect of victim issues is therefore not only not in accordance with international human rights law, but also hinders an effective prosecution.

20.1.4 The UN Trafficking Protocol and the Council of Europe Convention on Action against Trafficking in Human Beings

The main characteristics of the definition employed in the UN Trafficking Protocol are:

- A broad definition, which covers all forms of trafficking into forced labour or slavery-like exploitation, no matter the type of work.
- The key element is the presence of coercion, deception, abuse of authority or any other form of abuse;
- An element of coercion or deception is not required in the case of children,

- as the legal status of children is different from that of adults.
- Crossing a national border is *not* a necessary prerequisite.

Any definition of trafficking should therefore cover all forms of exploitation of work or services for which human beings can be trafficked, both across and within borders.

Moreover, the central element should be

- the presence of deception, coercion or any other form of abuse, and
- in the case of children the presence of an element of coercion should not be required.

Elements that, according to the ILO, might indicate a forced labour situation are the threat and/or application of physical or sexual violence, restriction of movement, debt bondage/ bonded labour, withholding of wages or no payment at all, retention of passport and identity documents and the threat of denunciation to the authorities.

Provisions relating to the position of victims/witnesses, including victim protection and assistance, can be found in the UN Protocol as well as in the recent Convention on Action against Trafficking in Human Beings of the Council of Europe.⁴⁷ Stressing the need for an international instrument specifically focusing on the human rights of victims, the latter contains an extensive list of victim provisions. These include the proper identification of victims, the protection of privacy, a minimum standard of assistance measures, the granting of a recovery and reflection period and a (temporary) residence permit, compensation and legal redress, and the repatriation and return of victims.

20.2 Analysis national legal context

In theory the victim has a strong position in the criminal justice system of Ukraine, in particular because s/he has the legal position of full participant in criminal procedures, including all rights attached to being a party. Apart from this, there are several legal provisions with regard to the right to information and protection of the victim. Problems seem to lie predominantly in the implementation of the law. However, also a number of necessary provisions are lacking. Both will be discussed below. The chapter will conclude with a discussion of the current situation in Ukraine with regard to the position of victims in the light of the Council of Europe Convention.

20.2.1 Current State of Affairs

⁴⁷ In addition the EU has a number of specific instruments, in particular the Directive on a short term residence permit for victims of trafficking and the Framework Decision on the standing of victims in criminal proceedings.

According to respondents progress has been made in particular on the level of the police. All respondents consider the establishment of special Counter-Trafficking Department (CTD)⁴⁸ within the police as a major improvement, although there is still the problem of lack of adequate resources. CTD's exist in all regions. According to respondents they are less infected by corruption than the general police, for a number of reasons, including better working conditions. . On the level of investigators there seem to be more problems, both in terms of expertise and technical equipment. Problems on the level of prosecutors include many prosecutors being reluctant to take on cases of trafficking as they are complicated and represent a high risk of 'loosing the case', which can negatively affect their career. Moreover, prosecutors tend to change very often, which has a negative impact in building up and maintaining expertise. Another problem mentioned is corruption.

Since the previous amendment of the trafficking article, the number of cases and convictions has increased. Victims are more willing to cooperate with the police and/or to testify. Also the focus of the police has changed. Whereas before they tended to concentrate on one or two individuals, they now try to map the entire network. Also new means are used, such as taps of international phone calls, custom declarations, et cetera. An important step forwards is the recognition of the role of NGOs: they seem to have a more important input now.

For the near future a number of improvements are foreseen, among which an increase in the salary of judges, prosecutors and investigators. Another envisaged improvement is to have one officer responsible for THB cases in the prosecutors' office and investigators' office.

Furthermore, a new draft of Article 149 (the trafficking article) and of a number of relevant provisions of the CPC have recently been adopted.

However, the willingness of victims to press charges and to testify is still very low, among other things for fear of reprisals. This willingness may be influenced by the factors discussed below.

20.2.2 Gaps in Victim Provisions

There are a number of provisions that are essential for the position of victims that are lacking in the current legislation. The most important of these are:

- The lack of a non-punishment clause. There is no provision in the Criminal Code nor the Code of Criminal Procedure to ensure that the victim will not be prosecuted for offences related to her/his being a victim of trafficking (e.g. the use of false identity documents, illegal border crossing, etc.);

⁴⁸ The counter-trafficking department was established in 2005 based upon the counter-trafficking unit, established in 2000, under the responsibility of Ministry of Interior.

- The lack of a provision to automatically try trafficking cases behind closed doors. The CPC does not qualify trafficking cases as one of the crimes that should be tried behind closed doors (like is the case with rape). Whether or not this is done depends on the decision of the judge. Moreover, any such requests have to be made during the first – public – part of the trial. There are no provisions to shield the victim from exposure to this public part, where all personal data are read out loud;
- In addition, there are no or few possibilities to have the victim cross-examined by a judge in the pre-trial investigation and use the sworn statement in the trial.

Until recently, also the punishability of prostitution formed a problem (Article 303 Criminal Code), which meant that the victim could be prosecuted her/himself for prostitution. In practice this also happened. In theory the victim could also be prosecuted for prostitution committed in another country (if there was a treaty and the requirement of double punishability had been fulfilled). In practice this could be misused by police officers by threatening victims to prosecute them for prostitution in order to press them to testify. Recently the article in the Criminal Code (Article 303) that criminalised prostitutes has been amended. Under the new article prostitutes are no longer criminally liable, which takes away one of the barriers for victims to report to the authorities. This must be considered an important step forwards.

Prostitution is still an administrative offence. This is an important barrier for victims to report cases of trafficking to the police, which should be abolished.

20.2.3 Problems on the level of implementation

The most pressing problems respondents mention are not related to a lack of adequate provisions, but rather to the lack of implementation of the available provisions on the position of victims. According to the law it is, for example, possible to shield the personal data of the victim and use an alias in all documents relating to the criminal case. However, in practice no respondent was aware of a case in which this possibility actually was used, allegedly because victims did not feel the need for it.

The most important problems that are mentioned with regard to the implementation of victim provisions are:

- The lack of protection of the victim in practice. Theoretically the victim can request protection (see e.g. the Law on the protection of individuals involved in criminal proceedings), however in practice the actual possibilities to get protection are minimal. According to the law, for example, the victim can request a change of the place where s/he lives, a change of appearance or protection by bodyguards, but there are no

procedures and no funds to actually apply these measures. However, it is not only a matter of money, but also a matter of attitude. For example, the use of an alias or the possibility for the victim to not disclose her/his situation to her/his family or community, depends strongly on the way of acting of the police and the other bodies involved in prosecution;

- The lack of a system of free legal aid. The law provides for the right of the victim to have her/him legally represented, but there is no working system of free/state subsidised legal aid. Most victims have no money for a lawyer. This means that in practice they have no access to legal aid, unless there is an assistance organisation that pays for it. At the same time respondents agree that without a lawyer the chances of the victim to prove her/his case are minimal. Theoretically the prosecutor is supposed to defend the interests of the victim; in practice the victim is highly dependent on a lawyer to do so;
- In general, there is a need for more active state assistance and protection of victims. At the present time victims could count on non-state support only;
- Lack of specialization and cooperation. A general complaint is the lack of knowledge of trafficking and its mechanisms among prosecutors and judges, as well as a lack of experience in running trafficking cases. The CTDs function well in general, but, according to the respondents, are not everywhere sufficiently staffed. Investigators are often not very willing to open the case because of the complexity of trafficking cases and the little chance of success. This underlines the importance of special units and specialised investigators. An improvement in this respect is the order of the MOI to appoint specialised investigators in the Investigative Department. However, there is no specialisation at the level of the office of prosecutors. A proposal to have a special trafficking unit at the prosecutor's office has so far not been supported. In general, the prosecutor's office is considered to be the weakest link and to lag behind the positive changes that took place at the level of the police. According to respondents it still frequently happens that the investigator has enough evidence but the prosecutor refuses to bring the case to court, withdraws the case or weakens the indictment. Also a lack of understanding between CTD's and the prosecutors' office is reported. At the same time all respondents agree that cooperation between CTD's, investigators and prosecutors is an essential condition for a successful case, as is proved by those teams that do work well together.
- The attitude of investigators, prosecutors and judges towards the victim. Related to the previous point the problematic attitude of (some) investigators, prosecutors and judges towards victims is mentioned, in particular the mechanism of 'blaming the victim'. Especially the attitude

towards prostitutes needs improvement. One of the critiques in the TIP report of the US State Department on the judiciary held that trafficking victims are not treated as victims of a serious crime but as 'common prostitutes'. Apart from the obvious fact that also prostitutes are entitled to be treated with respect, for the law it does not make a difference whether or not a trafficking victim has worked in prostitution before, knew that she would work as a prostitute or is willing to continue to do so under self-controlled circumstances. The distinguishing element of trafficking is the use of deceit, force or abuse, not the personal history of the victim or the type of industry in which the victim is exploited under forced labour or slavery-like conditions. In practice, however, social opinion is strongly against prostitutes. Common attitudes hold that 'they knew where they were going, so they have to take the consequences' or that 'they are all just prostitutes'. Also in other ways victims tend to be blamed themselves. Even if it is clear that a woman is not a prostitute, for example because of her age, it is not uncommon that it is assumed that she will then have been involved in an other illegal act like drugs trafficking. Another reason to blame the victim is the fact that s/he voluntarily choose to go abroad. At the same time, it is generally not considered a problem that victims illegally went abroad for work. Given the lack of legal migration opportunities, this is something that many people do. A complicating factor is the lack of opportunities in Ukraine and the poor working conditions. Unemployment figures are high and people are willing to do any work for little money under extremely poor conditions. As a consequence, there is little understanding for exploitation abroad, also when it concerns male victims in, for example, factories or agricultural work.

- Corruption is still reported as a problem. Examples that are given by respondents include documents that disappear and prosecutors who drop a case or weaken the charges because of being paid by the suspect. This problem is aggravated by the lack of understanding of Article 149, the trafficking article, and the lack of transparency of the role of the prosecutor. Sometimes also the police itself are involved in trafficking. This observation reinforces the importance of 'social control' as a mechanism to prevent corruption. In this respect NGOs and victim lawyers play an important role, including cooperation between law enforcement and NGOs and the presence of NGOs at court proceedings.
- The lack of effective mechanisms to execute claims for compensation. All respondents mention the lack of an effective mechanism to collect awarded claims for compensation as a structural and serious problem. Before the judicial reform there existed a special judicial service to this aim. However, this has changed and now the executive branch of the MOI is responsible for the collection of claims. They appear to be far less effective. According to respondents, before the reform about 75% of the claims was effectively collected, this has gone down to about 25%. One of

the reasons mentioned is the lack of training and skills of the MOI. Moreover, there is a lack of sanctions in case of non-payment of the offender, especially if s/he is not imprisoned. Neither NGOs nor the victim have themselves means to collect claims. Even if possessions of the offender are confiscated by the state, no cases are known that the victim gets her/his compensation actually paid. For these reasons some NGOs advocate that confiscated assets are given directly to the victim instead of first to the State. Other barriers to collect damages are the fear of the victim for reprisals, lack of assets of the offender and the wide possibilities the offender has to shield off assets for example by transferring them during the criminal proceedings to a third person. This failure of effective mechanisms to collect compensation claims leads to situations in which the victim's lawyer and the suspect negotiate that if the suspect pays compensation to the victim, the victim will drop her/his accusations. However, by doing so the victim risks to be prosecuted her/himself for perjury. There are cases known in which this indeed has happened. A solution mentioned by NGOs is the establishment of an Asset Confiscation Fund, from which claims for compensation are paid. Such a fund could, for example, also be used to finance legal and medical assistance for the victim.

- Lack of effective mechanisms to freeze and confiscate criminal assets. After its amendment the CPC contains a provision to freeze criminal assets. In practice, however, freezing or confiscation of assets runs up against a load of practical and technical problems. Just to mention an example: the investigator has the authority to investigate cash flows and request the freezing of bank balances through a court order.. However, to issue such an order, the court requires that the account number of the suspect must be known. At the same time, the bank only gives the account number if there is a court order.
- Lack of procedures. A general complaint is the lack of procedures to actually implement the relevant CPC provisions. Everybody knows the theoretical possibilities, but no one knows how to use those in practice, for example how to use video testimony or how to interview a witness with the help of a camera in a different room.

20.2.4 Other problems

Apart from gaps in the CPC with regard to the position of victims and the lack of implementation of existing provisions, a number of other problems are mentioned that negatively affect the effective investigation and prosecution of trafficking.

There is a lack of published case law or written comments that help interpreting the new amended article 149 of CC of Ukraine. However, in general the criminal justice system is not well informed about international legislation on trafficking

and forced labour. During the course of the writing of this report, a new article was adopted by Parliament. This can be considered a step forward. However, this does not solve the problem of lack of published case law and the lack of knowledge of international law. In particular the lack of published case law is a barrier to develop a common interpretation among judges.

Lack of funds is a general problem. There is a special anti-trafficking program, but by lack of adequate funds its implementation is largely dependent on foreign donors. Moreover, many trafficking cases require international cooperation and the collection of evidence abroad since the actual exploitation took place in another country. However, there are no funds to do an investigation abroad (passport, translators, travel costs). This hinders the collection of evidence.

In addition, there are no clear provisions in the CPC regarding international cooperation (for example on mutual legal assistance). In this context, it should be noted that NGOs seem to cooperate much more effectively across borders than law enforcement. Presently there is a new draft CPC submitted to Parliament which, among others, contains provisions on mutual legal assistance, extradition, joint investigation teams, confiscation and money laundering.

A last point mentioned by several respondents concerns the lack of convictions and/or the 'softness' of the convictions. According to the figures presented, 53 persons are prosecuted in 2003, of which only 18% were convicted to imprisonment; the others received a light punishment. This is also a point of critique of Amnesty International.

According to NGOs many cases are dismissed or do not lead to a conviction. As the main reasons are mentioned:

- Lack of clarity of Article 149 and the absence of guidelines for interpretation. Every prosecutor or judge can interpret it in his/her own way;
- Prejudices/stereotypes about prostitutes;
- Lack of guidelines on how to deal with cases and on the treatment of victims. This goes for all stages of a case: from the recognition of indicators of trafficking and the treatment of victims to the collection of evidence, international cooperation and bringing the case to court.
- Not sufficient and effective cooperation, (which may be, among other factors, due to a lack of an understanding of the specific needs of the partner within the criminal justice chain), between the police, investigator, prosecutor and court.
- The victim is forced to repeat her statement many times – this can run up to 15 times – in which every time new details are asked. As nobody is able to repeat details 15 times in exactly the same way, the consequence is that the victim gets mistrusted.
- The problem of fixed terms: trafficking cases often need quite some time, because they are complex and in many cases require international

cooperation. The legal system is not sufficiently equipped to deal with this situation. Cases are regularly dismissed because terms are not met, for example because information from abroad is needed. If the information does not arrive in time, it can not be used. Terms can be extended, but then the suspect must be released.

NGOs strongly underline the need for professionals, such as the Anti Trafficking Units.

20.3 The current situation in the light of the CoE Convention on Trafficking

The Council of Europe Convention contains an extensive list of victim provisions, together with a number of principles. Some of these are already incorporated in Ukrainian law and practice, others are still missing. An evident gap, which has already been mentioned, is a non-punishment provision. In the words of the convention ‘the (legal) possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so’.

In other cases there is a clear gap between the law ‘in the books’ and the ‘law in action’. The non-discrimination principle, for example, is clearly incorporated in the Ukrainian law, both as a general principle and in the specific article on trafficking. For the law, it makes no difference if a victim has been working in prostitution before or knew she would do so. In practice, however, a discriminatory attitude towards prostitutes is a common phenomenon. This is not only in violation with a basic human rights principle, which holds that all human beings are equally entitled to protection against human rights abuses, but also hinders the effective prevention and prosecution of trafficking as well as the adequate assistance of victims.

The same problem goes for a number of other obligations in the Council of Europe Convention. The Ukrainian law has, for example, provisions on the protection of the privacy and safety of victims, on compensation and on informing the victim. The problem here is not so much the lack of legal provisions – though some provisions might need improvement – but rather the implementation of these provisions in practice. This means that the emphasis should lie more on training and the development of guidelines and mechanisms to implement those provisions than on changing the law. Especially in the light of the described implementation problems, the appointment of a National Rapporteur – as mentioned in the convention – to monitor the implementation of anti-trafficking policies could be considered.

As to compensation, special attention should be paid to the mechanisms to execute awarded claims for compensation. In addition, the establishment of a special victim fund should be considered. In this context also the improvement of provisions and mechanisms for the confiscation of criminal proceedings needs

attention. Regarding the provision of information, it is important to note that the convention obliges to ensure that victims have, *from their first contact* with the competent authorities, access to information on the relevant judicial and administrative proceedings. At present, Ukrainian law only obliges to inform the victim from the moment of the opening of an official criminal case. Moreover, prosecution should not be dependent of a complaint of the victim.

With regard to assistance of victims, a lot of improvements have taken place over the last years. However, it can be doubted if the current situation meets the minimum standard as laid down in the Council of Europe convention (appropriate and secure accommodation, psychological and material assistance, emergency medical treatment, translation and interpretation services, counselling and information on their rights, legal assistance, vocational training and education). In particular, the lack of a system of legal assistance and free legal aid presents an urgent problem. Moreover, assistance and protection should be provided independent of the victim's willingness to act as witness.

Another major theme that runs through the convention is the need for specialisation and cooperation, both among the various authorities concerned and between NGOs and the authorities. Also here, Ukraine has set important steps forwards, for instance in the establishment of the CTDs. Also the cooperation between NGOs and the authorities seems to have improved. However, when it comes to the other links of the judicial chain – investigators, prosecutors, and judges – the lack of expertise and specialisation is still mentioned as a problem. The same goes for the (lack of) cooperation among the various authorities involved.

A specific problem is presented by the unwillingness of investigators or prosecutors to open a criminal case for fear of negative consequences for their career if they fail to secure a conviction. Given the complexity of trafficking cases, the risk of failure should never be a reason not to start a prosecution, nor should the lack of a conviction have negative consequences for the investigator or prosecutor involved.

Until now, Ukraine has mainly functioned as country of origin. Because the majority of victims the authorities deal with have the Ukrainian nationality, there has been no urgent need for specific provisions for foreign victims. In this report we, too, have not looked into the Aliens' law. However, it is very well possible that this changes in the near future. A point of attention, therefore, is the establishment of specific provisions in the Aliens law with regard to foreign victims, such as a reflection period and temporary residence permit.

Finally the Council of Europe convention contains a number of obligations with regard to the repatriation and return of victims and the establishment of reintegration programmes for victims. As this report focuses on the Code of Criminal Procedure we have not looked into this issue.

IV. ANNEXES

Annex 1: Article 149 (Trafficking in persons) and Article 303 (Pimping or involving a person in prostitution)

LAW OF UKRAINE

On the Introduction of Changes into the Criminal Code of Ukraine

Concerning the Enhancement of Responsibility for Trafficking in Human Beings and for Involving into Prostitution

of 13.01.2006

The Supreme Rada of Ukraine resolves:

I. To introduce the following changes into the Criminal Code of Ukraine (Bulletin of the Supreme Rada of Ukraine, 2001, No 25-26, P.131):

1. Article 8 shall be extended to include the words 'grave or' after the words 'provided by this Code'.

2. Articles 149 and 303 shall have the following language:

'Article 149. Trafficking in Persons or Other Illegal Agreement with Regard to a Person.

1. Trafficking in persons or the execution of another illegal agreement concerning a person, or recruitment, transfer, hiding, hand-over or receiving of a person by fraud, blackmail or by taking advantage of a persons' vulnerable status with the aim of exploitation –

shall be punishable by a 3 to 8 year's jail term.

2. Actions provided by Part 1 of this Article and committed with regard to a minor or several persons or repeatedly, or subject to a prior group collusion by several persons, or by an employee who took advantage of his/her official position, or by a person on whom the victim was materially or otherwise dependent or actions involving violence which endangers the victim's or his relatives' life or health or the threat of resorting to such violence –

shall be punishable by a 5 to 12 year's jail term with or without the seizure of property.

3. Actions provided by Part 1 or 2 of this Article and committed with regard to a minor, or by an organized group or actions involving violence which endangers

the victim's or his relatives' life or health or the threat of resorting to such violence, or if they have led to grave consequences –

shall be punishable by a 8 to 15 year's jail term with or without the seizure of property

Note 1. For the purposes of this Article, exploitation of human beings shall mean all forms of sexual exploitation, use in the porno business, forced labour or forced provision of services, slavery or practices similar to slavery, bondage, forcing into debt servitude, extraction of organs, experiments on a person without his/ her consent, adoption of a person for personal gain, forced pregnancy, forcing into criminal activities, using in military conflicts, etc.

2. For the purposes of articles 149 and 303 of this Code, the vulnerable status of a person shall mean the status of a person which results from his/ her physical or mental traits or external circumstances, makes it impossible for this person to take stock of his /her actions (inaction) or to control them, to make independent decisions of his/ her own free will, to resist violent or other illegal actions or restricts his /her ability to do so, concurrence of adverse personal, family or other circumstances.

3. Under this Article, the responsibility for recruitment, transfer, hiding, hand-over or receiving of juveniles or minors shall arise regardless of whether or not such actions have been carried out by fraud, blackmail, or by taking advantage of the vulnerable status of the above-said persons or by force or under the threat of using force, by using one's official position, or by a person on whom the victim was materially or otherwise dependent;

Article 303. Pimping or involving of a person into prostitution

1. Involving or forcing a person into prostitution by fraud, blackmail, or by taking advantage of the vulnerable status of this person or by force or under the threat of using force, or pimping –

shall be punishable by a 3 to 5 year's jail term.

2. Actions provided by Part 1 of this Article and committed with regard to several persons or repeatedly, or subject to prior group collusion by several persons, or by an employee who took advantage of his/ her official position, or by a person on whom the victim was materially or otherwise dependent –

shall be punishable by a 4 to 7 year's jail term.

3. Actions provided by Part 1 or 2 of this Article and committed with regard to a minor, or by an organized group –
shall be punishable by a 5 to 10 year's jail term with or without the seizure of property.

4. Actions provided by Part 1, 2 or 3 of this Article and committed with regard to a minor, or if they have brought about grave consequences –
shall be punishable by a 8 to 15 year's jail term with or without the seizure of property.

Note 1. For the purposes of this Article, pimping shall mean a person's actions aimed at facilitating another person's involvement in prostitution.

2. Under this Article, the responsibility for involving a juvenile or a minor in prostitution shall arise regardless of whether or not such actions have been carried out by fraud, blackmail, or by taking advantage of the vulnerable status of the above-said persons or by force or under the threat of using force, by using one's official position, or by a person on whom the victim was materially or otherwise dependent.

II. This Law shall enter into force on the date on which it is published.

Annex 2: Code of Criminal Procedure; relevant articles

EXTRACTS

THE CODE OF CRIMINAL PROCEDURE OF UKRAINE

Article 4.

The Obligation to Initiate a Criminal Case and to Disclose a Crime

A court, a prosecutor, an investigator and a body of inquiry are obliged, within their relevant spheres of competence, to initiate a criminal case if elements of crime are identified, to take all actions, provided by law, for identification of the event of the crime, persons, who committed the crime and for prosecution of these persons.

Article 16.

Administration of Justice at Basis of Equality of Citizens before Law and a Court

Justice in criminal cases shall be administered on basis of equality of citizens before law and a court, regardless their backgrounds, social and material status, race, ethnic origin, gender, education, language, religion, character and nature of occupation, places of residence and other circumstances.

Article 16-1.

Adversarity and Purview

(...)

State prosecution in a court is administered by a prosecutor. In cases, stipulated in this Code, prosecution shall be administered by a victim or his/her representative.

(...)

A prosecutor, a defendant, his/her defender or a legal representative, a victim, a civil claimant, a civil defendant and their representatives shall participate in a court session as parties and shall enjoy equal rights and freedoms in submission of evidence, examination of the evidence and proving its pertinence before the court.

A court shall, objectively and without prejudice, provide necessary conditions for parties to fulfil their procedural duties and to exercise their rights.

(...)

Article 20

Public Court Examinations

In all courts, cases shall be examined publicly, unless it contradicts to the interests of protection of state secrets.

Besides that, closed court proceedings shall be allowed under a substantiated court decision in cases of offences committed by persons who were under 16 years of age, in cases of sexual offences, as well as in other cases, in order to prevent publicity of information on intimate details of personal life of persons, who participate in such a case, and if it is necessary for the interests of security of persons under protection.

Cases in closed court sessions shall be examined according to all rules of court procedure.

Court sentences shall be proclaimed publicly in all cases.

Article 28

A Civil Lawsuit in a Criminal Case

A person who suffered material damages from a crime, shall have the right, in the course of examination of a criminal case, to submit a civil lawsuit against an accused or persons who bear material responsibility for the actions of the accused; the civil lawsuit shall be examined by a court jointly with the criminal case.

Closure of a criminal case due to reasons stipulated in articles 7 and 7-1 of this Code [what is in there?], shall not free a person from the obligation to compensate, according to procedures established by law, material damages caused by such person to public and non-governmental organisations or citizens.

A civil lawsuit may be submitted both at the time of pre-trial investigation and inquiry, and at the time of court examination of a case, but prior to initiation of court investigation. A refusal to accept a civil lawsuit shall deny a suitor to submit the same lawsuit in a criminal case.

A person who has not submitted a civil lawsuit in a criminal case, as well as a person whose civil lawsuit was not proceeded, shall have the right to file the lawsuit under civil law procedures.

A civil claimant and a civil defendant, in the course of examination of a civil lawsuit in a criminal case or in the course of examination of a lawsuit on compensation of material damages, caused by a person, whose criminal case

was closed according to reasons, stipulated in articles 7 and 7-1 of this Code, shall be exempt from the requirement to pay legal costs.

Article 29.

Ensuring Compensation of Damages Caused by a Crime, and Enforcement of a Sentence, Incorporating Confiscation of Property

Should there be sufficient evidence that a crime has resulted in material damages or in expenses of a health care facility, associated with hospital treatment of the victim of the crime, a body of inquiry, an investigator, a prosecutor and a court shall be obliged to take measures to ensure compensation under a civil suit.

A prosecutor shall initiate a civil lawsuit or support a civil lawsuit, filed by a victim for compensation of damages caused by a crime, if it is so required for the protection of interests of the state and citizens, who cannot protect their rights themselves due to state of their health or other reasonable excuses.

In the course of proceeding of a criminal case on an offence that can entail confiscation of property as an additional sanction, a body of inquiry, an investigator, a prosecutor shall take measures to ensure potential confiscation of property of the accused.

Article 49.

A Victim

A victim shall be recognised as a person, who suffered moral, physical or material damage as a result of a crime.

A body of inquiry, an investigator and a judge shall issue resolutions on recognition or non-recognition of a person as a victim of a crime, and a court shall issue a court order on these matters.

A citizen, recognised as a victim of a crime, shall have the right to testify in a case. A victim and his/her representatives shall have the following rights: to submit evidence, to submit requests, to review all materials on the case from the moment of completion of pre-trial investigation, or from the moment of transfer of the case for court examination (in cases, that do not incorporate pre-trial investigation); to participate in court examination; to submit motions on dismissal; to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court, as well as to appeal against the court sentence or court

orders and resolutions of a people's judge;⁴⁹ and, provided relevant reasons – the right to be granted security.

In cases, stipulated in this Code, a victim shall have the right to pursue a charge in the course of court examination, personally or via his/her representative. A victim can participate in court debates.

In cases on crimes, that resulted in death of a victim, the rights stipulated in this article, shall be granted to his/her close relatives.

Article 50.

A Civil Claimant

A civil claimant shall be recognised as a citizen, a facility, an official body or an organisation, that suffered material damages from a crime and submitted a request on compensations for these damages according to Article 28 of this Code. A body of inquiry, an investigator and a judge shall issue resolutions on recognition or non-recognition of a civil claimant, and a court shall issue a court order on these matters.

A civil claimant or his/her representatives have the following rights: to submit evidence; to submit requests; to participate in court examination; to apply to a body of inquiry, an investigator and a court with requests to take measures in order to secure enforcement of their claims; to pursue a civil charge; to review materials on the case from the moment of completion of pre-trial investigation, or from the moment of transfer of the case for court examination (in cases, that do not incorporate pre-trial investigation); to submit motions on dismissal; to appeal against actions of a person in charge of inquiry, an investigator, a prosecutor and a court; as well as to appeal against a court sentence or court orders to the extent of their connection with a civil lawsuit; and provided relevant reasons - the right to be granted security.

A civil claimant shall be obliged to provide all necessary documents, associated with the civil lawsuit submitted, on request of a body of inquiry, an investigator, a prosecutor and a court.

Article 52.

Representatives of a Victim, a Civil Claimant and a Civil Defendant

Representatives of a victim, a civil claimant and a civil defendant can incorporate lawyers, close relatives, legal representatives as well as other persons,

⁴⁹ Translator's note: 'people's judge' seems to be inherited from the Soviet times, the term is not covered in Definition' section (Article 32)

recognised as such representatives according to a resolution of a person in charge of inquiry, an investigator, a judge, or according to a court order of a court.

If roles of civil claimants or civil defendants are fulfilled by a facility, an official body or an organisation, their interests can be represented by persons, specially authorised by these entities.

Representatives, referred to in this article, shall enjoy procedural rights of persons, whose interests they represent.

Article 52-1.

Ensuring Security of Persons, who Participate in Criminal Justice

If persons who participate in criminal justice, are under a real threat to their lives, health, housing or property, they shall have the right to be granted security.

The following persons shall have the right to be granted security, provided relevant reasons:

- 1) a person, who informed a law enforcement body on a crime or participated by other means in detection, prevention, termination and disclosure of a crime or facilitated such actions;
- 2) a victim or his/her representative in a criminal case;
- 3) a suspect, an accused, defenders and legal representatives;
- 4) a civil claimant, a civil defendant and their representatives in a case on compensation of damages, caused by a crime;
- 5) a witness;
- 6) an expert, a specialist, an interpreter and a procedural witness⁵⁰;
- 7) family members and close relatives of persons, listed in clauses 1-6 of this article, if they are under threats or other illegitimate actions to influence participants or criminal justice.

A body of inquiry, an investigator, a prosecutor or a court after getting a statement or a notification on a threat to security of a person listed in paragraph 2 of this article, is obliged to check such statement (notification) and decide not longer than within three days or immediately in urgent cases, to apply or refuse to apply security measures. According to their decisions, they shall issue a motivated resolution or a court order and submit it for execution to a body, authorised to enforce security measures. Such resolutions or court orders shall be mandatory for execution by the above bodies.

A body, authorised to enforce security measures, shall identify the range of necessary measures and means of their implementation, accounting for specific circumstances and the need to eliminate existing threats. A person under

⁵⁰ Translator's note: 'procedural witness' is a general term, used in this translation to cover a witness of arrest, search, seizure, etc. - i.e. witnesses of procedural actions. The relevant Ukrainian term does not differentiate such witnesses.

protection shall be informed on security measures, circumstances of their use and rules of use of property items or documents, issued for security purposes.

Should a statement (notification) on a threat to a person, listed in paragraph 2 of this article, contain information on a crime, a body of inquiry, an investigator, a prosecutor, a court or a judge, according to procedures, stipulated in articles 94, 98 and 99 of this Code, shall decide on initiation of a criminal case or on refusal to initiate a criminal case or on submission of such statement (notification) to a relevant entity.

An applicant shall be immediately notified of a decision made.

A body that executes security measures, shall notify in written a body of inquiry, an investigator, a prosecutor, a court or a judge, dealing with the criminal case, on measures taken and results of these measures.

Article 52-2.

Rights and Obligations of Persons under Security Measures

Persons under protection have the following rights:

- 1) to submit requests on application of security measures or on termination of these measures;
- 2) to know about application of specific security measures in respect to them;
- 3) to require from a body of inquiry, an investigator, a prosecutor, a court to apply additional security measures or to terminate measures that are being implemented;
- 4) to appeal against illegal decisions or actions of bodies in charge of security to a relevant superior body, a prosecutor or a court.

Persons under protection are obliged:

- 1) to comply with conditions of application of security measures and legitimate requests of bodies in charge of enforcement of security measures;
- 2) to inform the above bodies immediately on every case of threat or illegal actions against them;
- 3) to deal with property items and documents provided to them temporarily by a body in charge of enforcement of security measures, according to rules established by the due legislation.

Article 52-3.

Non-disclosure of Information on a Person under Protection

Non-disclosure of information on a person under protection can be made by minimising information on such person in inspection materials (statements, explanatory notes, etc.), as well as in protocols of investigation actions and court

sessions. A body of inquiry, an investigator, a prosecutor, a court (a judge), after making decision on application of security measures, shall issue a motivated resolution, or a court order on replacement of the genuine name, family name and patronymic of a person under protection by a pseudonym. Later on, procedural documents shall refer to the pseudonym only, while the genuine name, family name and patronymic (date of birth, marital status, employment or position, place of residence and other identification data of the person under protection) shall be referred to only in the resolution (court order) on replacement of genuine identification data. Such resolution (court order) shall not be incorporated into the case materials and shall be stored separately by a body, dealing with the criminal case. If the genuine name of a person under protection is replaced by a pseudonym, protocols of investigation actions and other documents, containing genuine information on the person, shall be withdrawn and stored separately, while copies of the above documents, containing the pseudonym instead of the genuine name of the person shall be added to the case materials.

Information on security measures and persons under protection shall be treated as a limited assess information. Documents, that contain such information, shall not be covered by rules, stipulated by paragraph 2 of Article 48, articles 217 - 219 and 255 of this Code.

Article 53.

The Obligation to Explain Rights of Persons, who Participate in a Case and to Ensure Their Exercising these Rights

A court, a prosecutor, a person in charge of inquiry are obliged to explain their rights to persons, who participate in a case, and to ensure opportunities for exercising these rights.

Article 64.

Circumstances, that need to be Proved in a Criminal Case

In the course of pre-trial investigation, inquiry and examination of a criminal case, the following circumstances need to be proved:

(...)

4) nature and monetary value of damages caused by the crime, as well as costs, incurred by medical facilities in connection with hospital treatment of a victim of the criminal act.

Article 66.

Collection and Submission of Evidence

A person in charge of inquiry, an investigator, a prosecutor and a court in cases they are proceeding have the right to require, according to procedures stipulated by this Code, any persons to attend as witnesses and as victims for interrogation or as experts for making their conclusions; to require facilities, official bodies, organisations, officials and citizens to submit items and documents that may provide objective data, necessary for the case; to require to carry out audits, to require banks to submit confidential banking information on physical persons and legal entities, according to procedures and to the extent as stipulated by Law of Ukraine 'On Banks and Banking Activities' (2121-14). These requests are mandatory for execution by all citizens, facilities, official bodies and organisations.

Evidence can be submitted by a suspect, an accused, his/her defender, an accusant, a victim, a civil claimant, a civil defendant and their representatives, as well as by all other citizens, facilities, official bodies and organisations.
(...)

Article 68.

Testimony of Witnesses

Any person who is known to have information on circumstances associated with a case, can be called as a witness.

A witness can be interrogated on circumstances to be identified in a given case, including facts that characterise personality of a suspect or an accused and his/her relations with them.

Information from an unknown source submitted by a witness, cannot be used as evidence. If testimony of a witness is based on information submitted by other persons, these persons also should be interrogated.

Article 69.

Persons, Who Cannot be Interrogated as Witnesses and Persons, Who Have the Right to Refuse to Testify.

The following persons cannot be interrogated as witnesses:

(...)

(...)

- 4) a witness who, according to Article 52-3 of this Code, testifies under a pseudonym - on information about his/her genuine identity;
- 5) a person, who has information about genuine identity of a person who testifies under a pseudonym, according to Article 52-3 of this Code - on such information.

The following persons can refuse to testify as witnesses:

(...)

2) a person who, by his/her testimony, could criminate him/herself, his/her family members, close relatives, adopted children, adoptive parents of committing a crime.

(...)

Article 69-1.

Rights of a Witness

A witness has the following rights:

- 1) to testify in his/her native language or in other language he/she knows and use services of an interpreter;
- 2) to demand recusal of an interpreter;
- 3) to know, in connection with what and under what case he/she is being interrogated;
- 4) to handwrite his/her testimony in a protocol of interrogation;
- 5) to use notes and documents in the course of his/her testifying in cases, when his/her testimony is associated with calculations or other data, he/she can hardly remember;
- 6) to refuse testifying against him/herself, his/her family members and close relatives;
- 7) to review a protocol of interrogation and require to introduce changes, additions and comments into the protocol, to handwrite such additions and comments;
- 8) to submit complains to a prosecutor against actions of a person in charge of inquiry and an investigator;
- 9) to get reimbursements for his/her costs incurred by being called to testify..

Provided relevant grounds, a witness shall have the right to be granted security by application of measures, stipulated by law and according to procedures, stipulated in articles 52-1 - 52-5 of this Code.

Article 70.

Responsibilities of a Witness

A person called as a witness by a body of inquiry, an investigator, a prosecutor or a court, is obliged to appear in a required place and in required time and testify truly about circumstances of a case that are known to him/her.

Should a witness fail to appear without a valid excuse, a body of inquiry, an investigator, a prosecutor and a court shall have the right to use the compulsory process, enforced by bodies of the Ministry of Interior, according to procedures stipulated in articles 135 and 136 of this Code.

In cases stipulated by paragraph 2 of this article, a court shall also have the right to impose a monetary fine on a witness amounting up to a half of the official minimal wage. The issue of the monetary fine shall be decided upon by the court at a court session, dedicated to examination of a case such witness was called to testify on. The issue can be also decided upon at another court session, when this witness is called to participate. Failure of the witness to attend without a valid excuse shall not prevent review of the issue of imposing a monetary fine.

Article 71.

Liabilities of a Witness

A witness shall be liable to criminal responsibility for his/her patently false testimony according to Article 384 of the Criminal Code of Ukraine.

A witness who deliberately fails to appear when called to testify in a court, bodies of pre-trial investigation or inquiry, shall be liable to sanctions, stipulated by paragraph 1 of Article 185-3 or Article 185-4 of the Code of Ukraine on Administrative Offences (80731-10). A witness who declines to testify about circumstances of a case known to him/her, shall be liable to sanctions, stipulated in Article 385 of the Criminal Code of Ukraine.

Article 72.

Testimony of a Victim

A victim is obliged to appear if called by a person in charge of inquiry, an investigator, a prosecutor and a court.

A victim can be interrogated on circumstances to be identified under a given case, including facts that characterise personality of a suspect or an accused and his/her relations with them. Information from an unknown source submitted by a victim cannot be used as evidence.

Should a victim fail to appear without a valid excuse, a body of inquiry, an investigator, a prosecutor and a court shall have the right to use the compulsory process, according to procedures, stipulated in articles 135 and 136 of this Code.

A victim who deliberately fails to appear, when called to testify in a court, bodies of pre-trial investigation or inquiry, shall be liable to sanctions stipulated, respectively, by paragraph 1 of Article 185-3 or Article 185-4 of the Code of Ukraine on Administrative Offences. A victim shall be liable to sanctions under Article 384 of the Criminal Code of Ukraine for a patently false testimony.

Article 75.

Conclusions of an Expert

Forensic examination shall be required if, in the course of examination of a case, addressing of some specific issues needs application of some scientific, technical or other special knowledge.

(...)

Article 76.

Mandatory Initiation of a Forensic Examination

Forensic examinations shall be mandatory initiated:

- 1) (...)
- 2) for identification of severity and nature of bodily injuries;
- 3) (...)

PROTOCOLS

Article 84.

The Mandatory Requirement to Protocol

Execution of investigation actions at the time of pre-trial investigation and inquiry, at court sessions of a first instance court and a court of appeal shall be documented in protocols.

Article 85.

Protocols of Investigation Actions

A protocol of every investigation action shall contain: a date and a place of its completion; positions and names of persons who participated in the investigation action, addresses of these persons, explanation of their rights and obligations; contents of the investigation action, time of initiation and completion of the investigation action; all substantive circumstances of significance for a case, identified in the course of the action. In order to prevent disclosure of information on a person under protection, protocols of investigation actions, stipulated in articles 95, 96, 107, 145, 170, 171, 173 and 176 of this Code, shall contain limited data on this person, according to procedures, specified in Article 52-3 of this Code.

A protocol shall be read to all persons, who participated in an investigation action and these persons shall be notified about their rights to make comments. The above persons may study such protocol individually.

Inserts and alterations shall be noted in a protocol above signatures.

A protocol shall be signed by: a person who executed an investigation action, an interrogated person, as well as by an interpreter, procedural witnesses (if present) and other persons who were present or participated in execution of the investigation action. If any of these persons cannot sign a protocol personally due to physical disabilities, a third person may be invited to sign the protocol. The protocol can be accompanied by photos, audio records, films, video records, charts, diagrams, casts and other explanatory materials.

If a person who participates in an investigation action refuses to sign a protocol, a relevant entry on the matter shall be made in the protocol and certified by signature of a person who executed the investigation action.

Article 85-1.

Use of Audio Recording in the Course of Pre-trial Investigation

Audio recording can be used in the course of interrogation of a suspect, an accused, a witness, a victim, in the course of a confrontation, face-to-face identification, reconstruction of circumstances and in the course of other investigation actions at the time of pre-trial investigation.

If audio recording is used for an investigation action, all participants of the investigation action shall be informed on its use prior to beginning of the investigation action. The soundtrack must contain information, referred to in paragraph 1 of Article 85 of this Code and reflect the whole course of the investigation action. It is prohibited to repeat some part of the investigation action for purposes of its audio recording.

Prior to completion of an investigation action, its soundtrack shall be played back in full to participants of the investigation action. Their comments and amendments shall be recorded at the soundtrack. A protocol of an investigation action, carried out with use of audio recording shall be completed according to rules stipulated in this Code. Besides that, the protocol shall refer to use of audio recording, notification of participants of the investigation action on use of audio recording, technical means and conditions of audio recording, playback of the soundtrack and their comments on use of audio recording. In the case of playback of recorded testimonies of another investigation action, this fact shall be noted in a protocol of a relevant investigation action. In the case of a confrontation, playback of earlier recorded testimonies of the confrontation participants shall be allowed only after they have testified at the confrontation and their testimonies have been recorded in the confrontation protocol.

In the course of submission of case materials to process participants after completion of a pre-trial investigation, audio records shall be played back to an

accused and his/her defender, and to other process participants, on request. The audio records shall be sealed and stored with other case materials.

Article 85-2.

Use of Filming and Video Recording in the Course of an Investigation Action

Filming and video recording can be used in the course of inspections, searches, reconstruction of circumstances and in the course of other investigation actions.

Participants of an investigation action shall be informed on use of filming or video recording prior to beginning of the investigation action. After completion of filming, recording and film processing, these visual materials shall be demonstrated to all participants of the investigation action, and these actions shall be documented as a separate protocol. Procedures of documenting of use of filming and video recording, demonstration of these materials in the course of carrying out another investigation action, submission of case material in connection with completion of pre-trial investigation, and in the course of a court examination, shall comply with rules, stipulated in Article 85-1 of this Code.

INITIATION OF A CRIMINAL CASE

Article 94.

Causes and Grounds for Initiation of a Criminal Case

A criminal case shall be initiated based on the following causes:

- 1) submissions or notifications of facilities, bodies, organisations, officials, representatives of authorities, public representatives or individual citizens;
- 2) notifications of representatives of authorities, public representatives or individual citizens, who caught a suspect at a place of a crime or red-handed;
- 3) surrender of a self-reported criminal;
- 4) media publications;
- 5) direct identification of elements of crime by a body of inquiry, an investigator, a prosecutor or a court.

A case can be initiated only if there is sufficient evidence showing existence of elements of a crime.

Article 97.

The Mandatory Obligation to Receive Submissions and Notifications on Crimes and Procedures of their Review

A prosecutor, an investigator, a body of inquiry or a judge are obliged to receive submissions and notifications on crimes that were committed or are being prepared, including submissions and notification on cases out of their jurisdiction.

A prosecutor, an investigator, a body of inquiry or a judge are obliged to make one of three below listed decisions on a submission or a notification on a crime, not later than within three days:

- 1) to initiate a criminal case;
- 2) to refuse initiation of a criminal case;
- 3) to transfer a submission or a notification to a relevant jurisdiction.

In parallel, all appropriate measures shall be taken to prevent or terminate a crime. In the case of relevant reasons to believe that there is a real threat to life or health of a person, who notified about the crime, necessary measures shall be taken to ensure security of the applicant, as well as his/her family members and close relatives, if they are objects of threats or other illegitimate acts made in order to influence the applicant.

If it is necessary to check a submission or a notification of a crime prior to initiation of a criminal case, these checks shall be conducted by a prosecutor, an investigator or a body of inquiry within the terms of not more than ten days by requiring explanations of individual citizens or officials or by requiring necessary documents.

Prior to initiation of a criminal case, a submission or a notification on a crime can be checked by means of search and investigation activities. Execution of specific search and investigation activities, stipulated by the due legislation of Ukraine shall be made if authorised by a court, based on application of a chief officer of a relevant operational unit or his/her deputy, agreed with a prosecutor. A judge shall issue a resolution on such authorisation and the resolution can be appealed against, according to procedures and in cases stipulated in articles 177, 178 and 190 of this Code.

Article 98.

Procedures of Initiation of a Case

Provided existence of causes and grounds stipulated in Article 94 of this Code, a prosecutor, an investigator, a body of inquiry or a judge are obliged to issue a resolution on initiation of a criminal case, specifying causes and grounds for initiation of the case, relevant article of the criminal law that specifies elements of the crime under which the case was initiated and further proceeding of the case.

If at the moment of initiation of a criminal case a person who committed the crime has been already identified, the criminal case shall be initiated against this person.

A people's judge shall initiate cases stipulated in paragraph 1 of Article 27 of this Code and a prosecutor shall initiate cases, stipulated in paragraph 3 of Article 27 of this Code.

After initiation of a case:

- 1) a prosecutor shall transfer the case for pre-trial investigation or inquiry;
- 2) an investigator shall start a pre-trial investigation, and a body of inquiry shall start an inquiry;
- 3) a court shall decide on court examination of the case if a relevant crime is stipulated in paragraph 1 of Article 27 of this Code.

Article 99.

Refusal to Initiate a Case

If there are no grounds to initiate a criminal case, a prosecutor, an investigator, a body of inquiry or a judge shall issue resolutions on refusal to initiate the criminal case and shall inform interested persons, facilities, organisation on these matters.

If after checking of a submission or a notification, no grounds for initiation of a criminal case were identified, but outcomes of the checks suggest existence of elements of an administrative offence, a disciplinary infraction or some other infringement of the due public order, a prosecutor, an investigator, a body of inquiry or a judge shall refuse to initiate a criminal case but can submit a relevant submission or a notification for review of a non-governmental organisation, a juvenile service, an owner or personnel members of a facility, a body or an organisation or to a duly authorised body for implementation of relevant measures or can transfer materials for application of administrative sanctions according to established procedures.

Article 99-1.

Appeals against Decisions to Refuse Initiation of a Criminal Case

Resolutions of an investigator and a body of inquiry on refusal to initiate a criminal case can be appealed against to a relevant prosecutor. If such resolution was issued by a prosecutor, it can be appealed against to a superior prosecutor. Such appeals shall be submitted by an interested person, or by his/her representative within seven days from the date of reception of a copy of the resolution.

Resolutions of a prosecutor, an investigator and a body of inquiry on refusal to initiate a criminal case can be appealed against by an interested person or by his/her representative to a court according to procedures stipulated in Article 236-1 of this Code.

Resolution of a judge on refusal to initiate a criminal case can be appealed against by an interested person or by his/her representative within seven days from reception of a copy of the resolution, according to appeal procedures.

Article 100.

Supervision of Legality of Initiation of Criminal Cases by Prosecutors

A prosecutor shall supervise legality of initiation of a criminal case.

An investigator and a body of inquiry are obliged to submit a copy of a resolution on initiation of a criminal case or on refusal to initiate the criminal case to a prosecutor, not later than within one day.

If a case was initiated without legitimate grounds, a prosecutor shall close the case, and if no investigation actions have been carried out under the case, the prosecutor shall cancel the resolution on initiation of the case.

If an investigator or a body of inquiry have refused to initiate a criminal case without relevant grounds, a prosecutor shall issue his/her resolution on cancellation of the resolution of the investigator or the body of inquiry and shall initiate the case.

BODIES OF INQUIRY AND PRE-TRIAL INVESTIGATION

Article 101.

Bodies of Inquiry

Bodies of inquiry incorporate:

(...)

4) customs bodies - on cases of smuggling;

(...)

7) bodies of protection of the state border - on cases of violations of the state border;

(...)

Article 102.

Bodies of Pre-trial Investigation

Bodies of pre-trial investigation incorporate investigators of the Office of the Public Prosecutor, investigators of bodies of the Ministry of Interior, investigators of the Tax Militia and investigators of security bodies.

INQUIRY

Article 108.

Terms of Inquiry

In the case of a crime, that does not belong to grievous crimes or especially grievous crimes, inquiry must be completed within the term of not more than ten days from the moment of identification of a person who committed the crime. If such person was not identified, inquiry shall be terminated in compliance with requirements stipulated in Article 209 of this Code.

In the case of a grievous or especially grievous crime, inquiry must be carried out within the term of not more than ten days from the moment of initiation of the case.

In the case of imposition of a restraint on a suspect according to procedures stipulated in Article 165-2 of this Code, inquiry must be carried out within the term of not more than five days from the moment of imposition of the restraint.

Article 110.

Appeals against Actions and Resolutions of a Body of Inquiry

Actions and resolutions of bodies of inquiry can be appealed against to a prosecutor.

In the case of submission of a complaint a prosecutor is obliged to review it within ten days and to inform the applicant on his/her decision on the complaint.

Actions and resolutions of bodies of inquiry can be appealed against to a court.

Complaints against actions and resolutions of bodies of inquiry shall be reviewed by a court of first instance in the course of preliminary examination of a relevant case or in the course of its substantive examination unless otherwise stipulated in this Code.

MAJOR PROVISIONS OF PRE-TRIAL INVESTIGATION

Article 111.

Conduction of Pre-trial Investigation

Pre-trial investigation shall be conducted in all cases, except in cases of crimes listed in paragraph 1 of Article 27 and Article 425 of this Code. The latter cases shall be subject to the requirement to conduct pre-trial investigation if relevant

crimes were committed by a minor or by a person who cannot execute his/her right for defence due to physical or mental disabilities; or if ruled necessary by a prosecutor or by a court.

Article 113.

Procedures of Pre-trial Investigation

Pre-trial investigation shall be conducted only after initiation of a criminal case and according to procedures, stipulated in this Code.

An investigator is obliged to launch investigation of a criminal case, initiated by the investigator or transferred to him/her. If the criminal case was initiated by the investigator and taken by him/her for further proceeding, he/she shall issue a single resolution on initiation of the case and acceptance of the case for investigation. In the case of acceptance of a criminal case that was initiated earlier, the investigator shall issue a separate resolution on acceptance of the case for his/her investigation.

An investigator shall submit a copy of a resolution on acceptance of a case for his/her investigation to a prosecutor, within one day.

Article 114.

Competence of an Investigator

Conducting a pre-trial investigation, an investigator shall independently decide on the course of the investigation course and conduction of investigation actions, except in cases when law stipulates the need of authorisation by a court (a judge) or by a prosecutor; the investigator shall bear full responsibility for their legitimate and timely completion. If the investigator does not agree with instructions of the prosecutor on accusation of a person, on qualification of a crime and a charge, on transfer of a case to a court or on closure of the case, he/she shall have the right to submit the case to a superior prosecutor with written description of his/her arguments. In this case the superior prosecutor shall either cancel instructions of the subordinate prosecutor or authorise another investigator to investigate the case.

In connection with cases under his/her investigation, an investigator has the right to require and instruct bodies of inquiry to conduct search and investigation activities and to require bodies of inquiry to provide assistance in conduction of specific investigation actions. These requests and instructions of the investigator are mandatory for execution by bodies of inquiry.

In cases, that require mandatory conduction of pre-trial investigation, an investigator has the right to launch a pre-trial investigation without waiting for completion of actions stipulated in Article 104 of this Code by bodies of inquiry.

Resolutions of an investigator, issued according to law in a criminal case under his/her investigation, shall be mandatory for execution by all facilities, bodies, organisations, officials and individuals.

In the course of conduction of different investigation actions, an investigator has the right to use typewriting, audio-recording, shorthand, filming and video-recording.

Article 120.

Terms of Pre-trial Investigation

A pre-trial investigation of a criminal case shall be completed within two months. This period of time shall include the time from the moment of initiation of the case to the moment of its submission to a prosecutor with a bill of indictment or a resolution on submission of the case to a court for review on application of forced medical measures; or to the period of time till closure of the case or termination of proceeding the case. The term can be extended up to three months by a district prosecutor, a city prosecutor, a military prosecutor of an army, a fleet and a garrison and by a prosecutor of the same rank, if it is impossible to complete the investigation. The term of pre-trial investigation does not incorporate the period of time of review of materials of the criminal case by an accused and his/her defender.

The term of pre-trial investigation, stipulated in paragraph 1 of this Article can be extended in especially complex cases up to six months by the prosecutor of the Autonomous Republic of Crimea, an oblast prosecutor, the prosecutor of Kyiv, a military prosecutor of an army, a fleet and a prosecutor of the same rank or by their deputies, based on a motivated resolution of an investigator.

Further extensions of terms of pre-trial investigation can be made in extraordinary cases by the Prosecutor-General of Ukraine or his/her deputies.

If a case is returned by a court for additional investigation, and if investigation of a closed case is renewed, terms of pre-trial investigation shall be set by a prosecutor in charge of supervision of the case, within one month from the moment of acceptance of the case for investigation. Further extension of the term shall be made according to general procedures.

The rules, set in this article, shall now cover cases where a person who committed a crime was not identified. The term of investigation of such a case shall start from the moment of identification of a person who committed the crime.

Article 121.

Inadmissibility of Disclosure of Information of a Pre-trial Investigation

Information of a pre-trial investigation can be disclosed only if authorised by an investigator or a prosecutor and only to the extent, they assume possible.

In necessary cases, an investigator shall warn witnesses, a victim, a civil claimant, a civil defendant, a defender, an expert, an interpreter, procedural witnesses, as well as other persons who participate in investigation actions, on their obligation of non-disclosure of information of a pre-trial investigation without his/her authorisation. Persons who disclose information of a pre-trial investigation shall be liable to criminal sanctions under Article 387 of the Criminal Code of Ukraine.

Article 122.

Procedures of Notification of a Victim on His/her Rights

An investigator who recognises a person as a victim of a crime, shall explain this person his/her rights stipulated in Article 49 of this Code and shall note these matters in a resolution that shall be confirmed by signature of the victim.

If a crime caused material damages to a person, a facility, a body or an organisation, an investigator shall notify a victim and his/her representative on the right to make a civil lawsuit and shall note these matters in a protocol of interrogation or shall send a written notification to the victim; a copy of the notification shall be incorporated into the case materials.

Article 123.

Recognition of a Civil Claimant

If a civil lawsuit was filed under a case, an investigator is obliged to issue a motivated resolution on recognition of a victim as a civil claimant or on rejection to recognise.

A civil claimant or his/her representative shall be notified on issuance of the resolution. In the case of attendance of the civil claimant or his/her representative, he/she shall be explained his/her rights stipulated in Article 50 of this Code, and a relevant entry shall be made on the matter at the resolution, that shall be certified by signature of the civil claimant or his/her representative.

Article 125.

The Obligation to Ensure a Civil Lawsuit and Confiscation of Property Stipulated by Law

An investigator, based on an application of a civil claimant or acting independently, is obliged to take measures to ensure a lawsuit filed under a criminal case, as well as a potential civil lawsuit and issue a resolution on these matters.

In cases of crimes for which criminal law stipulates potential sanction of confiscation of property, an investigator is obliged to take necessary measures to ensure fulfilment of a potential court sentence of confiscation of property by issuance of a resolution on these matters.

Article 126.

Procedures for Ensuring a Civil Lawsuit and Potential Confiscation of Property

A civil lawsuit and potential confiscation of property shall be ensured by arrest of deposits, valuable items and other property items of a defendant or a suspect or persons who bear material liability for his/her actions, wherever these deposits, valuable items and other property items may be located, as well as by seizure of property under arrest.

Property under arrest shall be inventoried and can be transferred for storage to representatives of facilities, bodies, organisations or to family members of an accused or to other persons. Persons to whom the property items are transferred shall be warned against their signatures on their criminal liability for a failure to store these items.

Basic necessities that are used personally by a person under inventory and his/her family members shall not be inventoried. The list of these items is specified in the Annex to the Criminal Code of Ukraine (2002-05).

Arrest of property and transfer of the property for storage shall be documented as a protocol, that shall be signed by a person who carried out the inventory, procedural witnesses and a person to whom the property was transferred for storage. The protocol shall be accompanied by the list of property items transferred for storage, signed by these persons.

In necessary cases a specialist shall be invited for valuation of property items inventoried, who shall also sign the protocol and the list of property items inventoried and valued. .

An arrest of property shall be cancelled by a resolution of an investigator when this measure is no longer needed.

Article 129.

Review of Applications by an Investigator

An investigator is obliged to review applications of a suspect, an accused, their defenders, as well as a victims and his/her representative, a civil claimant, a civil defendant or their representatives on execution of any investigation action, within not more than three days and to satisfy these applications, if circumstances on identification of which these applications were submitted, are of significance for a case.

A person who submitted an application shall be informed on outcomes of review of the application. A motivated resolution shall be issued on complete or partial rejection of the application.

Chapter 14

INTERROGATION OF A WITNESS AND A VICTIM

Article 166.

Procedures of Ordering a Witness to Attend for Interrogation

A witness shall be ordered to attend an investigator by summons, that shall be handed to the witness against his/her signature; if the witness is temporary absent, the summons shall be handed to an adult family member of the witness, to a housing maintenance facility, Executive Committee of a village or township Council of People's Deputies or administration of a facility of employment of the witness. The witness can be also ordered to attend by a cable message or a telephone message.

Summons must specify who is ordered to attend as a witness, a place of attendance, a person ordering, a time of attendance and consequences of a failure to attend, stipulated in articles 70 and 71 of this Code.

A minor witness shall be ordered to attend via his/her legal representatives.

Article 167.

Interrogation of a Witness

A witness can be interrogated on facts associated with a given case, as well as on personalities of a suspect or an accused or a victim.

A witness shall be interrogated in a place of proceeding a pre-trial investigation and, if necessary, in his/her place of stay.

A witness shall be interrogated separately and in absence of other witnesses. An investigator shall take measures to ensure that witnesses called under a common case were not able to communicate prior to completion of the interrogation.

Prior to an interrogation an investigator shall ascertain identify of a witness, inform the witness what is a case he/she is called to attend and shall warn the witness on his/her obligation to provide all information he/she knows on the case, as well as about his/her criminal liability for his/her refusal to testify and for provision of a patently false testimony. Then the investigator shall ascertain relations between the witness and an accused and a victim and shall initiate the interrogation. After completion of testimony of the witness, the investigator shall pose questions to him/her. It is prohibited to pose questions formulated in such a way that they contain an answer, a part of the answer or a prompt to the answer (suggestive questions).

Article 170.

A Protocol of Interrogation of a Witness

An interrogation of a witness shall be documented as a protocol, in compliance with rules, stipulated in Article 85 of this Code. Besides that, the protocol of interrogation shall contain: family name, first name and patronymic name of the witness, his/her age, citizenship, ethic origin, education, employment, occupation or a position, a place of residence as well as information on his/her relations with an accused and a victim.

A protocol shall note that a witness was explained his/her rights, obligations and liabilities for a refusal to testify or provision of a patently false testimony. Testimony of the witness and his/her responses to questions posed shall be written in the first person and as literally as possible.

A witness, if he/she so wishes, can be provided opportunity to make his/her own hand-written testimony in presence of an investigator, that shall be noted in a protocol.

After completion of an interrogation, an investigator shall provide a protocol to a witness for reading. On request of the witness, the investigator can read him/her the protocol. The witness and persons who participated in the interrogation have the right to request introduction of amendments and corrections into the protocol. These amendments and correction shall be incorporated into the protocol by the investigator.

A protocol shall be signed by a witness, an investigator and persons who participated in the interrogation. If the protocol contains several pages, the witness shall sign every page of the protocol separately.

Article 171.

Ordering to Attend and Interrogation of a Victim

A victim shall be ordered to attend in compliance with rules, stipulated in Article 166 of this Code.

A victim shall be interrogated in compliance with requirements stipulated in paragraphs 1, 2 and 3 of Article 167 of this Code. Prior to an interrogation an investigator shall warn the victim about his/her criminal liability for provision of a patently false testimony according to Article 384 of the Criminal Code of Ukraine. Then the investigator shall ascertain relations between the victim and a suspect or an accused and shall propose the victim to tell what he/she knows in connection with a case. It is prohibited to pose questions formulated in such a way that they contain an answer, a part of the answer or a prompt to the answer (suggestive questions).

An interrogation of a witness shall be documented as a protocol, in compliance with rules, stipulated in Article 170 of this Code.

Chapter 15

A CONFRONTATION, A LINE-UP IDENTIFICATION

Article 172.

A Confrontation

An investigator has the right to conduct a confrontation of two persons who were interrogated earlier and whose testimonies are contradictory.

Article 173.

Conduction of a Confrontation

At the beginning of a confrontation it shall be identified whether the persons who were called to participate in the confrontation, know each other and what are relations between these persons. Witnesses shall be warned about their criminal liability for a refusal to testify and for provision of a patently false testimony, and victims shall be warned about their criminal liability for provision of a patently false testimony.

Persons who were called to participate in a confrontation shall be proposed to testify, in rotation, about circumstances of a case that are to be refined by the confrontation. Then an investigator shall pose questions. Persons who were called to participate in the confrontation, can pose questions to each other if allowed by the investigator.

Testimonies made by participants of a confrontation in the course of previous interrogations can be disclosed only after completion of their testimonies at the confrontation and incorporation of their testimonies into a protocol.

An investigator shall provide a confrontation protocol to interrogated persons for review, or shall read the protocol to them if they wish so. The interrogated persons have the right to require introduction of changes and amendments into the protocol. These changes and amendments must be incorporated into the protocol. The confrontation protocol shall be signed by every interrogated person and by the investigator.

Article 174.

Presenting a Person for a Line-up Identification

If it is necessary to present a person for a line-up identification by a witness, a victim, an accused or a suspect, an investigator shall initially interrogate them about appearance and signs of that person and about circumstances under which an identifier saw the person, and shall complete a protocol of interrogation on these matters.

If an identifier is a witness or a victim, he/she shall be warned about his/her criminal liability for provision of a patently false testimony; besides that, the witness shall be also warned about his/her criminal liability for a refusal to testify. A person to be identified shall be presented to the identifier accompanied by not less than three other persons of the same sex, who do not differ sharply by their appearance and clothes.

Before presenting a person for identification, he/she shall be proposed to take any place among other persons being presented. An identifier shall be proposed to specify a person identified and to explain signs of the identification.

In exceptional cases, in order to ensure security of an identifier, a line-up identification shall be conducted out of eyesight of a person to be identified, in compliance with requirements stipulated in this Article. A person who was presented for identification must be informed on the outcome of the identification.

In necessary cases, identification can be made with use of photographs, in compliance with requirements stipulated in this Article.

Presentation of a person for identification shall be conducted in presence of not less than two procedural witnesses. In the case of identification according to rules of paragraph 4 of this Article, the procedural witnesses must ascertain possibilities of identification out of eyesight of a person under identification and shall certify such identification.

Article 176.

A Protocol on Presentation for Identification

Presentation of a person or an item for identification shall be documented as a protocol in compliance with rules stipulated in Article 85 of this Code. Besides that, the protocol shall provide personal information about an identifier and information on the fact that he/she was warned about his/her criminal liability for provision of a patently false testimony and for a refusal to testify; information on persons and items presented for identification and detailed account of signs that allowed the identifier to identify the person or the item.

In the case of conducting an identification according to rules stipulated in paragraph 4 of Article 174 of this Code, besides the information entries referred to in this Article, a protocol must also note that the identification was conducted out of eyesight of a person under identification, and specify all circumstances and conditions of the identification procedure.

A protocol shall be signed by all persons who participated in an identification, by procedural witnesses and by an investigator. The protocol shall be annexed by photographs, if persons or items presented for identification were photographed.

Chapter 17

A SURVEY, A PHYSICAL EXAMINATION, A RECONSTRUCTION OF CIRCUMSTANCES AND CONDITIONS OF AN EVENT

Article 193.

Conduction of a Physical Examination

If it is necessary to identify or to confirm existence of specific peculiarities of an accused, a suspect or a victim, an investigator shall issue a resolution on these matters and shall conduct a physical examination.

If it is necessary to conduct a forensic medical examination of an accused, a suspect, a victim or a witness, the said examination shall be conducted by a forensic medical expert or a physician as instructed by an investigator.

An investigator does not have the right to be present in the course of physical examination of a person of the opposite sex, when the examination is associated with the need to strip the person under examination. In the course of physical examination it is prohibited to act in a way that is derogatory for dignity of a person under examination or is dangerous to his/her health.

A physical examination conducted by an investigator shall be documented as a protocol that shall be signed by the investigator and by a person under the physical examination. A forensic medical examination shall be documented as a report; when the examination is conducted by a physician, he/she shall issue a certificate.

Chapter 19

TERMINATION OF A PRE-TRIAL INVESTIGATION

Article 206.

Grounds for and Procedures of Termination of an Investigation

A pre-trial investigation of a criminal case shall be terminated if:

- 1) location of an accused is not known;
- 2) a mental or another serious disease of the accused prevents completion of proceeding the case;
- 3) a person who committed a crime was not identified.

In cases referred to in clauses 1 and 2 of this Article, a pre-trial investigation can be terminated only after issuance of a resolution by an investigator on arraignment of a definite person as an accused, when the investigator completed all investigation actions that are possible in absence of the accused and took all necessary measures to secure documents and other potential evidence items under a case.

In cases referred to in clause 3 of this Article, a pre-trial investigation can be terminated only after completion of all necessary and possible investigation actions for identification of a person who committed a crime.

A pre-trial investigation shall be terminated by a motivated resolution of an investigator; a copy of the resolution shall be submitted to a prosecutor. If two or several persons were arraigned as accused under a case and if grounds for termination of the case do not cover all of these accused, an investigator has the right to separate and terminate the case with respect to some of the accused persons or to terminate proceeding of the whole case.

Chapter 20

COMPLETION OF A PRE-TRIAL INVESTIGATION

Article 212.

Forms of Completion of a Pre-trial Investigation

A pre-trial investigation shall be completed by issuance of a statement of indictment⁵¹ or a resolution on closure of a case, or a resolution on submission of the case to a court to decide on application of compulsory medical measures.

Article 213.

Grounds for Closure of a Case

A criminal case shall be closed:

- 1) provided existence of grounds stipulated in Article 6 of this Code;
- 2) if participation of an accused in commitment of a crime has not been proven.

Article 214.

Procedures of Closure of a Case

An investigator shall close a case by a motivated resolution; besides entries listed in Article 130 of this Code, the resolution shall contain: personal information about the accused, the essence of the case, grounds for closure of the case, a decision on cancellation of a restraint and measures to ensure a civil lawsuit and potential confiscation of property, as well as a decision on issues associated with material evidence in compliance with Article 81 of this Code.

If an investigation found facts that require application of community correction or disciplinary measures or an administrative sanction with respect to a persons who was arraigned as an accused or with respect to other persons, in the course of closure of a case, an investigator shall make these facts known to a non-governmental organisation, a comrades' court⁵², a facility personnel or administration of a facility, a body or an organisation for application of relevant measures or shall send the case materials to a court for application of administrative sanctions.

A copy of a resolution on closure of a case shall be sent to a prosecutor, a person who was arraigned as an accused, a person on whose application the case was initiated, as well as to a victim and a civil claimant.

Article 215.

⁵¹ Translator's note - in this translation 'statement of indictment' refers to a summary case report to be issued by an investigator at completion of investigation.

⁵² Translator's note - it seems to be a rudiment of Soviet times.

Appeals against a Resolution on Closure of a Case

Article 216.

Recommencement of Investigation of a Closed Case

A pre-trial investigation of a closed case can be recommenced within the established time limitations of criminal liability by a resolution of a prosecutor, a chief of an investigation department; and in cases stipulated in paragraph 3 of Article 236-6 of this Code - by a resolution of a judge.

Article 217.

Familiarisation of an Accused, a Civil Claimant and a Civil Defendant with Case Materials

Having recognised a pre-trial investigation of a case that is to be transferred to a court examination completed, an investigator shall notify on these matters: a victim and his/her representative, a civil claimant, a civil defendant or their representatives; the investigator shall explain them their rights to get familiarised with the case materials; the investigator shall complete a relevant protocol on these matters or shall annex a copy of the relevant notification to the case materials.

If the said persons require in a verbal or in a written form to get familiarised with case materials, an investigator is obliged to provide opportunities to a victims or his/her representative, a civil claimant, a civil defendant for familiarisation with the case material. The civil defendant can get familiarised with the case materials only to the extent stipulated in paragraph 2 of Article 51 of this Code.

The said persons have the right to take notes on case materials and make applications for additional investigation [actions]; an investigator shall decide on these applications in compliance with rules stipulated in Article 129 of this Code.

Materials on application of security measures with respect to personal who participate in criminal proceedings shall not be provided to the said persons for familiarisation.

Declaring an investigation completed and provision of case materials for familiarisation shall be documented as a protocol in compliance with rules stimulated in Article 220 of this Code.

Article 222.

Provision of Additional Investigation Materials to an Accused and other Process Participants

After completion of additional investigation actions, an investigator is obliged to familiarise an accused and his/her defender, as well as to provide opportunities to a victim and his/her representative, a civil claimant, a civil defendant or to their representatives to get familiarised with all additional materials, and - in the case of their application - to get familiarised with the whole case, in compliance with requirements of articles 217 - 221 of this Code.

Article 223.

A Statement of Indictment

After completion of an investigation and meeting requirements of articles 217 - 222 of this Code, an investigator shall complete a statement of indictment.

A statement of indictment shall contain two parts - a descriptive part and a resolute part. The descriptive part shall contain: circumstances of a case as identified in the course of a pre-trial investigation; a place, a time, methods, motives and consequences of a crime committed by every accused, as well as evidence collected in the case and information on a victim; testimonies of every accused on substance of the accusations posed, his/her arguments provided in defence and results of checks of these arguments; existence of circumstances that aggravate or mitigate his/her punishment.

References to evidence items must specify pages of case materials.

A resolute part shall contain personal information about every accused, a brief description of substance of accusations posed with references to articles of criminal law that stipulate given crimes.

(...)

Article 224.

Annexes to a Statement of Indictment

A statement of indictment shall be annexed by:

1) a list of persons to be required to attend a court session, specifying their addresses and pages of case materials, where their testimonies or conclusions are provided;

(...)

3) notes on material evidence, a civil lawsuit, measures taken to ensure the lawsuit and potential confiscation of property;

(...)

In order to prevent disclosure of information on persons with respect to whom security measures were applied according to procedures stipulated in articles 52-1 and 52-3 of this Code, a list of persons to be required to attend a court session shall contain pseudonyms instead of their genuine family names, first names and patronymic name and a title of a body that implements the security measures and its address instead of genuine addresses of these persons.

Article 225.

Transfer of a Case to a Prosecutor

After completion of a statement of indictment an investigator shall transfer a case to a prosecutor.

Chapter 21

PROSECUTORS' SUPERVISION OF COMPLIANCE OF BODIES OF INQUIRY AND PRE-TRIAL INVESTIGATION WITH LAW

Article 227.

Competence of a Prosecutor in the Sphere of Supervision of Compliance of Bodies of Inquiry and Pre-trial Investigation with Law

Supervising compliance of bodies of inquiry and pre-trial investigation with law, a prosecutor within his/her competence, shall:

- 1) request bodies of inquiry and pre-trial investigation to submit, for supervision of criminal cases: documents, materials and other information in committed crimes, information on progress of inquiry, investigation and identification of persons who committed crimes; check, not less than once in a month, compliance with legal requirements on reception, registration and review of submissions and notifications on committed crimes and crimes in preparation;
- 2) abrogate illegitimate and unjustified resolutions of investigators and persons in charge of inquiry;
- 3) provide written instructions on investigation of crimes, on choice, replacement or cancellation of restraints, on qualification of a crime, on conduction of specific investigation actions and search for persons who committed crimes;
- 4) authorise bodies of inquiry to execute resolutions in apprehension, compulsory attendance, taking into custody, search, seizure, search for persons who committed crimes, execution of other investigation actions, as well as provide instructions on execution of necessary measures for disclosure of crimes and identification of perpetrators of these crimes in cases being processed by a prosecutor or a by a prosecutor-investigator;
- 5) take part in an inquiry and a pre-trial investigation and execute particular investigation actions in necessary cases or investigate any criminal case to a full extent;

- 6) authorise execution of a search and dismissal of an accused from his/her position and other actions of an investigator and a body of inquiry in cases stipulated in this Code;
- 7) extend term of investigation in cases and according to procedures stipulated in this Code;
- 7-1) agree to a choice of restrain of taking into custody or submit an application of a court on choice of the restrain, and on extension of terms of keeping in custody according to procedures stipulated in this Code;
- 8) return criminal cases to bodies of pre-trial investigation with his/her instructions on additional investigation;
- 9) withdraw a case from a body of inquiry and transfer any case to an investigator, transfer a case from one body of pre-trial investigation to another in order to ensure its full and unbiased investigation to the maximal extent possible;
- 10) dismiss a person in charge of inquiry or an investigator from further processing of an inquiry or a pre-trial investigation if these persons did not comply with law in the course of investigation of a case;
- 11) initiate criminal cases or refuse to initiate them; close or terminate proceeding of criminal cases; warrant closure of a criminal case by an investigator in cases stipulated in this Code, approve statements (resolutions) of indictment; submit criminal cases to a court;
- 12) decide on granting participation of a defender in a case.

Besides that, a prosecutor shall fulfil other responsibilities provided to him/her by this Code.

Instructions of a prosecutor that are submitted to bodies of inquiry and pre-trial investigation in connection with initiation and investigation of criminal cases according to procedures stipulated in this Code, are mandatory for execution by these bodies. Submission of appeals against these instructions to a superior prosecutor shall not terminate execution of these instructions, except in cases stipulated in paragraph 2 of Article 114 of this Code.

Article 228.

Examination of a Case with a Statement of indictment by a Prosecutor

After receiving a case with a statement of indictment from an investigator, a prosecutor is obliged to examine:

- 1) whether an event of crime has happened;
- 2) whether there are elements of crime in an act of which an accused is charged;
- 2-1) whether requirements of this Code on ensuring the right of a suspect and an accused for defence were met in the course of inquiry and pre-trial investigation;
- 3) whether the case incorporates circumstances that entail the need to close the case according to Article 213 of this Code;
- 4) whether the accused was charged of all his/her criminal actions identified;

- 5) whether all persons who were found to commit a crime were arraigned as accused;
- 6) whether actions of the accused were adequately qualified according to articles of criminal law;
- 7) whether requirements of law were complied with in the course of completion of the statement of indictment ;
- 8) whether a restraint was chosen adequately;
- 9) whether measures were taken to ensure compensation of damages caused by the crime and potential confiscation of property;
- 10) whether causes and conditions that promoted the crime were identified and whether measures were taken to eliminate these causes and conditions;
- 11) whether bodies of inquiry or pre-trial investigation complied with other requirements of this Code.

Article 229.

Decisions of a Prosecutor on a Case with a Statement of Indictment

After examination of a case with a statement of indictment, a prosecutor or his/her deputy shall make one of the following decisions:

- 1) to approve the statement of indictment or to complete a new statement of indictment ;
- 2) to return the case to a body of inquiry or to an investigator for additional investigation, accompanied by his/her written instructions;
- 3) to close the case by issuing a resolution on the matter in compliance with requirements of Article 214 of this Code.

A prosecutor or his/her deputy has the right to amend a list of persons to be called to attend a court session; as well as to cancel or replace a restraint chosen earlier or to chose a restraint if it was not chosen earlier; or, in cases stipulated in this Code, to apply to a court on choosing the restraint of taking into custody.

Article 230.

Completion of a New Statement of Indictment by a Prosecutor

Article 231.

Replacement of a Charge by a Prosecutor

If it is necessary to change a charge by a more serious one or by a new charge that substantially alters the actual circumstances of the earlier charge, a prosecutor or his/her deputy shall return a case to an investigator for additional investigation and a new arraignment.

If a replacement of a previous charge does not entail application of an article of criminal law that stipulates more serious sanctions and if it is not associated with substantial alteration of actual circumstances of the earlier charge, a prosecutor or his/her deputy shall issue a resolution on amendments introduced into the statement of indictment .

Article 232.

Transfer of a Case to a Court by a Prosecutor

After approval of a statement of indictment completed by an investigator or after completion of a new statement of indictment, a prosecutor or his/her deputy shall transfer a case to a court of relevant jurisdiction and shall notify the court whether he/she considers necessary to support the public prosecution.

In parallel, a prosecutor or his/her deputy shall notify an accused to what particular court his/her case was transferred.

In exceptional cases of especially complicated and important criminal cases under jurisdiction of a district (city), inter-district (regional) court or a garrison military court, the Prosecutor of the Autonomous Republic of Crimea, an oblast prosecutor, a city prosecutor of Kyiv or Sevastopol, a military prosecutor (of the rank of an oblast prosecutor) and their deputies can transfer, respectively, these case for court examination to the Supreme Court of the Autonomous Republic of Crimea, an oblast court, Kyiv or Sevastopol city courts, a military court of a region or the Navy.

The Prosecutor-General of Ukraine, the Prosecutor of the Autonomous Republic of Crimea, oblast prosecutors, the City Prosecutor of Kyiv and prosecutors of equal ranks have the right to withdraw a criminal case from a court if the case has not been preliminary examined by the court.

Article 232-1.

Actions of a Prosecutor on Cases Submitted by an Investigator for their Transfer to a Court Examination on Matters of Discharging from Criminal Liability

After reception of a criminal case from an investigator, that was submitted according to procedures stipulated in articles 7, 7-1, 7-2, 7-3, 8, 9, 10 and 11-1 of this Code, a prosecutor shall examine completeness of its investigation and legitimacy of a resolution and shall make one of the following decisions:

- 1) to issue a written consent on resolution of the investigator and transfer the case to a court;
- 2) to abrogate resolution of the investigator and return the case to the investigator, accompanied by his/her written instructions;
- 3) to amend resolution of the investigator or to issue a new resolution.

Article 233.

Terms of Prosecutor's Review of Cases Submitted by Bodies of Inquiry or Investigators

After reception of a case from a body of inquiry or an investigator, a prosecutor is obliged to review the case within not more than five days and transfer the case as appropriate.

Chapter 22

APPEALS AGAINST ACTIONS OF AN INVESTIGATOR OR A PROSECUTOR

Article 234.

Appeals against Action of an Investigator

Actions of an investigator can be appealed against to a prosecutor both directly or via the investigator.

(...)

An investigator is obliged to submit a complaint that was received by him/her to a prosecutor within one day, accompanied by his/her explanations.

(...)

Actions of an investigator can be appealed against to a court.

(...)

Article 235.

Review of Complaints by a Prosecutor

A prosecutor is obliged to decide on a complaint within three days after its reception and to notify a complainant on outcomes of the review.

A complaint and a copy of a notification on review of the complaint shall be incorporated into a case.

A refusal to satisfy a complaint must be motivated.

A decision of a prosecutor can be appealed against to a superior prosecutor.

Article 236.

Appeals against Actions of a Prosecutor

Complaints against actions of a prosecutor in the course of execution of a pre-trial investigation or particular investigation actions by him/her shall be submitted to a superior prosecutor, who shall decide on these complaints within the terms and according to procedures stipulated in articles 234 and 235 of this Code.

Actions of a prosecutor can be appealed against in a court.

Complaints against actions of a prosecutor shall be reviewed by a court of first instance in the course of preliminary examination of a case or in the course of its substantive court examination, unless stipulated otherwise elsewhere in this Code.

Article 236-1.

Appeals to a Court against a Resolution to Refuse Initiation of a Case

A complaint against a resolution of a body of inquiry, an investigator, a prosecutor on refusal to initiate a criminal case shall be submitted by a person whose interests the resolution affects or by his/her representative to a district (city) court in location of a body of a place of employment of an official that issued the resolution, within seven days from the day of reception of a copy of the resolution or a notification of the prosecutor on refusal to abrogate the resolution.

Article 236-2.

Review of a Complaint against a Resolution on Refusal to Initiate a Criminal Case by a Judge

A complaint against a resolution of a prosecutor, an investigator, a body of inquiry on refusal to initiate a criminal case shall be reviewed by a judge individually not later than within ten days from the date of its reception by a court.

A judge shall request materials that substantiated a decision on refusal to initiate a criminal case, he/she shall review them and notify a prosecutor and a complainant on a time of examination of his/her complaint. If necessary, the judge shall listen to explanations of the complainant.

After review of a complaint, a judge, depending on whether a refusal to initiate a criminal case was made in compliance with requirements of Article 99 of this Code, shall make one of the following decisions:

1) to abrogate a resolution on refusal to initiate a criminal case and to return materials for additional examination;

2) to refuse satisfying the complain.

A resolution of a judge can be appealed against to a court of appeals by a prosecutor or a complainant within seven days from its issuance.

A copy of a resolution of a judge shall be sent to a person who issued a resolution [on refusal to initiate a criminal case] that was appealed against, to a prosecutor and a complainant.

Article 236-5.

Appeals to a Court against a Resolution on Closure of a Case

A resolution of a body of inquiry, an investigator, a prosecutor on closure of a criminal case can be appealed against by a person whose interests the resolution affects or by his/her representative to a district (city) court in location of a body of a place of employment of an official that issued the resolution, within seven days from the day of reception of a copy of the resolution or a notification of the prosecutor on his/her refusal to satisfy a complain against the resolution.

Article 236-6.

Review of a Complaint against a Resolution on Closure of a Case by a Judge

A complaint against a resolution of a body of inquiry, an investigator, a prosecutor on closure of a case shall be reviewed by a judge individually not later than within five days, or, if the case is complicated, within ten days from the date of reception of the closed case by a court.

(...)

A resolution of a judge can be appealed against to a court of appeals by a prosecutor or a complainant within seven days from its issuance.

A copy of a resolution of a judge shall be sent to a person who decided to close a case, to a complainant against the resolution [on closure of the case] and to a prosecutor who refused to recommence a pre-trial investigation or an inquiry.

Annex 3. Witness Protection Act

LAW OF UKRAINE ON PROTECTION OF INDIVIDUALS INVOLVED IN CRIMINAL PROCEEDINGS

(*Vidomosti Verkhovnoyi Rady [VVR], 1994, #11, p. 51*)
(*Enacted by the Supreme Council's Resolution #3926-12, of 02.04.94; VVR, 1994, #18, p. 105*)
(*Changed and amended according to Law of Ukraine #523-IV (523-15) of February 06, 2003*)

Chapter I. General Provisions

Article 1

The Notion of Protection of Individuals Involved in Criminal Proceedings

Securing protection of individuals involved in criminal proceedings - i.e., officials engaged in detecting, preventing, stopping, uncovering or investigating criminal offences, as well as in court hearings of criminal cases - shall be understood as legal, organizational, technical, and other measures taken by law enforcement agencies, aimed at protecting the life, homes, health, and property of these individuals against unlawful encroachments by providing conditions necessary for properly administering justice.

Article 2

Individuals Entitled to Protection

The right to use security arrangements stipulated by Articles 1 and 7 of this Law, in the presence of proper circumstances, shall be vested in:

- (a) An individual informing a law enforcement agency on a criminal offence or otherwise involved in or with the detection, prevention, termination, and exposure of criminal offences;
- (b) Victim or his/her proxy involved in a criminal case;
- (c) Suspect, defendant, defence counsel and [other] legal representatives;
- (d) Plaintiff, respondent and their representatives in the given lawsuit on reimbursement of damage incurred by a criminal offence;
- (e) Witness [of the prosecution];
- (f) Experts, translators, and witnesses at official searches;
- (g) Members of families and close relatives of individuals listed in sub clauses (a) to (f) hereinabove provided these individuals are being bullied or exposed to other unlawful actions as participants in criminal proceedings.

Article 3

Protecting Organs

1. Among the organs responsible for protecting individuals indicated in Article 2 hereinbefore shall be bodies of the State which:

- (a) Make decisions on use of protection measures;
- (b) Carry out protection measures.

2. Decisions on protection measures shall be made by the investigating authority, public prosecutor, and court conducting criminal proceedings in which any of the individuals indicated in Article 2 hereinabove are involved, and by the investigating body (unit) in regard to persons involved in or with the detection, prevention, termination or exposure of criminal offences.

3. Protection measures shall be carried out, respectively, on organs of the Security Service or the Interior Ministry, in whose structures relevant task forces [special organization departments] shall be set up. In regard to individuals placed under protection in conjunction with criminal cases being handled by the public prosecutor's office or during court hearings, security arrangements shall be made by the agency of the security service, internal affairs agencies, or penitentiary agencies and institutions.

Security arrangements in relation to military servicemen shall also be made by the commanding officers of respective units.

The security of people staying in the institutions of the criminal penitentiary system shall be ensured by penitentiary agencies and institutions. *(Paragraph 3 added to the Part 3 according to Law of Ukraine #523-IV (523-15) of February 06, 2003)*

(Part 3 changed and amended according to Law of Ukraine #523-IV (523-15) of February 06, 2003)

Article 4

Legal Basis of Security Arrangements with Respect to Persons involved in Criminal Proceedings

The legal basis of protection measures with respect to individuals involved in criminal proceedings shall be made up of the Constitution of Ukraine (888-09), this Law, the Criminal Code (2001-05,2002-05) and the Criminal Proceedings Code (1001-05,1002-05), the Law of Ukraine On Search and Detection Work (2135-12), and other laws.

Chapter II. Rights and Obligations of Individuals Subject to Protection measures, and of Protecting Organs

Article 5

Rights and Obligations of Individuals Subject to Protection Measures

1. Individuals placed under protection shall have the right to:

- (a) File petitions concerning security measures or their cancellations;
- (b) Be informed about security arrangements in their regard;
- (c) Request and receive from the investigating authority, public prosecutor or court additional protection measures or cancellation of measures being taken;
- (d) Lodge complaints of unlawful decisions or actions of protecting authorities with relevant higher-standing authorities, also with the public prosecutor or a court of law.

2. Individuals placed under protection shall be under the obligation to:

- (a) Comply with the terms and conditions of security arrangements and with lawful demands from protecting organs;
- (b) Inform said organs forthwith on each threat or unlawful acts against these individuals;
- (c) Handle with care property and documents issued them for temporary possession by the protecting authority, in keeping with legally set procedures.

Article 6

Rights and Obligations of Protecting Organs

1. The organ deciding on protection measures shall have the right to:

- (a) Request and receive documents, information, and explanations without conducting investigative proceedings, as per statements and notifications on danger threatening persons being placed under protection;
- (b) Have the protecting authority make additional security arrangements;
- (c) Cancel wholly or partially protection measures being taken;

2. Protecting organs shall have the right to:

- (a) Determine protection measures, means and methods thereof, and perforce add to them or modify them;
- (b) Demand from persons under protection compliance with the terms and conditions of security arrangements, and with lawful instructions in conjunction therewith;
- (c) Turn to the investigating authority, public prosecutor or the court of law handling the case for sanctioning protection measures when conducting proceedings or for cancellation of such measures being taken.

3. Protecting organs shall be under the obligation to:

- (a) Negatively respond to any such unlawful act as may become known to them, committed in regard to persons indicated in Article 2 hereinbefore in conjunction with their involvement in or with criminal proceedings;
- (b) Secure protection of the life, health, home, and property, depending on the threatening situation;

(c) Timely inform persons under protection on changes in or cancellation of security arrangements.

4. Protecting organs shall be under the obligation to adhere to the law and respect citizens' rights and freedoms.

Information about security arrangements in regard to the above- mentioned persons shall be considered classified.

Chapter III. Security Arrangements

Article 7

Security Arrangements

1. Security arrangements shall include:

- (a) Bodyguards and guards watching home and property;
- (b) Issuance of special individual protection means and warning devices;
- (c) Use of technical means of tracing and listening in on telephone and other communications; visual surveillance;
- (d) Replacement of ID papers and changes in appearance;
- (e) Transfer to a different place of work or enrolment in a course of training;
- (f) Change of residence;
- (g) Enrolment in a children's preschool educational institution or social welfare institution;
- (h) Securing confidentiality of information on the person [under protection];
- (i) Court hearings in camera.

2. Depending on the nature and degree of danger to the life, health, home, and property of persons under protection, other security arrangements may be made.

Article 8

Bodyguards, Protection of Home and Property

1. Protecting organs shall perforce arrange for bodyguards and protection of the homes and property of their charges.

2. Home and property may be equipped with fire and burglar alarm devices, private home numbers and car license plates may be changed.

Article 9

Issuance of Special Individual Protection Means and Warning Devices

In the presence of danger to the life and health of persons under protection these persons may be issued special individual protection means and warning devices in keeping with legally set procedures.

Article 10

Use of Technical Means of Tracing and Listening In on Telephone and Other Communications

When threatened with acts of violence or other unlawful actions, persons under protection may request or agree in writing to use of means of listening in on their telephone and other communications, including audio recording equipment.

Article 11

Change of ID Papers and Appearance

If need be, persons under protection may have their ID papers, other documents, and appearance changed.

Article 12

Change of Place of Work or Study

1. If in order to eliminate a danger to a person under protection his/her place of work or study has to be changed, such arrangements shall be made following this person's request or consent [in writing].

2. The time this person has to be absent from work under such circumstances shall be included in this person's service record and a monetary compensation issued; if this person receives a lower paid job, the difference shall be made up for as provided by current legislation and keeping with procedures adopted by the Cabinet of Ministers of Ukraine.

Article 13

Change of Residence

1. Persons placed under protection may for reasons of security be temporarily or perpetually moved to a different place of residence.

2. Making decisions on changes of residence, accommodations, and allowance in the amount of a minimum wage, and employment arrangements shall be the responsibility of the authority assigning protection, in keeping with procedures determined by the Cabinet of Ministers of Ukraine.

When temporarily moved to a new residence, the previous living accommodation shall be retained.

3. Changes of ID papers, appearance, and residence shall be effected only as petitioned for or agreed to by the person under protection and sanctioned by the public prosecutor or ruled by a court of law, except in an emergency, under circumstances when a threat to the life and safety of the person under protection cannot be eliminated using other means.

Article 14

Enrolment in a Children's Preschool Educational or Social Welfare Institution

To secure protection of minors, in the presence of their parents' or legal representatives' consent, these minors may be temporarily enrolled in children's preschool educational institutions; as for disabled adults, they may be enrolled in social welfare institutions.

Article 15

Securing Confidentiality of Information

The confidentiality of information about persons under protection shall be secured by:

- (a) Classifying data pertaining to such a person in the documents of verification (statements, letters of explanation, etc.), as well as in investigating and court records, changing the first, middle and last name therein with pseudonyms - as resolved by the investigating authority, public prosecutor or court ruling. These decisions (rulings) shall not be entered in the case file, but shall be kept separately by the authority conducting the criminal proceedings;
- (b) Conducting line-ups with the identifying person unobserved by the suspect, in keeping with the criminal proceedings legislation;
- (c) Not entering genuine biographical data of a person under protection in the list of persons to be subpoenaed;
- (d) Subpoenaing such persons only via the body responsible for their protection;
- (e) Temporarily banning disclosure of information about a person under protection at public inquiry offices, passport desks, traffic control inspectorates, telephone inquiry services, and other government-run inquiry outlets.

Article 16

Court Hearings in Camera

1. In certain circumstances, for reasons of security, court hearings involving persons under protection may be held in camera.

2. To secure protection of witnesses or victims to be interrogated, a court of law may, on its own initiative or as submitted by the public prosecutor's office or other participant in court hearings, pass a ruling stating the reasons and ordering such

interrogation without the defendant being present. Given similar reasons and circumstances, one defendant may be interrogated with the others being absent. After a defendant is brought back to the courtroom the court shall familiarize him/her with the evidence received in this defendant's absence and allow this defendant to offer explanations on this evidence.

3. As an exception, a court of law may relieve witnesses or victims under protection from the obligation to report to a court hearing, provided they confirm their previous testimonies in writing.

Article 17

Refusal of Protection by a Person Involved in Criminal Proceedings

1. If a person involved in criminal proceedings refuses protection stipulated by Articles 9; 11-16 hereinbefore, no security arrangements in regard to this person shall be made.

2. If the circumstances are such that grave consequences are likely to occur, the public prosecutor or court may sanction measures to protect such persons, their homes, and property using technical means of tracing and listening in on their telephone and other communications.

3. Persons refusing protection shall be informed about measures stipulated by Section 2 hereinabove, as well as about their right to appeal against them.

Article 18

Securing Protection of Military Servicemen

Article 19

Securing Protection of Persons at Penitentiaries or Other Places of Confinement

Chapter IV. Security Arrangements in Regard to Persons under Protection and their Cancellation

Article 20

Circumstances and Reasons Warranting Protection Measures

1. Protection measures in regard to persons indicated in Article 2 hereinbefore shall be warranted by evidence pointing to an actual danger to their life, health, home, and property.

2. Protection measures in regard to persons involved in criminal proceedings, members of their families and close relatives shall be resorted to on the following grounds:

- (a) Statement made by a person involved in criminal proceedings or by a member of his/her family or a close relative;
- (b) Request from the official in charge of an appropriate organ of the State;
- (c) Availability of investigative or other information testifying to a danger to the life, health, home, and property of any of the above-mentioned persons.

Article 21

Circumstances and Reasons Warranting Cancellation of Protection Measures

1. The following may be reasons for cancelling protection measures stipulated by this Law:

- (a) Expiry of the term of security arrangements;
- (b) Elimination of the threat to the life, health, home, and property of persons under protection;
- (c) Systematic non-compliance by the person under protection of lawful demands from the protecting organ, provided this person was warned in writing of the possibility of such cancellation.

2. Protection measures in regard to persons involved in criminal proceedings, members of their families, and close relatives may be cancelled on the following grounds:

- (a) Statement made by a person involved in criminal proceedings, a member of his family or a close relative in regard to whom such security arrangements were made;
- (b) Availability of authentic information on the elimination of a threat to the life, health, home and property of said persons.

Article 22

Procedures of Making Decisions on Security Arrangements and their Cancellation

1. Security arrangements shall be made in regard to persons placed under protection only in the presence of circumstances and reasons indicated in Article 20 hereinbefore. Procedures of protection measures shall be determined by this Law and by other legislative acts of Ukraine.

2. The detective and investigative authorities, public prosecutor, and court, on receiving a statement or notification on circumstances threatening persons as stipulated in Article 2 hereinbefore, shall be under the obligation to verify this statement (notification) within 72 hours, or perforce make immediate decisions on using or refusing protection measures. Such decisions shall be executed in the form of substantiated resolutions or rulings and handed over to the organ

responsible for the implementation of such protection measures. Each such resolution or ruling shall be binding on said organs.

If a statement (notification) on a threat to the safety of any such person as indicated in Article 2 hereinbefore contains information on a criminal offence, an investigating officer, public prosecutor, court or judge shall, in keeping with criminal proceedings legislation, make a decision on initiating or refusing criminal proceedings in this case, or on transferring this statement (notification) to an authority with respective jurisdiction..

The applicant shall be promptly notified on the decision in writing.

3. The organ responsible for protection measures shall draw up a list of such measures and means of their implementation, considering the particulars of the case and the need to eliminate the threat. Persons placed under protection shall be advised on the security arrangements, terms and conditions thereof, and rules of using property or documents issued them for reasons of their security.

The protecting organ shall notify the investigating authority, public prosecutor, court or judge handling the criminal case on the security arrangements and their results, and if the threat is eliminated, shall submit a statement requesting cancellation of protection measures to the relevant authority at the place of the person under protection.

4. The protecting organ and the person under protection make an agreement on the terms of use of these measures and obligations of the parties thereto.

5. In the presence of evidence warranting cancellation of protection measures, the investigating authority, public prosecutor, and court shall pass a substantiated resolution or ruling cancelling these measures, which document shall be made known in writing to any of the persons indicated in Article 2 hereinbefore.

This decision may be appealed by the interested party to the public prosecutor or a relevant higher standing authority responsible for protection measures.

Article 23

Obligations in Carrying Out Decisions on Protection Measures

Decisions made by protecting organs within their respective jurisdiction shall be binding on relevant organs, enterprises, institutions, organizations, and officials thereof.

Chapter V. Answerability for Non-compliance with Obligations Established by this Law

Article 24

Answerability for Non-application of Protection Measures

Workers of courts and law enforcement agencies guilty of not making or making untimely decisions, not taking or taking insufficient protection measures in regard to persons indicated in Article 2 hereinbefore shall face disciplinary liability or criminal prosecution.

Article 25

Answerability for Disclosure of Information on Security Arrangements

1. Disclosure of information on security arrangements by persons making decisions on such protection measures or by persons implementing them shall result in disciplinary punishments, and in criminal prosecution provided by law in cases when such disclosure causes grave consequences.
2. Disclosure of such information by a person placed under protection shall result in administrative proceedings or in criminal prosecution in cases when such disclosure causes or may cause grave consequences.

Article 26

Property Liability of a Person Placed under Protection in the Event of Loss of Property Issued for Security Reasons

Selling, pledging or assigning property issued a person under protection for personal use to enhance security arrangements, as well as its loss or damage shall result in liability provided by current legislation.

Chapter VI. Financing and Material-Technical Support of Protection Measures

Article 27

Financing and Material-Technical Support of Protection Measures

Protection measures stipulated by this Law shall be financed and supported in material and technical terms in accordance with current legislation and in keeping with procedures adopted by the Cabinet of Ministers of Ukraine, as well as at the expense of persons placed under protection if they so agree in writing.

Article 28

Control and Monitoring of Security Arrangements

1. Control of the security arrangements for participants in criminal proceedings, members of their families, and close relatives shall be the respective responsibility of the Interior Ministry, the Security Service of Ukraine or State

Penitentiary Department of Ukraine. *(Part 1 changed and amended according to Law of Ukraine #523-IV (523-15) of February 06, 2003)*

2. Monitoring the legality of security arrangements for participants in criminal proceedings, members of their families, and close relatives shall be responsibility of the Procurator General of Ukraine and subordinate public prosecutors.

Leonid Kravchuk, President of Ukraine
City of Kyiv, December 23, 1993
#3782-XII

Annex 4: Decree of the Supreme Court on Rights of Victims of Crimes

THE PLENARY SESSION OF THE SUPREME COURT OF UKRAINE

DECREE

No. 13 of 02.07.2004

On Court Practice of Application of the Legislation on Rights of Victims of Crimes

The Constitution of Ukraine provides for the duty of the State to protect and ensure rights and freedoms of every individual. In this connection, correct and uniform application of provisions of the due criminal procedure legislation on rights of victims of crimes becomes particularly important.

In order to ensure constitutional and procedural guarantees of rights of victims of crimes in the course of criminal justice procedures, and in connection with issues that emerged in court practices, the Plenary Session of the Supreme Court of Ukraine DECREES:

1. To draw attention of courts to the fact that consistent and implacable compliance with provisions of the criminal procedure law of Ukraine that provide for rights of victims of crime, is one of major preconditions for materialisation of citizens' rights for court protection from illegitimate acts, as declared in Article 55 of the Constitution of Ukraine.

2. According to paragraph 2 of Article 49 of the Criminal Procedure Code of Ukraine (referred hereinafter to as CPC), a person, who suffered moral, physical or material damage as a result of a crime, shall be granted rights of a participant of court proceedings only after his/her recognition as a victim of crime. A body of inquiry, an investigator, a prosecutor and a judge shall issue resolutions on recognition or non-recognition of a person as a victim of a crime, and a court shall issue a court order on these matters.

Examining the issue of recognition of a person as a victim of crime, a judge or a court should identify specific damages incurred by a crime (moral, physical or property damages) and specify these matters in a resolution or in a court order.

In cases of uncompleted crimes, a person shall be recognised as a victim of crime if he/she actually incurred moral, physical or property damages.

3. Persons, who incurred damages as a result of crimes committed by themselves cannot be recognised as victims of crime, at the same time, as law does not associate non-recognition of a person as a victim of crime with illegitimate nature of his/her actions, courts should recognise a person as a victim of crime if he/she provoked a crime against him/her by his/her actions. In this

case, illegitimate nature of the victim's actions may be accounted for in legal assessment of actions of the defendant or in the course of awarding his/her sentence.

4. In the course of preliminary case examination, a judge, according to Article 237 CPC, has to check whether all persons who incurred moral, physical or material damages by a crime, have been recognised as victims of crime. If any of such persons has not been recognised as a victim of crime at stages of inquiry and pre-trial investigation, provided a relevant request, the judge should recognise such a person as a victim of crime by his/her resolution, notify the person on these matters and provide him/her opportunities to study materials of the court case. The judge should make the same decision if it is necessary to replace a person who was groundlessly recognised as a victim of crime, a representative of a victim or a civil claimant, by a due person.

If recognition of a person as a victim of crime results in extension of charges against a defendant or in alteration of legal classification of actions he/she committed, a judge or a court should return the case for additional investigation, in compliance with requirements of Article 246 CPC or Article 281 CPC.

A judge or a court should make the same decision if a body of inquiry or a body of pre-trial investigation substantially limited legitimate rights of a victim (e.g. to choose a legal representative, to make requests, to submit motions on dismissal, to submit evidence, to examine all case materials, etc.) and if it is impossible to restore these rights at the stage of court examination of the case.

5. According to paragraph 2 of Article 232 CPC, courts are obliged to respond by separate court orders (resolutions) to identified facts of unjustified delays in recognition of victims of crime (if there are clear signs of damages incurred by crimes), by bodies of inquiry or bodies of pre-trial investigation.

6. In cases of crimes that resulted in death of a victim of crime, rights under paragraphs 3 and 4 of Article 49 CPC, shall be transferred to his/her close relatives. As clause 11 of Article 32 CPC provides the inclusive list of such relatives (parents, spouses, children, full sisters and brothers, grandparents and grandchildren), courts cannot recognise other persons as victims of crimes in these cases.

If several persons from the range of close relatives of a person, who died as a result of the crime, request granting the above rights, all these persons may be recognised as victims of crime

7. A person who incurred damages and requested redress of these damages shall be recognised as a victim of crime and as a civil claimant. The person shall be granted all rights of a victim of crime and a civil claimant as stipulated by law.

8. If a minor or a legally incompetent person was recognised as a victim of crime, a court shall ensure participation of a legal representative of such a person in court proceedings, who should protect his/her rights and legitimate interests; in such a case, there is no need to secure agreement of the victim of crime for participation of his/her legal representative in court proceedings. After 18th birthday of the victim of crime, functions of his/her legal representatives shall cease, however, such legal representative may continue to participate in the case as a representative of the victim of crime (Article 52 CPC).

According to clause 10 of Article 32 CPC, the range of legal representatives of minor or legally incompetent victims of crime incorporates only parents, guardians, wards or representatives of bodies and organisations, that fulfil guardianship/wardship functions in respect to these victims of crime. Courts cannot allow other persons to participate in court proceeding of relevant cases as legal representatives of these victims of crime.

If a minor victim of crime does not have parents or other legal representatives, a court is obliged to ensure participation of a representative of the victim in the court proceedings (to be selected from from the range of persons, specified in Article 52 CPC).

9. Representatives of a victim of crime in the course of court proceedings may incorporate a lawyer, a legal representative, a close relative or other persons allowed to participate by resolutions of an inquiry officer, an investigator of a judge or by a court order. Such representative, whose powers are specified by a relevant certificate, has the same powers as the victim of crime and may act in parallel with the latter person and *in lieu* of the victim of crime.

An adult, legally competent victim of crime has the right to dismiss his/her representative at any time and to protect his/her rights independently.

If a representative abuses his/her powers to the detriment of a victim of crime, his/her participation should be terminated by a resolution of an inquiry officer, an investigator, a judge or by a court order.

10. According to Article 63 CPC, a person who was interrogated or is to be interrogated as a witness in a case, cannot serve as a representative of a victim of crime. In such a case, a court is obliged to inform an adult, legally competent victim of crime on his/her right to select another representative from the range of persons, specified in Article 52 CPC, or to ensure participation of a representative of a minor, legally incompetent victim of crime.

11. Interference in actions of a representative of a victim of crime, threats, violence, offences against his/her health or life, as well as deliberate destruction or damage of his/her property entail criminal sanctions under Articles 397 to 400 of the Criminal Code of Ukraine (referred hereinafter to as CC) .

12. Courts are obliged to ensure participation of a victim of crime in court sessions. If the victim of crime failed to attend after being issued a warrant to appear, a court, according to paragraph 1 of Article 290 CPC, shall decide on further examination of a relevant case or on postponement of the session, depending on whether it is possible to ascertain all circumstances of the case and to protect his/her rights and legitimate interests in his/her absence.

Testimony of the victim of crime, submitted in the course of inquiry or preliminary investigation may be presented in cases, specified in Article 306 CPC.

Examination of a case in absence of the victim of crime (his/her legal representative), without issuance of a warrant to appear in a court session, is a substantial violation of his/her procedural rights and may justify abrogation of a court sentence/verdict or another court order.

In exceptional cases, for example, if it is necessary to ensure security of a victim of crime, a court may free him/her from participation in court proceedings, provided he/she preliminarily certifies authenticity of his/her testimony, submitted in the course of inquiry or pre-trial investigation

Accounting for the fact, that obstruction of attendance of a court session by a victim of crime, as well as compelling him/her to refuse testifying, entail criminal sanctions under Article 386 CC; if the court identifies such facts in the course of trial investigation, the court, according to Article 278 CPC, shall issue a motivated order and a judge shall issue a resolution to notify a public prosecutor on these matters.

13. At a court session, a court is obliged to explain to a victim of crime and his/her representative their rights under Articles 49, 52, 521, 87, 871, 88, 267, 348, 384 CPC, moreover, the court is obliged to ensure materialisation of these rights. A victim of crime, who has the status of a civil claimant, shall be explained rights of a civil claimant, specified in Articles 50 and 268 CPC.

If a victim of crime failed to submit a civil lawsuit in the course of pre-trial investigation, a court has to explain him/her right to do this at a court session, but before initiation of trial investigation proceedings.

14. According to requirements of Article 295 CPC, the chief judge at a court session shall explain to a victim of crime, a civil claimant (or their representatives) their rights and duties.

If there are several victims of crime in a case, their rights and duties may be explained to them all collectively, however, it is necessary to ascertain whether they understand their rights and duties by asking every victim of crime individually.

15. After explaining a victim of crime his/her right to testify or to refuse testifying, a court should ask him/her whether he/she wants to use the said right. If the victim of crime agrees to testify, the court should warn him/her about criminal sanctions under Article 384 CC for patently false testimony.

16. A victim of crime, who does not know the language of the legal process, has the right to testify in his/her native language, and - if necessary - to use free interpretation services.

17. A court should ensure that, in the course of interrogation of a victim of crime, he/she is not asked questions that are offensive to his/her dignity, offensive to him/her personally and his/her close friends/relatives, as well as questions on personal matters that are not relevant for the case.

18. A victim of crime or his/her representative have rights to be ensured security if there are real threats to their lives, health, housing estate or property. Family members and close relatives of the above persons shall be granted the same rights, if they are under threats or other illegitimate acts, made to influence the victim of crime or his/her representative. Application of security measures in respect to the above persons shall be made only at the base of real information on a relevant threat.

Grounds for application of the above measures in respect to the victim and his/her representative, and in respect to their family members and close relatives may differ. In particular, these measures shall not be applied in the case of a real threat to honour and dignity of the victim of crime (his/her representative), contrary to the case of their family members and close relatives.

Security of the above persons should be ensured according to requirements of Law of Ukraine No. 3782-XII of December 23, 1993 'On Ensuring Security of Participants of Criminal Justice Procedures'.

19. Accounting for the fact that, at a court session, a victim of crime is interrogated according to rules of interrogation of a witness (Article 308 CPC), a minor victim of crime under 14 years old (or under 16 years old, at discretion of the court) should be interrogated in presence of an educator, and, if necessary, in presence of a doctor, parents or other legal representatives (paragraph 1 of Article 307 CPC, Article 168 CPC). The court should explain the duty to tell truth to minor victims under 16 years old, but they should not be warned about criminal responsibility for patently false testimony.

If presence of a defendant in a court session hall may adversely affect comprehensiveness and adequacy of testimony of a minor victim of crime, the court may interrogate such victim of crime in absence of the defendant, according to a court order. Besides that, the court is obliged to review

appropriateness of presence of the minor victim of crime in the court session hall after his/her interrogation if a legal representative of the victim participates in the case.

20. To draw attention of courts to the need to ask a victim of crime, whether he/she was under threats, violence, bribery and other illegitimate acts of a defendant, his/her relatives and other persons made in order to persuade the victim to refuse to testify or to give patently false testimony. If such facts are identified, the court should review issues of submission of relevant materials to a public prosecutor and application of security measures in respect to the victim of crime. The court should similarly respond, if the court identifies that a victim of crime was compelled to testify by illegitimate acts of an inquiry officer or an investigator.

21. According to paragraphs 3 and 5 CPC of Article 161 and Article 261 CPC, a victim of crime participates in court proceedings at the side of prosecution and has the same rights as other participants of criminal justice procedures in submission and examination of evidence and in court assessment of evidence.

22. In the course of ordering and implementation of forensic examination, a court should ask for opinion of a victim of crime and his/her representative on necessity and appropriateness of the expert examination, and should ensure their active participation in formulating points to be examined by an expert.

A psychiatric examination of a victim of crime with his/her hospitalisation may be ordered only at his/her consent, while in the case of a minor victim of crime under 14 years old, his/her psychiatric examination may be ordered only at consent of his/her legal representatives.

23. According to Article 277 CPC, if, in the course of court proceedings, a prosecutor alters charges against a defendant, the prosecutor should issue copies of the motivated resolution on the new charges to a victim of crime, his/her legal representative and his/her representative. If the resolution stipulates application of a criminal law that covers a lesser crime or reduces the charge, the court should explain to the victim of crime, his/her legal representative and his/her representative their rights to demand prosecution under previous charges. Opinions of the victim of crime (his/her legal representative and his/her representative) on the new charges should be documented in the court session protocol.

If the prosecutor rejects the charge (paragraph 3 of Article 264 CPC), the court should explain to the victim of crime, his/her legal representative and his/her representative their rights to demand continuation of the case examination by the court and to support the prosecution, these matters should be noted in the court session protocol. Under such circumstances, opinion of the victim of crime is a priority for the court; because if the victim of crime does not agree with the

prosecutor, he/she assumes prosecution functions and the court examination of the case shall continue; if the victim of crime agrees with the prosecutor, the court shall close the case.

If a prosecutor altered charges or rejected charges in a case that is examined by a court in absence of a victim of crime, the court shall postpone examination of the case, to submit a copy of the prosecutor's resolution to the victim of crime and to explain him/her his/her rights to support prosecution under previous charges or to request continuation of the case examination and to support prosecution by him/herself.

24. The duty to prove and to take measures in support of a civil suit is that of the prosecution side. If relevant measures were not taken at the stage of inquiry or pre-trial investigation, a judge should decide on these issues according to clause 7 of paragraph 1 of Article 253 CPC.

Taking into account that the main aim of criminal justice is associated with protection of rights and legitimate interests of participants of criminal justice procedures, courts must respond strongly, if, in the course of court proceedings, facts are identified, that suggest that relevant bodies fail to ensure or fail to ensure timely actual redress of damages inflicted by a victim of crime. Courts should apply their powers stipulated by law, to ensure such redress.

Lawsuits on redress of damages that are not associated with relevant criminal charges cannot be examined in a criminal process. If such situation emerges, a court should explain a victim of crime the option to settle such disputes by civil law procedures.

A court can refuse to examine a civil lawsuit only in two cases: if a civil claimant or his/her representative failed to attend a court session (Article 291 CPC, except in cases stipulated in paragraph 2 of Article 291 CPC); and if a defendant was acquitted on grounds of lack of elements of crime in his/her actions (Article 328 CPC).

25. Courts are obliged to ensure due review of citizens' submissions on crimes, if initiation of criminal cases on these crimes can be made only provided a victim's submission; courts must avoid unjustified refusals to initiate such criminal cases. At the same time, it is necessary to comply strictly with requirements of paragraph 1 of Article 27 CPC (criminal cases on crimes listed in the Article, can be initiated only provided a submission of a victim of crime or his/her legal representative). Such submission should clearly specify grounds for initiation of a criminal case, in particular: circumstances, time, a place, motives and consequences of the crime, a suspect, a request to prosecute the suspect, etc.

To recommend courts to apply the institution of voluntary settlement of disputes between a victim and a defendant/accused to the maximal extent possible in

cases of the above category (at the stage of preliminary case examination by a judge or at a court session, but before completion of the court investigation) and to support activities of non-governmental organisations that facilitate voluntary settlements prior to court examination; to inform persons who committed crimes on presence of such organisations in a relevant city (district); and to provide relevant information to the latter ones. On request of interested participants of court proceedings (an offender, a victim of crime, their representatives), a court may recess a court session and provide opportunities to these persons to apply to the above mediator for a voluntary settlement.

If a victim of crime refused to use his/her right for a voluntary settlement, explained by a court and proved existence of sufficient evidence that a crime was committed against the victim, a judge shall issue a resolution on initiation of a criminal case and court examination of the case.

If a crime of the above category was committed by a minor or by a person who cannot protect his/her interests due to physical/mental disabilities or due to other reasons, the judge shall submit the initiated criminal case to a public prosecutor for pre-trial investigation.

26. To draw attention of courts to the mandatory need to secure a verbal/written statement of a victim of crime on initiation of criminal prosecution of a defendant in cases under public prosecution, when results of court investigation suggest the need to alter category of a crime to an article of the criminal law that stipulates prosecution for crimes under requirements of paragraph 1 of Article 27 (cases under private prosecution). If the victim of crime refuses to make such statement and if there are relevant grounds, the defendant may be acquitted on grounds of lack of elements of crime in his/her actions. However, the victim of crime retains his/her right to apply to courts, demanding initiation of a criminal case, within a relevant limitation period as stipulated in Article 49 CC.

27. A judge cannot reject a submission of a victim of crime on criminal prosecution under paragraph 1 of Article 126 CC and Article 356 CC, if the submission was submitted to the court by the Public Prosecutor Office or by other competent bodies, according to procedures specified in clause 3 of paragraph 2 of Article 97 CPC. In the course of review of such submission, the judge is obliged to invite the victim of crime and study his/her opinion and other circumstances necessary for an adequate decision.

In response to a submission on commitment of the above crimes, the judge is obliged either to initiate a criminal case or to refuse to initiate it, within terms specified in Article 97 CPC.

If a criminal case was initiated, it should be scheduled for court review within terms specified in Article 256 CPC.

28. If a court receives a submission of a victim of crime and a counter-suit, a judge (provided relevant grounds) shall issue a resolution on initiation of a criminal case at the base of the counter-suit and schedule the case for court review. According to paragraph 4 of Article 251 CPC, the judge can merge counter-claims into one court case. Under such circumstances, the both claimants should be granted procedural rights of a victim and a defendant - as a result, it is necessary to ensure protection of the both rights.

29. In the course of court debates it is necessary to comply with requirements of Article 251 CPC. As persons without legal education may participate in the debates (a defendant, a victim of crime, civil claimants, etc.), prior to the debates, the chief judge is obliged to explain them the substance and aims of the above procedure.

If a victim of crime and his/her representative participate in court proceedings, the both of them shall be granted the right to participate in court debates.

If a court denies a victim of crime, a civil claimant, their representatives the right to speak, the denial can justify abrogation of the court verdict/sentence.

If a representative of a civil claimant does not attend court debates, the court cannot use his/her absence as a reason to refuse reviewing a relevant civil lawsuit

30. In cases under private prosecution, in the case of merger of two counter-claims, floor should be given to participants of court debates once to each, the person, who was the first to submit his/her submission on initiation of the criminal case, should be given floor first. The both parties retain the right to cross-talk.

31. In the course of decision-making on redress of moral damages according to a lawsuit of a victim of crime, courts should rely on relevant provisions of the Civil Code of Ukraine and explanations of Decree No. 4 of Plenary Session of the Supreme Court of Ukraine of March 31, 1995 'On Court Practices of Review of Cases on Redress of Moral (Intangible) Damages', as amended by Decree No. 5 of May 25, 2001.

32. According to paragraph 3 of Article 341 CPC, the chief judge is obliged to explain contents of a court sentence, terms and procedures of appeal against the sentence to a victim of crime and his/her representative.

To assess positively practices of courts that submit a copy of a court sentence to a victim of crime, if relevant court proceedings were conducted in absence of the victim of crime.

33. Courts must comply strictly with requirements of due criminal and criminal procedure law of Ukraine pertaining to protection of rights of victims of crime in

the course of closure of criminal cases. If a person is discharged from criminal responsibility under Articles 7, 7-1, 7-2, 7-3, 8, 9, 10, 11-1 CPC, it is necessary to ascertain opinion of a victim of crime on these matters.

A court must notify the victim of crime or his/her representative on closure of the criminal case by issuing/sending to them a copy of the relevant court resolution, that, according to Article 12 CPC, may be appealed against by them according to appellate procedures.

In the case of closure of a case, a victim of crime must be explained his/her right to file a civil lawsuit according to civil law procedures without the need to pay relevant fees.

34. To declare the following legal acts null and void: Decree No. 8 of Plenary Session of the Supreme Court of Ukraine of December 22, 1979 'On Some Issues that Emerged in Court Practices of Application of Provisions of Criminal Procedure Law of Ukraine, that Stipulate Rights of Victims of Crime' (as amended by Decrees No. 6 of June 29, 1984, No. 3 of June 4, 1993, No. 12 of December 3, 1997) and Decree No. 2 of January 25, 1974 ' On Court Practices of Review of Criminal Cases that Are Initiated by a Victim's Submission Only' (as amended by Decrees No. 7 of December 30, 1977, No. 2 of February 27, 1981, No. 3 of June 4, 1993, No. 3 of January 13, 1995 and No. 12 of December 3, 1997).

Annex 5: Law on operational - investigating activities No 2135-XII, 18-2-1992

On Espial Activities

N 2135-XII, 18.02.1992, Law, Supreme Council of Ukraine

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ATTENTION! This version of the document is not up to date.

(The following changes to this document have been adopted:

Law of Ukraine#3200-IV of 15.12.2005)

LAW OF UKRAINE

ON ESPIAL ACTIVITIES

*(Enacted under Resolution of the Supreme Council of Ukraine
#2136-12 of February 18, 1992)*

*(Changed and amended in accordance with Laws of Ukraine
#2549-XII of July 7, 1992,
#2932-XII of January 26, 1993,
#3784-XII of December 23, 1993
#85/98-VR of February 5, 1998
#312-XIV of December 11, 1998,
#1381-XIV of January 13, 2000,*

*#2181-III of December 21, 2000 - comes into force as
from April 01, 2001,*

#2246-III of January 18, 2001,

#3111-III of March 07, 2002,

*#662-IV of April 03, 2003 - comes into force as from
August 01, 2003,*

#747-IV of May 15, 2003;

#762-IV of May 15, 2003;

#965-IV of June 19, 2003;

#1130-IV of July 11, 2003;

#2322-IV of January 12, 2005;

#2600-IV of May 31, 2005)

(Throughout the text of the law, the words "National Security Service", "High-

Rank Officials Security Department of Ukraine" in all cases have been replaced with the words "Security Service" and "State Guard Directorate of Ukraine" respectively in appropriate cases according to Law of Ukraine #2246-III of January 18, 2001)

Article 1. Tasks of Espial Activities

The task of the espial activities shall be to search for and record the factual data on the illegal actions of individuals and groups subject to the liability under the Criminal Code of Ukraine" (2001-05, 2002-05), intelligence and sabotage activities of special services of foreign countries and organisations with the objective to stop the illegal actions and in the interests of the criminal justice, as well as to obtain information in the interests for the security of the citizens, society and the state.

(The Article changed according to Law of Ukraine 1381-XIV of January 13, 2000; #2246-III of January 18, 2001)

Article 2. Notion of Espial Activities

Espial activities shall denote public and non-public searching, intelligence and counterintelligence measures taken with the use of espial and espial/technical means.

Article 3. Legal Framework of Espial Activities

The legal framework of espial activities shall be established by the Constitution of Ukraine (888-09), this Law, Criminal Code (2001-05, 2002-05) and Code of Criminal Procedures (1001-05, 1002-05, 1003-05) of Ukraine, Laws of Ukraine on Prosecutor's Office, Militia, Security Service, State Border Service of Ukraine, the state protection of state authorities of Ukraine and officials, the status of judges, the security of parties to criminal proceedings, the state protection of court and law enforcement officers, other legal acts and international agreements and treaties, to which Ukraine is a party.

(The Article changed according to Laws of Ukraine #1381-XIV of January 13, 2000; #662-IV of April 03, 2003 - comes into force as from August 01, 2003)

Article 4. Principles of Espial Activities

The espial activities shall be based upon the principles of law, adherence to human rights and freedoms, interaction with government bodies and residents.

Article 5. Bodies Exercising Espial Activities

The espial activities shall be exercised by espial departments of:

The Ministry of Internal Affairs of Ukraine: the criminal, transport and special militia, special units for combating the organised crime, judicial militia;

(Paragraph 2 of Section 1 of Article 5 in the wording of Law #3784-XII of

December 23, 1993; changed according to Law #312-XIV of December 11, 1998; in the wording of Law of Ukraine #2246-III of January 18, 2001; #762-IV of May 15, 2003)

The Security Service of Ukraine: the intelligence, counter-intelligence, military counter-intelligence, the protection of the national statehood, the special units combating the corruption and organised crime, the operative equipment, internal security, operative recording, counter-terrorism units, and units protecting participants of criminal proceedings and officers of law enforcement bodies;

(Paragraph 3 in the wording of Law of Ukraine #2246-III of January 18, 2001)

The State Border Service of Ukraine - by the intelligence agency of the specifically authorised central executive agency for protecting the state border of Ukraine, by espial and search units of the specifically authorised central executive agency for the state border protection and its territorial agencies respectively, state border protection units of the state border protection agencies and the Coast Guard, the internal security, own security, operative documentation, and espial technology units;

(Paragraph 4 in the wording of Laws of Ukraine #3111-III of March 07, 2002; #662-IV of April 03, 2003 - comes into force as from August 01, 2003; changed and amended according to Law of Ukraine #2600-IV of May 31, 2005)

Department of State Security - ensuring the security solely to ensure the security of individuals and facilities guarded by the state;

(Paragraph 5 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

bodies of the State Tax Administration: investigation and espial departments of the tax militia;

(The Paragraph added to the Part 1 according to Law of Ukraine #85/98-VR of February 5, 1998)

bodies and institutions of the State Punishment Administration Department of Ukraine - investigation and espial units;

(The Paragraph added to the Part 1 according to Law of Ukraine #312-XIV of December 11, 1998)

the intelligence agency of the Ministry of Defence of Ukraine: by espial, espial/technical, and own security units.

(The Paragraph added to the Part 1 according to Law of Ukraine #3111-III of March 07, 2002)(Part 1 changed and amended according to Law of Ukraine #2932-XII of January 26, 1993)

The exercise of espial activities by other departments of the specified bodies, by departments of other ministries, agencies, public, private organisations and individuals prohibited.

(Part 2 changed according to Law of Ukraine #2246-III of January 18, 2001)

Article 6. Grounds for Exercise of Espial Activities

The grounds for the exercise of espial activities shall be as follows:

1) availability of sufficient information received according to the procedure specified by law, which requires the verification using the espial actions and facilities, about:

(Paragraph 1, Item 1 in the wording of Law of Ukraine #2246-III of January 18, 2001)

- the crimes under preparation or crimes committed by unidentified individuals;

- the individuals, who are preparing or have committed a crime;

- the individuals escaping from the investigation bodies, court or evade from serving the criminal sentence;

(Paragraph 4, Item 1 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

- missing individuals;

(Paragraph 5, Item 1 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

- intelligence and sabotage activities of special services of foreign states, organisations and individuals against Ukraine;

- real threat to the life, health, housing and property of court and law enforcement officials in connection with their official activities, as well as individuals involved in criminal court proceedings, members of their families and close relatives in order to create the conditions required for the proper administration of justice; officials of intelligence agencies of Ukraine in connection with the official activities of such individuals, their close relatives, as well as individuals, who co-operate or have co-operated with intelligence agencies of Ukraine on a confidential basis, and their family members for the purposes of the proper exercise of intelligence activities.

(The Paragraph added to the Item according to Law of Ukraine #1381-XIV of January 13, 2000; in the wording of Law of Ukraine #3111-III of March 07, 2002)

2) Requests from authorised state bodies, institutions and organisations for the scrutiny of individuals due to their access to the state, secrets and the work with nuclear materials and on nuclear installations;

(Item 2 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

3) Need in obtaining intelligence information in the interests of the security of the society and the state.

The specified grounds can be contained in applications, notifications of individuals, officials, public organisations, mass-media, in written authorisations

and resolutions of an investigator, in prosecutor's instructions, court decisions related to the cases in the scope of court's competence, materials of investigation bodies, other law protection bodies, in requests of espial departments of international law protection bodies and organisations of other states, as well as in the requests of authorised state bodies, institutions and organisations specified by the Cabinet of Ministers of Ukraine for scrutiny of individuals with regard to their access to the state, military and service secrets.

It shall be forbidden to take a decision on the exercise of espial activities, if the grounds specified in this article are missing.

Article 7. Obligations of Departments Exercising the Espial Activities

Departments exercising the espial activities shall:

1) to take the necessary espial measures within the scope of their authority in accordance with laws making up the legal framework of the espial activities, in order to prevent, detect timely, terminate and reveal offences, as well as ascertain reasons and conditions conducive to offences, to prevent the misdemeanour;

(Item 1 added to the Article according to Law of Ukraine #2246-III of January 18, 2001)

2) obey investigator's written orders, prosecutor's instructions and court decisions and requests of authorised state bodies, institutions and organisations for espial measures;

3) carry out requests of relevant international law protection organisations and law protection bodies of other states on the basis of treaties and agreements;

4) to inform the relevant state authorities about facts known to them and the data confirming the threat to the security of the society and the state, as well as about violations of the legislation related to service activities of officials;

(The Item in the wording of Law of Ukraine #2246-III of January 18, 2001)

5) interact with one another and with other law protection bodies including the relevant agencies of foreign states and international counter-terrorism organisations, with the objective of rapid and complete investigation of crimes and identification of individuals in fault;

(The Item changed and amended according to Law of Ukraine #965-IV of June 19, 2003)

6) to ensure, involving other units, the safety of court and law enforcement officers, the persons providing assistance and assisting in espial activities, persons participating in criminal proceedings, their family members and close relatives;

(The Item in the wording of the Law of Ukraine #1381-XIV of January 13, 2000)

7) to take part in the implementation of actions aimed at the physical

protection of nuclear installations, nuclear materials, radioactive waste and other ionising radiation sources, as well as in conducting the special inspection in respect of the clearance for special works.

(The Item in the wording of the Law of Ukraine #747-IV of May 15, 2003)

Article 8. Rights of Departments Exercising Espial Activities

The espial departments shall have the following rights to carry out the tasks of espial activities, if there are grounds specified in Article 6 hereof:

1) to interview people on their consent, use their voluntary assistance;

2) to undertake the control and operative purchase and supply of commodities, objects and substances, including those, whose turnover is prohibited, to and from individuals and legal entities regardless of ownership forms in order to detect and record the facts of illegal actions. The procedure of the operative purchase and controlled supply shall be specified by regulations of the Ministry of Internal Affairs of Ukraine, the tax militia, the Security Service of Ukraine concurred with the General Public Prosecution Office of Ukraine and registered with the Ministry of Justice of Ukraine;

(Item 2 in the wording of Law of Ukraine #2246-III of January 18, 2001)

3) to raise the issue of performing the inspection of financial and commercial activities of enterprises, institutions and organisations regardless of ownership forms and individuals engaging in business activities or other types of commercial activities on their own according to the procedure established by law, and to take part in such inspections;

(Item 3 in the wording of Law of Ukraine #2246-III of January 18, 2001)

4) to familiarise itself with documents and data, which characterise the operations of enterprises, institutions and organisations, review them at the expense of funds allocated for the upkeep of units exercising the operative search activities, produce copies of such documents, on request of chief executive officers of enterprises, institutions and organisations solely on the premises of such enterprises, institutions and organisations, and, on permission of court, to demand and obtain the documents and data, which characterise the activities of enterprises, institutions and organisations, and the lifestyle of individuals, who are suspected of preparing or having committed a crime, the source and value of their income, subject to leaving copies of such documents and the list of the seized documents to the parties, from which they have been demanded and obtained, and ensuring the preservation thereof and the return in accordance with the established procedure;

(Item 4 of Part 1 of Article 8 in the wording of Law of Ukraine #2322-IV of January 12, 2005)

5) to carry out operations on capture of criminals, termination of crimes, intelligence and sabotage activities of special services of foreign states, organisations and individuals;

(Item 5 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

6) to visit housing and other rooms on the consent of their owners or tenants in order to determine the circumstances of a committed crime or crime under preparation, as well as to gather information on the illegal activities of suspects or individuals under scrutiny;

7) to detect and record in non-public manner the traces of a grave and especially grave crime, documents and other objects, which can become evidence of the preparation or committing of such a crime, or to receive intelligence information also by way of penetration of an operative to rooms, vehicles and land plots;

(Item 7 changed and amended according to Law of Ukraine #965-IV of June 19, 2003; #1130-IV of July 11, 2003)

8) to undertake penetration of a criminal group by an undercover operative or a person co-operating with the latter, while ensuring the confidentiality of the actual data about their identity.

A resolution shall be passed in respect of the need of such penetration; it is to be approved by the head of the relevant authority;

(Item 8 in the wording of Law of Ukraine #2246-III of January 18, 2001)

9) to collect information from communication channels, to use other technical facilities of information collection;

10) to control telegraph and mail correspondence by way of selection according to certain features;

11) to carry out visual observation in public places using photo or cinema filming and video recording, optical and radio devices, other technical facilities;

12) to have employees known and not known included in the staffing schedule and those not included in the staffing schedule;

(Item 12 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

13) to establish confidential co-operation with individuals on voluntary basis;

14) to obtain information on crimes, which are under preparation or have been committed, and the threat to the security of the society and the state; from legal entities and individuals, free of charge or against payment;

15) to use rooms, vehicles and other property of enterprises, institutions, organisations subject to the consent of their administration as well as to use housing, other rooms, vehicles and property owned by individuals subject to the consent of the latter;

16) to establish, for the sake of confidentiality, enterprises or

organisations, to use documents, concealing an individual or the subordination of members, rooms or vehicles of espial departments;

17) to create and use automated information systems;

18) to use physical influence means, special means and fire arms on the basis and according to the procedures established by laws on Militia, Security Service, State Border Service of Ukraine, the state guarding of state authorities of Ukraine and the officials.

(Item 18 changed and amended according to Law of Ukraine #2246-III of January 18, 2001; #662-IV of April 03, 2003)

Concealed penetration of the house or another property of a person, the recording of the information at communication channels, the control of the correspondence, telephone conversation, telegrams and other correspondence, the application of other technical facilities for obtaining information shall be undertaken by court decision made on the basis of a proposal of the head or deputy head of the relevant espial unit. The said individuals shall notify the public prosecutor within one day about the obtainment of such a court permit or the refusal thereof. These measures shall be applied solely to prevent an offence or find out the truth while investigating a criminal case, unless it is possible to obtain the required information otherwise. A protocol with appropriate attachments to be used as the source of evidence during criminal proceedings shall be compiled as a result of the said espial actions.

(Part 2 of Article 8 in the wording of Laws #2549-XII of July 07, 1992; #2246-III of January 18, 2001)

Exclusively in order to obtain the intelligence information for ensuring the external security of Ukraine, prevention and termination of the acts of terror, intelligence and sabotage encroachments of special services of foreign states and foreign organisations, the above mentioned actions may be taken according to the procedure agreed upon with the Prosecutor General of Ukraine and the Chairman of the Supreme Court of Ukraine.

(Part 3 changed and amended according to Law of Ukraine #2246-III of January 18, 2001; #965-IV of June 19, 2003)

Members of other departments may be involved to carry out certain tasks in the course of espial activities.

In case of the performance of the espial assignments related to the termination of offences in the field of the tax legislation, the rights under this article shall be granted solely to bodies of the tax militia within the framework of their competence.

(The Part added to the Article according to Law of Ukraine #2181-III of December 21, 2001)

The actions related to the exercise of rights of the units, which engage into the espial activities for the purposes of combating the terrorism, shall be co-

ordinated by the Security Service of Ukraine.

(The Part added to the Article according to Law of Ukraine #965-IV of June 19, 203)

Article 9. Law Guarantees during Exercise of Espial Activities

In every case, when there are grounds for exercise of the espial activities, an espial file shall be initiated. A resolution on the initiation of such a case shall be approved by the head of the body of internal affairs, security service, State Border Service of Ukraine, high-rank officials security, investigation and espial department of the tax militia, body, punishment administration institution of the intelligence agency of the Ministry of Defence of Ukraine or his authorised deputy

(Part 1, Article 9 changed and amended according to Laws of Ukraine #85/98-VR of February 5, 1998; #312-XIV of December 11, 1998; #2246-III of January 18, 2001; #3111-III of March 07, 2002; #662-IV of April 03, 2003 - comes into force as from August 01, 2003)

The control over the espial activities shall be exercised by the Ministry of Interior of Ukraine, Security Service of Ukraine, specifically authorised central executive agency for protecting the state border of Ukraine, State Guard Directorate of Ukraine, State Tax Administration of Ukraine, State Punishment Administration Department of Ukraine, the intelligence agency of the Ministry of Defence of Ukraine.

(Part 2, Article 9 changed and amended according to Laws of Ukraine #85/98-VR of February 5, 1998; #312-XIV of December 11, 1998; #3111-III of March 07, 2002; #662-IV of April 03, 2003 - comes into force as from August 01, 2003)

For an individual, which is suspected of preparing or committing a crime, escaping from investigation authorities, court or evading from serving a criminal sentence, or is missing, only one espial file shall be initiated. The espial actions shall be prohibited without setting up an espial case, except for the case covered by part four of this article. A resolution to be approved by the head or an authorised deputy head of the internal affairs, security service bodies, Border Service, the State Security Administration of Ukraine, the intelligence agency of the Ministry of Defence of Ukraine, an operative unit of the tax militia, a penitentiary body or institution shall be passed when setting up an espial case. The resolution shall indicate the place and time of its adoption, the position and the name of the person issuing the resolution, grounds for and objectives of setting up the espial case.

(Part 3, Article 9 changed and amended according to Law of Ukraine #2246-III of January 18, 2001; #3111-III of March 07, 2002; #662-IV of April 03, 2003 - comes into force as from August 01, 2003)

No espial case shall be set up in case of clearing the individuals in connection with allowing them access to state secrets, as well as to the work with

nuclear materials and on nuclear installations. The clearance inspection should not take more than one month.

(Part 4, Article 9 in the wording of Law of Ukraine #2246-III of January 18, 2001)

When exercising the espial activities, it shall not be allowed to violate rights and freedoms of individuals and legal entities. Individual limitations of these rights and freedoms shall be of exceptional and temporary nature and may be applied only subject to a court decision in respect of a person, whose actions contain indications of a grave or especially grave offence, as well as in cases specified by the legislation of Ukraine in order to ensure the rights and freedoms of other individuals as well as the security of the society.

(Part 5, Article 9 changed and amended according to Law of Ukraine #2246-III of January 18, 2001; #965-IV of June 19, 2003; #1130-IV of July 11, 2003)

In case of availability of sufficient grounds, the permit for the exercise of espial activities shall be issued by the head of relevant espial department, who is also liable for the legality of measures being taken in accordance with the current legislation,

When taking espial measures, the members of espial departments shall take into account their compliance with the degree of social danger of the criminal encroachments and of the threat to interests of the society and the state.

In cases of violation of rights and freedoms of individuals or legal entities in the course of espial activities, as well as if the involvement in a crime of the individual, in relation to whom the espial measures have been taken, is not confirmed, the Security Service of Ukraine, Ministry of Interior of Ukraine, specifically authorised central executive agency for protecting the state border of Ukraine, State Guard Directorate of Ukraine, State Tax Administration of Ukraine, State Punishment Administration Department of Ukraine or an intelligence agency of the Ministry of Defence of Ukraine shall restore urgently the violated rights and reimburse for the caused tangible and non-pecuniary damages in full.

(Part 8, Article 9 changed and amended according to Laws of Ukraine #85/98-VR of February 5, 1998; #312-XIV of December 11, 1998; #2246-III of January 18, 2001; #3111-III of March 07, 2002; #662-IV of April 03, 2003 - comes into force as from August 01, 2003)

The citizens of Ukraine and other individuals are entitled (in accordance with the procedure established by law) to receive from bodies, entitled to exercise the espial activities an explanation in writing with regard to the limitation of their rights and freedoms and to appeal against such actions.

It shall be forbidden to transfer or disclose the information about security actions and protected persons, non-investigated crimes or such information, which can be harmful for the investigation, interests of an individual, security of Ukraine.

(Part 10 changed and amended according to Law of Ukraine #1381-XIV of January 13, 2000)

The departments using automated information systems for espial activities shall provide for the possibility of issuing the data for an individual on the request of investigation bodies, prosecutor's office, court. The information adequacy and reliability of its protection shall be guaranteed in places of information storage.

The data related to the private life, honour and dignity of an individual obtained as a result of espial activities shall not be kept and must be destroyed, if they do not contain information on committing illegal actions. The information obtained as a result of espial activities in respect of the preparation for the acts of terror or the commitment thereof by individuals and groups shall be kept up to 5 years.

(Part 12 changed and amended according to Law of Ukraine #965-IV of June 19, 2003)

The results of espial activities, which are the state, secrets under the legislation of Ukraine, as well as the data related to the private life, honour and dignity of an individual shall not be transferred and disclosed. The members of espial departments as well as the individuals, to whom these data have been assigned in the course of espial activities, or who have become aware of these data in the course of work shall be liable under the current legislation for the transfer and disclosure of such data, except for the cases of disclosing the information on illegal actions violating the human rights.

(Part 13 changed and amended according to Law of Ukraine #2246-III of January 18, 2001)

The espial measures associated with temporary limitation of human rights, in order to prevent, terminate and investigate grave or especially grave crime, search for individuals, who are escaping from serving the criminal sentence or missing, protection of the life, health, housing and property of court and law enforcement officers and persons participating in criminal proceedings, termination of intelligence and sabotage activities against Ukraine. In case of operative necessity of urgent taking such measures, the espial departments shall within 24 hours notify Court or the prosecutor of their application and grounds for taking such measures.

(The Part changed and amended according to Law of Ukraine #1381-XIV of January 13, 2000; #2246-III of January 18, 2001; #965-IV of June 19, 2003; #1130-IV of July 11, 2003)

The visual observation may be carried out in order to obtain data on a person and its relations, if there is evidence of such person's preparing or having committed a grave crime, in order to obtain information indicating the signs of such crime, as well as in order to ensure the safety of court and law enforcement officers, persons participating in criminal proceedings, their family members and close relatives.

(The Part in the wording of Law of Ukraine #1381-XIV of January 13, 2000)

It shall be forbidden to use technical means, psychotropics, chemical and

other substances, inhibiting the will or causing damage to the health of people and to the environment.

Article 9-1. Period of Espial Proceedings

The espial proceedings shall take place in respect of:

1) non-identified persons, who are preparing for or have committed a crime, as well as persons, which hide from the investigation agencies or the court or evade serving their criminal sentences - until such persons are identified or found; the time for proceedings shall not exceed the limitation period of the criminal liability or the enforcement of an indicting sentence;

2) persons in connection with the investigation of a criminal case in their respect - until the sentence passed on them becomes legally effective, until the court resolves to terminate the proceedings, until the court passes a judgement (resolution) on applying the measures of medical or educational nature, or until the criminal case is terminated by the court, public prosecutor, investigator or an inquest agency;

3) missing people - until they are found or a court decision declaring them missing or deceased becomes legally effective;

4) persons, if there are data on their participation in the preparation or commitment of a crime - up to six months;

5) in case of the intelligence activities aimed at the security of the society and the state: until the intelligence activities are completed or the opportunities for the exercise thereof are exhausted;

(Item 5 added to the Article according to Law of Ukraine #3111-III of March 07, 2002)

6) regarding the individuals, in whose respect the data are available on their participation or implication in terrorist activities, terrorist groups or terrorist organisations, as well as in the logistical, organisational and other support to the establishment of a terrorist group or terrorist organisation - up to 5 years.

(Item 6 added to the Article according to Law of Ukraine #965-IV of June 19, 2003)

Should the data be obtained in the course of the espial proceedings on the participation of a person in the preparation or commitment of a grave and especially grave crime, the time for proceedings may be extended to 12 months by heads of main and independent directorates of the Ministry of Interior of Ukraine, the Central Directorate of the Security Service of Ukraine, main directorates and directorates of the Ministry of Interior of Ukraine and the tax militia of the State Tax Administration of Ukraine in the Autonomous Republic of Crimea, oblasts, cities of Kyiv and Sevastopol, regional directorates and agencies of the military counter-intelligence of the Security Service of Ukraine, by territorial agencies of the specifically authorised central executive agency for the

state border protection, by the Head of the State Border Service of Ukraine or their deputies.

(Part 2 changed and amended according to Laws of Ukraine #965-IV of June 19, 2003, #2600-IV of May 31, 2005)

Further extension of the espial proceedings up to 18 months may be granted by the Minister of Interior of Ukraine, the Head of the Security Service of Ukraine, the First Deputy Head of the State Tax Administration of Ukraine being the head of the tax militia, and the Head of the State Border Service of Ukraine and the Head of the State Guard Directorate of Ukraine.

(Part 2 changed and amended according to Laws of Ukraine #2600-IV of May 31, 2005)

The extension of espial proceedings in respect of foreigners and stateless individuals suspected of engaging in intelligence and subversion activities against Ukraine for a period over 18 months shall be granted by the Head of the Security Service of Ukraine in concurrence with the Prosecutor General of Ukraine.

(Part 4 changed and amended according to Law of Ukraine #965-IV of June 19, 2003)

The period of the espial proceedings shall commence from the date of approval of a resolution on the institution of proceedings by the head or deputy head of the relevant agency and end on the date of the approval of the resolution on the termination of the espial proceedings.

This period may be suspended if the person, in whose respect the proceedings have been instituted, has left Ukraine temporarily or is dangerously ill and the espial activities in respect of such person are not possible.

A substantiated resolution to be approved by the head or deputy head of the relevant agency shall be issued in cases of the suspension and resumption of the period of the espial proceedings.

(Article 9-1 added to the Law according to Law of Ukraine #2246-III of January 18, 2001)

Article 9-2. Termination of Espial Proceedings

Espial proceedings shall be terminated if:

- 1) the person, who hid from the investigation agencies or the court, evaded serving the criminal sentence or was missing, has been detected;
- 2) the court sentence, resolution or judgement has become effective;
- 3) the criminal proceedings have been terminated by the court, public prosecutor, investigator or inquest authority;
- 4) the intelligence or counter-intelligence actions have been completed or

opportunities for such actions have been exhausted;

5) materials on criminal activities of a person have been disproved according to the established procedure;

6) the person in question has left Ukraine for the place of permanent residence, unless it is possible to undertake espial actions in respect of such person;

7) data confirming the availability of indications of a crime in actions of a person have not been ascertained within the time frames specified hereby;

8) a public prosecutor has detected proceedings initiated illegally, in case of the performance of espial actions in the course of such proceedings;

9) if the person, in whose respect the espial proceedings were instituted, has deceased.

A substantiated resolution to be approved by a head or deputy head of the relevant authority shall be issued in case of the termination of espial proceedings. If the espial actions under such proceedings were performed upon the court decision, the notice of termination shall be sent to the court within three days.

The retention period for records of the terminated espial proceedings shall be established in line with the legislation of Ukraine.

(Article 9-2 added to the Law according to Law of Ukraine #2246-III of January 18, 2001)

Article 10. Use of Materials of Espial Activities

The materials of espial activities shall be used:

1) as basis and grounds for bringing a criminal action or conducting urgent investigation actions;

2) for obtaining factual data, which serve as evidence in a criminal case;

3) for the prevention, termination and investigation of crimes, intelligence and sabotage encroachments against Ukraine, search for criminals and missing individuals;

4) to ensure the safety of court and law enforcement officials, and individuals involved in criminal court proceedings, members of their families and close relatives, and officials of intelligence agencies of Ukraine, their close relatives, as well as individuals, who co-operate or have co-operated with intelligence agencies of Ukraine on a confidential basis, and their family members;

(The Item added to Article 10 according to Law of Ukraine #1381-XIV of January 13, 2000; in the wording of Law of Ukraine #3111-III of March 07, 2002)

5) for mutual information of departments, authorised to exercise espial

activities as well as other law protection bodies;

6) for informing state authorities according to their competence.

Article 11. Assistance with Exercise of Espial Activities

The state authorities, enterprises, institutions and organisations regardless of the ownership form shall assist espial departments with solving the tasks of espial activities.

(Part 1 changed and amended according to Law of Ukraine #965-IV of June 19, 2003)

Subject to the wish of an individual, his co-operation with an espial department can be subject of a written agreement guaranteeing the confidentiality of the co-operation. The agreement on assistance to espial departments with espial activities may be concluded with a competent individual. The agreement procedure shall be established by the Cabinet of Ministers of Ukraine.

The individuals involved in the espial activities shall keep confidential the information, which they became aware of. The disclosure of these secrets results in the prosecution according to the current legislation, except for cases of disclosing the information on illegal actions violating the human rights.

It shall be forbidden to involve in the execution of espial tasks the medical staff, priests, lawyers, if the individual, in relation to whom they have to take espial measures, is their patient or client.

Article 12. Social and Legal Protection of Members of Espial Departments

The guarantees of the legal and social protection provided by relevant laws of Ukraine shall apply to the officials exercising the espial activities.

The officials, who exercise espial activities, are entitled to additional social and financial privileges according to the procedure established by the Cabinet of Ministers of Ukraine.

If there are data on the threat to the life, health or property of the official or his relatives due to his exercising espial activities in the interests of the security of Ukraine, or of the investigation of a grave and especially grave crime or exposure of an organised criminal group, the espial department shall take special measures to ensure their safety: change in the personal data, change in the place of residence, work and study or in other data according to the procedure to be established by the Cabinet of Ministers of Ukraine.

(Part 3 changed and amended according to Law of Ukraine #965-IV of June 19, 2003)

A member of an espial department shall not be liable for the damage

caused by him to the rights, freedoms of an individual, interests of the state in the course of exercising the espial activities, while being in the conditions of the necessary defence, ultimate necessity or professional risk as well as in connection with the arrest of an individual, whose actions contain indications of a crime.

Article 13. Social and Legal Protection of an individual Involved in Performance of Tasks of Espial Activities

An individual involved in performance of espial activities shall be under the state protection.

Co-operation of such an individual with the espial department shall be included in his overall labour record, if an employment contract has been concluded with such an individual. If such an individual has died or become disabled in connection with the performance of tasks of espial activities, he shall be entitled to the privileges envisaged for the officials of espial departments.

In case of a danger to the life, health or property of an individual involved in the performance of tasks of espial activities, his protection shall be ensured according to the procedure provided by Part 3 of Article 12 hereof.

Article 14. Supervision of Compliance with Laws in the Course of Espial Activities

The compliance with laws in the course of espial activities shall be supervised by the Prosecutor General of Ukraine, his/her deputies, public prosecutors of the Autonomous Republic of Crimea, oblasts, cities of Kyiv and Sevastopol, public prosecutors and their deputies with the equivalent status, as well as by heads and public prosecutors of directorates and departments of the Public Prosecution Office of Ukraine and prosecution offices of the Autonomous Republic of Crimea, oblasts and cities of Kyiv and Sevastopol.

Within the scope of his authority, the public prosecutor shall:

1) enter all premises of agencies engaging in espial activities without obstruction;

2) request for inspection the directions, instructions, orders and other acts related to the espial activities, records of espial proceedings, registration, accounting, reporting, statistical and analytical documents, and other information on the progress of espial actions;

3) instruct heads of relevant authorities to undertake inspections in units reporting to them aiming at the elimination of breaches of law;

4) issue written instructions to undertake espial actions in the interests of the criminal procedure, to search for missing people;

5) give consent to the extension of the time for espial activities;

6) receive explanations on the violation of requirements of the law from officials of the espial agencies;

7) verify the complaints on the violation of laws by espial agencies and familiarise himself with the espial materials, if necessary therefore;

8) cancel illegal resolutions on the institution or termination of espial proceedings, suspension or resumption of espial activities or other decisions contradicting the law;

9) take measures aimed at rectifying the violations of laws in the course of espial activities and making the guilty persons answerable by law;

10) protest against illegal resolutions of courts permitting the espial actions or refusing such permit. A protest shall suspend the espial actions permitted by the court.

The information about individuals, who co-operate or have co-operated with an intelligence agency of Ukraine, the fact of particular individual's being staff officials of intelligence agencies, as well as forms, methods and means of the intelligence activities, and the organisational/staffing structure of intelligence agencies shall not be the subject of the public prosecutor supervision.

(Part 4 added to the Article according to Law of Ukraine #3111-III of March 07, 2002)(Article 14 in the wording of Law of Ukraine #2246-III of January 18, 2001)

Leonid Kravchuk, President of Ukraine

**City of Kyiv, February 18, 1992
#2135-XII**

Annex 6: Council of Europe Convention on Action against Trafficking in Human Beings

Council of Europe Treaty Series - No. 197



Council of Europe Convention
on Action against Trafficking
in Human Beings

Warsaw, 16.V.2005

Preamble

The member States of the Council of Europe and the other Signatories hereto,

Considering that the aim of the Council of Europe is to achieve a greater unity between its members;

Considering that trafficking in human beings constitutes a violation of human rights and an offence to the dignity and the integrity of the human being;

Considering that trafficking in human beings may result in slavery for victims;

Considering that respect for victims' rights, protection of victims and action to combat trafficking in human beings must be the paramount objectives;

Considering that all actions or initiatives against trafficking in human beings must be non-discriminatory, take gender equality into account as well as a child-rights approach;

Recalling the declarations by the Ministers for Foreign Affairs of the Member States at the 112th (14-15 May 2003) and the 114th (12-13 May 2004) Sessions of the Committee of Ministers calling for reinforced action by the Council of Europe on trafficking in human beings;

Bearing in mind the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) and its protocols;

Bearing in mind the following recommendations of the Committee of Ministers to member states of the Council of Europe: Recommendation No. R (91) 11 on sexual exploitation, pornography and prostitution of, and trafficking in, children and young adults; Recommendation No. R (97) 13 concerning intimidation of witnesses and the rights of the defence; Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation and Recommendation Rec (2001) 16 on the protection of children against sexual exploitation; Recommendation Rec (2002) 5 on the protection of women against violence;

Bearing in mind the following recommendations of the Parliamentary Assembly of the Council of Europe: Recommendation 1325 (1997) on traffic in women and forced prostitution in Council of Europe member states; Recommendation 1450 (2000) on violence against women in Europe; Recommendation 1545 (2002) on a campaign against trafficking in women; Recommendation 1610 (2003) on migration connected with trafficking in women and prostitution; Recommendation 1611 (2003) on trafficking in organs in Europe; Recommendation 1663 (2004) Domestic slavery: servitude, au pairs and mail-order brides;

Bearing in mind the European Union Council Framework Decision of 19 July 2002 on combating trafficking in human beings, the European Union Council Framework Decision of 15 March 2001 on the standing of victims in criminal proceedings and the European Union Council Directive 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;

Taking due account of the United Nations Convention against Transnational Organized Crime and the Protocol thereto to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children with a view to improving the protection which they afford and developing the standards established by them;

Taking due account of the other international legal instruments relevant in the field of action against trafficking in human beings;

Taking into account the need to prepare a comprehensive international legal instrument focusing on the human rights of victims of trafficking and setting up a specific monitoring mechanism,

Have agreed as follows:

Chapter I – Purposes, scope, non-discrimination principle and definitions

Article 1 – Purposes of the Convention

- 1 The purposes of this Convention are:
 - a to prevent and combat trafficking in human beings, while guaranteeing gender equality;
 - b to protect the human rights of the victims of trafficking, design a comprehensive framework for the protection and assistance of

victims and witnesses, while guaranteeing gender equality, as well as to ensure effective investigation and prosecution;

- c to promote international cooperation on action against trafficking in human beings.
- 2 In order to ensure effective implementation of its provisions by the Parties, this Convention sets up a specific monitoring mechanism.

Article 2 – Scope

This Convention shall apply to all forms of trafficking in human beings, whether national or transnational, whether or not connected with organised crime.

Article 3 – Non-discrimination principle

The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

Article 4 – Definitions

For the purposes of this Convention:

- a ‘Trafficking in human beings’ shall mean 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. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;
- b The consent of a victim of ‘trafficking in human beings’ to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used;
- c The recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation shall be considered ‘trafficking in

human beings' even if this does not involve any of the means set forth in subparagraph (a) of this article;

- d 'Child' shall mean any person under eighteen years of age;
- e 'Victim' shall mean any natural person who is subject to trafficking in human beings as defined in this article.

Chapter II – Prevention, co-operation and other measures

Article 5 – Prevention of trafficking in human beings

- 1 Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings.
- 2 Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings.
- 3 Each Party shall promote a Human Rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2.
- 4 Each Party shall take appropriate measures, as may be necessary, to enable migration to take place legally, in particular through dissemination of accurate information by relevant offices, on the conditions enabling the legal entry in and stay on its territory.
- 5 Each Party shall take specific measures to reduce children's vulnerability to trafficking, notably by creating a protective environment for them.
- 6 Measures established in accordance with this article shall involve, where appropriate, non-governmental organisations, other relevant organisations and other elements of civil society committed to the prevention of trafficking in human beings and victim protection or assistance.

Article 6 – Measures to discourage the demand

To discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking, each

Party shall adopt or strengthen legislative, administrative, educational, social, cultural or other measures including:

- a research on best practices, methods and strategies;
- b raising awareness of the responsibility and important role of media and civil society in identifying the demand as one of the root causes of trafficking in human beings;
- c target information campaigns involving, as appropriate, inter alia, public authorities and policy makers;
- d preventive measures, including educational programmes for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.

Article 7 – Border measures

- 1 Without prejudice to international commitments in relation to the free movement of persons, Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in human beings.
- 2 Each Party shall adopt legislative or other appropriate measures to prevent, to the extent possible, means of transport operated by commercial carriers from being used in the commission of offences established in accordance with this Convention.
- 3 Where appropriate, and without prejudice to applicable international conventions, such measures shall include establishing the obligation of commercial carriers, including any transportation company or the owner or operator of any means of transport, to ascertain that all passengers are in possession of the travel documents required for entry into the receiving State.
- 4 Each Party shall take the necessary measures, in accordance with its internal law, to provide for sanctions in cases of violation of the obligation set forth in paragraph 3 of this article.
- 5 Each Party shall adopt such legislative or other measures as may be necessary to permit, in accordance with its internal law, the denial of entry or revocation of visas of persons implicated in the commission of offences established in accordance with this Convention.

- 6 Parties shall strengthen co-operation among border control agencies by, *inter alia*, establishing and maintaining direct channels of communication.

Article 8 – Security and control of documents

Each Party shall adopt such measures as may be necessary:

- a To ensure that travel or identity documents issued by it are of such quality that they cannot easily be misused and cannot readily be falsified or unlawfully altered, replicated or issued; and
- b To ensure the integrity and security of travel or identity documents issued by or on behalf of the Party and to prevent their unlawful creation and issuance.

Article 9 – Legitimacy and validity of documents

At the request of another Party, a Party shall, in accordance with its internal law, verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for trafficking in human beings.

Chapter III – Measures to protect and promote the rights of victims, guaranteeing gender equality

Article 10 - Identification of the victims

- 1 Each Party shall provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, in identifying and helping victims, including children, and shall ensure that the different authorities collaborate with each other as well as with relevant support organisations, so that victims can be identified in a procedure duly taking into account the special situation of women and child victims and, in appropriate cases, issued with residence permits under the conditions provided for in Article 14 of the present Convention.

2. Each Party shall adopt such legislative or other measures as may be necessary to identify victims as appropriate in collaboration with other Parties and relevant support organisations. Each Party shall ensure that, if the competent authorities have reasonable grounds to believe that a person has been victim of trafficking in human beings, that person shall not be removed from its territory until the identification process as victim of an offence provided for in Article 18 of this Convention has been completed by the competent authorities and shall likewise ensure that that person receives the assistance provided for in Article 12, paragraphs 1 and 2.
3. When the age of the victim is uncertain and there are reasons to believe that the victim is a child, he or she shall be presumed to be a child and shall be accorded special protection measures pending verification of his/her age.
4. As soon as an unaccompanied child is identified as a victim, each Party shall:
 - a provide for representation of the child by a legal guardian, organisation or authority which shall act in the best interests of that child;
 - b take the necessary steps to establish his/her identity and nationality;
 - c make every effort to locate his/her family when this is in the best interests of the child.

Article 11 – Protection of private life

1. Each Party shall protect the private life and identity of victims. Personal data regarding them shall be stored and used in conformity with the conditions provided for by the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108).
2. Each Party shall adopt measures to ensure, in particular, that the identity, or details allowing the identification, of a child victim of trafficking are not made publicly known, through the media or by any other means, except, in exceptional circumstances, in order to facilitate the tracing of family members or otherwise secure the well-being and protection of the child.
3. Each Party shall consider adopting, in accordance with Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms as interpreted by the European Court of Human Rights, measures aimed at encouraging the media to protect the private life and

identity of victims through self-regulation or through regulatory or co-regulatory measures.

Article 12 – Assistance to victims

2. Each Party shall adopt such legislative or other measures as may be necessary to assist victims in their physical, psychological and social recovery. Such assistance shall include at least:
 - a standards of living capable of ensuring their subsistence, through such measures as: appropriate and secure accommodation, psychological and material assistance;
 - b access to emergency medical treatment;
 - c translation and interpretation services, when appropriate;
 - d counselling and information, in particular as regards their legal rights and the services available to them, in a language that they can understand;
 - e assistance to enable their rights and interests to be presented and considered at appropriate stages of criminal proceedings against offenders;
 - f access to education for children.
- 2 Each Party shall take due account of the victim's safety and protection needs.
- 3 In addition, each Party shall provide necessary medical or other assistance to victims lawfully resident within its territory who do not have adequate resources and need such help.
- 4 Each Party shall adopt the rules under which victims lawfully resident within its territory shall be authorised to have access to the labour market, to vocational training and education.
- 5 Each Party shall take measures, where appropriate and under the conditions provided for by its internal law, to co-operate with non-governmental organisations, other relevant organisations or other elements of civil society engaged in assistance to victims.
- 6 Each Party shall adopt such legislative or other measures as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness.

- 7 For the implementation of the provisions set out in this article, each Party shall ensure that services are provided on a consensual and informed basis, taking due account of the special needs of persons in a vulnerable position and the rights of children in terms of accommodation, education and appropriate health care.

Article 13 – Recovery and reflection period

- 1 Each Party shall provide in its internal law a recovery and reflection period of at least 30 days, when there are reasonable grounds to believe that the person concerned is a victim. Such a period shall be sufficient for the person concerned to recover and escape the influence of traffickers and/or to take an informed decision on cooperating with the competent authorities. During this period it shall not be possible to enforce any expulsion order against him or her. This provision is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. During this period, the Parties shall authorise the persons concerned to stay in their territory.
- 2 During this period, the persons referred to in paragraph 1 of this Article shall be entitled to the measures contained in Article 12, paragraphs 1 and 2.
- 3 The Parties are not bound to observe this period if grounds of public order prevent it or if it is found that victim status is being claimed improperly.

Article 14 – Residence permit

- 1 Each Party shall issue a renewable residence permit to victims, in one or other of the two following situations or in both:
 - a the competent authority considers that their stay is necessary owing to their personal situation;
 - b the competent authority considers that their stay is necessary for the purpose of their co-operation with the competent authorities in investigation or criminal proceedings.
- 2 The residence permit for child victims, when legally necessary, shall be issued in accordance with the best interests of the child and, where appropriate, renewed under the same conditions.

- 3 The non-renewal or withdrawal of a residence permit is subject to the conditions provided for by the internal law of the Party.
- 4 If a victim submits an application for another kind of residence permit, the Party concerned shall take into account that he or she holds, or has held, a residence permit in conformity with paragraph 1.
- 5 Having regard to the obligations of Parties to which Article 40 of this Convention refers, each Party shall ensure that granting of a permit according to this provision shall be without prejudice to the right to seek and enjoy asylum.

Article 15 – Compensation and legal redress

- 1 Each Party shall ensure that victims have access, as from their first contact with the competent authorities, to information on relevant judicial and administrative proceedings in a language which they can understand.
- 2 Each Party shall provide, in its internal law, for the right to legal assistance and to free legal aid for victims under the conditions provided by its internal law.
- 3 Each Party shall provide, in its internal law, for the right of victims to compensation from the perpetrators.
- 4 Each Party shall adopt such legislative or other measures as may be necessary to guarantee compensation for victims in accordance with the conditions under its internal law, for instance through the establishment of a fund for victim compensation or measures or programmes aimed at social assistance and social integration of victims, which could be funded by the assets resulting from the application of measures provided in Article 23.

Article 16 – Repatriation and return of victims

- 1 The Party of which a victim is a national or in which that person had the right of permanent residence at the time of entry into the territory of the receiving Party shall, with due regard for his or her rights, safety and dignity, facilitate and accept, his or her return without undue or unreasonable delay.
- 2 When a Party returns a victim to another State, such return shall be with due regard for the rights, safety and dignity of that person and for the status of any legal proceedings related to the fact that the person is a victim, and shall preferably be voluntary.

- 3 At the request of a receiving Party, a requested Party shall verify whether a person is its national or had the right of permanent residence in its territory at the time of entry into the territory of the receiving Party.
- 4 In order to facilitate the return of a victim who is without proper documentation, the Party of which that person is a national or in which he or she had the right of permanent residence at the time of entry into the territory of the receiving Party shall agree to issue, at the request of the receiving Party, such travel documents or other authorisation as may be necessary to enable the person to travel to and re-enter its territory.
- 5 Each Party shall adopt such legislative or other measures as may be necessary to establish repatriation programmes, involving relevant national or international institutions and non governmental organisations. These programmes aim at avoiding re-victimisation. Each Party should make its best effort to favour the reintegration of victims into the society of the State of return, including reintegration into the education system and the labour market, in particular through the acquisition and improvement of their professional skills. With regard to children, these programmes should include enjoyment of the right to education and measures to secure adequate care or receipt by the family or appropriate care structures.
- 6 Each Party shall adopt such legislative or other measures as may be necessary to make available to victims, where appropriate in co-operation with any other Party concerned, contact information of structures that can assist them in the country where they are returned or repatriated, such as law enforcement offices, non-governmental organisations, legal professions able to provide counselling and social welfare agencies.
- 7 Child victims shall not be returned to a State, if there is indication, following a risk and security assessment, that such return would not be in the best interests of the child.

Article 17 – Gender equality

Each Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.

Chapter IV – Substantive criminal law

Article 18 – Criminalisation of trafficking in human beings

Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct contained in article 4 of this Convention, when committed intentionally.

Article 19 – Criminalisation of the use of services of a victim

Each Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences under its internal law, the use of services which are the object of exploitation as referred to in Article 4 paragraph a of this Convention, with the knowledge that the person is a victim of trafficking in human beings.

Article 20 - Criminalisation of acts relating to travel or identity documents

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

- a forging a travel or identity document;
- b procuring or providing such a document;
- c retaining, removing, concealing, damaging or destroying a travel or identity document of another person.

Article 21 – Attempt and aiding or abetting

- 1 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, aiding or abetting the commission of any of the offences established in accordance with Articles 18 and 20 of the present Convention.
- 2 Each Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences when committed intentionally, an attempt to commit the offences established in accordance with Articles 18 and 20, paragraph a, of this Convention.

Article 22 – Corporate liability

- 1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that a legal person can be held liable for a criminal offence established in accordance with this Convention, committed for its benefit by any natural person, acting either individually or as part of an

organ of the legal person, who has a leading position within the legal person, based on:

- a a power of representation of the legal person;
 - b an authority to take decisions on behalf of the legal person;
 - c an authority to exercise control within the legal person.
- 2 Apart from the cases already provided for in paragraph 1, each Party shall take the measures necessary to ensure that a legal person can be held liable where the lack of supervision or control by a natural person referred to in paragraph 1 has made possible the commission of a criminal offence established in accordance with this Convention for the benefit of that legal person by a natural person acting under its authority.
 - 3 Subject to the legal principles of the Party, the liability of a legal person may be criminal, civil or administrative.
 - 4 Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offence.

Article 23 – Sanctions and measures

- 1 Each Party shall adopt such legislative and other measures as may be necessary to ensure that the criminal offences established in accordance with Articles 18 to 21 are punishable by effective, proportionate and dissuasive sanctions. These sanctions shall include, for criminal offences established in accordance with Article 18 when committed by natural persons, penalties involving deprivation of liberty which can give rise to extradition.
- 2 Each Party shall ensure that legal persons held liable in accordance with Article 22 shall be subject to effective, proportionate and dissuasive criminal or non-criminal sanctions or measures, including monetary sanctions.
- 3 Each Party shall adopt such legislative and other measures as may be necessary to enable it to confiscate or otherwise deprive the instrumentalities and proceeds of criminal offences established in accordance with Articles 18 and 20, paragraph a, of this Convention, or property the value of which corresponds to such proceeds.
- 4 Each Party shall adopt such legislative or other measures as may be necessary to enable the temporary or permanent closure of any establishment which was used to carry out trafficking in human beings,

without prejudice to the rights of bona fide third parties or to deny the perpetrator, temporary or permanently, the exercise of the activity in the course of which this offence was committed.

Article 24 – Aggravating circumstances

Each Party shall ensure that the following circumstances are regarded as aggravating circumstances in the determination of the penalty for offences established in accordance with Article 18 of this Convention:

- a the offence deliberately or by gross negligence endangered the life of the victim;
- b the offence was committed against a child;
- c the offence was committed by a public official in the performance of her/his duties;
- d the offence was committed within the framework of a criminal organisation.

Article 25 - Previous convictions

Each Party shall adopt such legislative and other measures providing for the possibility to take into account final sentences passed by another Party in relation to offences established in accordance with this Convention when determining the penalty.

Article 26 – Non-punishment provision

Each Party shall, in accordance with the basic principles of its legal system, provide for the possibility of not imposing penalties on victims for their involvement in unlawful activities, to the extent that they have been compelled to do so.

Chapter V – Investigation, prosecution and procedural law

Article 27 - Ex parte and ex officio applications

- 1 Each Party shall ensure that investigations into or prosecution of offences established in accordance with this Convention shall not be dependent upon the report or accusation made by a victim, at least when the offence was committed in whole or in part on its territory.
- 2 Each Party shall ensure that victims of an offence in the territory of a Party other than the one where they reside may make a complaint before

the competent authorities of their State of residence. The competent authority to which the complaint is made, insofar as it does not itself have competence in this respect, shall transmit it without delay to the competent authority of the Party in the territory in which the offence was committed. The complaint shall be dealt with in accordance with the internal law of the Party in which the offence was committed.

- 3 Each Party shall ensure, by means of legislative or other measures, in accordance with the conditions provided for by its internal law, to any group, foundation, association or non-governmental organisations which aims at fighting trafficking in human beings or protection of human rights, the possibility to assist and/or support the victim with his or her consent during criminal proceedings concerning the offence established in accordance with Article 18 of this Convention.

Article 28 – Protection of victims, witnesses and collaborators with the judicial authorities

- 1 Each Party shall adopt such legislative or other measures as may be necessary to provide effective and appropriate protection from potential retaliation or intimidation in particular during and after investigation and prosecution of perpetrators, for:
 - a Victims;
 - b As appropriate, those who report the criminal offences established in accordance with Article 18 of this Convention or otherwise cooperate with the investigating or prosecuting authorities;
 - c witnesses who give testimony concerning criminal offences established in accordance with Article 18 of this Convention;
 - d when necessary, members of the family of persons referred to in subparagraphs a and c.
- 2 Each Party shall adopt such legislative or other measures as may be necessary to ensure and to offer various kinds of protection. This may include physical protection, relocation, identity change and assistance in obtaining jobs.
- 3 A child victim shall be afforded special protection measures taking into account the best interests of the child.
- 4 Each Party shall adopt such legislative or other measures as may be necessary to provide, when necessary, appropriate protection from potential retaliation or intimidation in particular during and after

investigation and prosecution of perpetrators, for members of groups, foundations, associations or non-governmental organisations which carry out the activities set out in Article 27, paragraph 3.

- 5 Each Party shall consider entering into agreements or arrangements with other States for the implementation of this article.

Article 29 – Specialised authorities and co-ordinating bodies

- 1 Each Party shall adopt such measures as may be necessary to ensure that persons or entities are specialised in the fight against trafficking and the protection of victims. Such persons or entities shall have the necessary independence in accordance with the fundamental principles of the legal system of the Party, in order for them to be able to carry out their functions effectively and free from any undue pressure. Such persons or the staffs of such entities shall have adequate training and financial resources for their tasks.
- 2 Each Party shall adopt such measures as may be necessary to ensure co-ordination of the policies and actions of their governments' departments and other public agencies against trafficking in human beings, where appropriate, through setting up co-ordinating bodies.
- 3 Each Party shall provide or strengthen training for relevant officials in the prevention of and fight against trafficking in human beings, including Human Rights training. The training may be agency-specific and shall, as appropriate, focus on: methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers.
- 4 Each Party shall consider appointing National Rapporteurs or other mechanisms for monitoring the anti-trafficking activities of State institutions and the implementation of national legislation requirements.

Article 30 – Court proceedings

In accordance with the Convention for the Protection of Human Rights and Fundamental Freedoms, in particular Article 6, each Party shall adopt such legislative or other measures as may be necessary to ensure in the course of judicial proceedings:

- a the protection of victims' private life and, where appropriate, identity;
- b victims' safety and protection from intimidation,

in accordance with the conditions under its internal law and, in the case of child victims, by taking special care of children's needs and ensuring their right to special protection measures.

Article 31 – Jurisdiction

- 1 Each Party shall adopt such legislative and other measures as may be necessary to establish jurisdiction over any offence established in accordance with this Convention, when the offence is committed:
 - a in its territory; or
 - b on board a ship flying the flag of that Party; or
 - c on board an aircraft registered under the laws of that Party; or
 - d by one of its nationals or by a stateless person who has his or her habitual residence in its territory, if the offence is punishable under criminal law where it was committed or if the offence is committed outside the territorial jurisdiction of any State;
 - e against one of its nationals.
- 2 Each Party may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, by a declaration addressed to the Secretary General of the Council of Europe, declare that it reserves the right not to apply or to apply only in specific cases or conditions the jurisdiction rules laid down in paragraphs 1 (d) and (e) of this article or any part thereof.
- 3 Each Party shall adopt such measures as may be necessary to establish jurisdiction over the offences referred to in this Convention, in cases where an alleged offender is present in its territory and it does not extradite him/her to another Party, solely on the basis of his/her nationality, after a request for extradition.
- 4 When more than one Party claims jurisdiction over an alleged offence established in accordance with this Convention, the Parties involved shall, where appropriate, consult with a view to determining the most appropriate jurisdiction for prosecution.
- 5 Without prejudice to the general norms of international law, this Convention does not exclude any criminal jurisdiction exercised by a Party in accordance with internal law.

Chapter VI – International co-operation and co-operation with civil society

Article 32 – General principles and measures for international co-operation

The Parties shall co-operate with each other, in accordance with the provisions of this Convention, and through application of relevant applicable international and regional instruments, arrangements agreed on the basis of uniform or reciprocal legislation and internal laws, to the widest extent possible, for the purpose of:

- preventing and combating trafficking in human beings;
- protecting and providing assistance to victims;
- investigations or proceedings concerning criminal offences established in accordance with this Convention.

Article 33 - Measures relating to endangered or missing persons

- 1 When a Party, on the basis of the information at its disposal has reasonable grounds to believe that the life, the freedom or the physical integrity of a person referred to in Article 28, paragraph 1, is in immediate danger on the territory of another Party, the Party that has the information shall, in such a case of emergency, transmit it without delay to the latter so as to take the appropriate protection measures.
- 2 The Parties to this Convention may consider reinforcing their co-operation in the search for missing people, in particular for missing children, if the information available leads them to believe that she/he is a victim of trafficking in human beings. To this end, the Parties may conclude bilateral or multilateral treaties with each other.

Article 34 – Information

- 1 The requested Party shall promptly inform the requesting Party of the final result of the action taken under this chapter. The requested Party shall also promptly inform the requesting Party of any circumstances which render impossible the carrying out of the action sought or are likely to delay it significantly.
- 2 A Party may, within the limits of its internal law, without prior request, forward to another Party information obtained within the framework of its own investigations when it considers that the disclosure of such information might assist the receiving Party in initiating or carrying out investigations or proceedings concerning criminal offences established in

accordance with this Convention or might lead to a request for co-operation by that Party under this chapter.

- 3 Prior to providing such information, the providing Party may request that it be kept confidential or used subject to conditions. If the receiving Party cannot comply with such request, it shall notify the providing Party, which shall then determine whether the information should nevertheless be provided. If the receiving Party accepts the information subject to the conditions, it shall be bound by them.
- 4 All information requested concerning Articles 13, 14 and 16, necessary to provide the rights conferred by these Articles, shall be transmitted at the request of the Party concerned without delay with due respect to Article 11 of the present Convention.

Article 35 – Co-operation with civil society

Each Party shall encourage state authorities and public officials, to co-operate with non-governmental organisations, other relevant organisations and members of civil society, in establishing strategic partnerships with the aim of achieving the purpose of this Convention.

Chapter VII – Monitoring mechanism

Article 36 – Group of experts on action against trafficking in human beings

- 1 The Group of experts on action against trafficking in human beings (hereinafter referred to as 'GRETA'), shall monitor the implementation of this Convention by the Parties.
- 2 GRETA shall be composed of a minimum of 10 members and a maximum of 15 members, taking into account a gender and geographical balance, as well as a multidisciplinary expertise. They shall be elected by the Committee of the Parties for a term of office of 4 years, renewable once, chosen from amongst nationals of the States Parties to this Convention.
- 3 The election of the members of GRETA shall be based on the following principles:
 - a they shall be chosen from among persons of high moral character, known for their recognised competence in the fields of Human Rights, assistance and protection of victims and of action against trafficking in human beings or having professional experience in the areas covered by this Convention;

- b they shall sit in their individual capacity and shall be independent and impartial in the exercise of their functions and shall be available to carry out their duties in an effective manner;
 - c no two members of GRETA may be nationals of the same State;
 - d they should represent the main legal systems.
- 4 The election procedure of the members of GRETA shall be determined by the Committee of Ministers, after consulting with and obtaining the unanimous consent of the Parties to the Convention, within a period of one year following the entry into force of this Convention. GRETA shall adopt its own rules of procedure.

Article 37 – Committee of the Parties

- 1 The Committee of the Parties shall be composed of the representatives on the Committee of Ministers of the Council of Europe of the member States Parties to the Convention and representatives of the Parties to the Convention, which are not members of the Council of Europe.
- 2 The Committee of the Parties shall be convened by the Secretary General of the Council of Europe. Its first meeting shall be held within a period of one year following the entry into force of this Convention in order to elect the members of GRETA. It shall subsequently meet whenever one-third of the Parties, the President of GRETA or the Secretary General so requests.
- 3 The Committee of the Parties shall adopt its own rules of procedure.

Article 38 – Procedure

- 1 The evaluation procedure shall concern the Parties to the Convention and be divided in rounds, the length of which is determined by GRETA. At the beginning of each round GRETA shall select the specific provisions on which the evaluation procedure shall be based.
- 2 GRETA shall define the most appropriate means to carry out this evaluation. GRETA may in particular adopt a questionnaire for each evaluation round, which may serve as a basis for the evaluation of the implementation by the Parties of the present Convention. Such a questionnaire shall be addressed to all Parties. Parties shall respond to this questionnaire, as well as to any other request of information from GRETA.

- 3 GRETA may request information from civil society.
- 4 GRETA may subsidiarily organise, in co-operation with the national authorities and the 'contact person' appointed by the latter, and, if necessary, with the assistance of independent national experts, country visits. During these visits, GRETA may be assisted by specialists in specific fields.
- 5 GRETA shall prepare a draft report containing its analysis concerning the implementation of the provisions on which the evaluation is based, as well as its suggestions and proposals concerning the way in which the Party concerned may deal with the problems which have been identified. The draft report shall be transmitted for comments to the Party which undergoes the evaluation. Its comments are taken into account by GRETA when establishing its report.
- 6 On this basis, GRETA shall adopt its report and conclusions concerning the measures taken by the Party concerned to implement the provisions of the present Convention. This report and conclusions shall be sent to the Party concerned and to the Committee of the Parties. The report and conclusions of GRETA shall be made public as from their adoption, together with eventual comments by the Party concerned.
- 7 Without prejudice to the procedure of paragraphs 1 to 6 of this article, the Committee of the Parties may adopt, on the basis of the report and conclusions of GRETA, recommendations addressed to this Party (a) concerning the measures to be taken to implement the conclusions of GRETA, if necessary setting a date for submitting information on their implementation, and (b) aiming at promoting co-operation with that Party for the proper implementation of the present Convention.

Chapter VIII – Relationship with other international instruments

Article 39 – Relationship with the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime

This Convention shall not affect the rights and obligations derived from the provisions of the Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organised crime, and is intended to enhance the protection afforded by it and develop the standards contained therein.

Article 40 – Relationship with other international instruments

- 1 This Convention shall not affect the rights and obligations derived from other international instruments to which Parties to the present Convention are Parties or shall become Parties and which contain provisions on matters governed by this Convention and which ensure greater protection and assistance for victims of trafficking.
- 2 The Parties to the Convention may conclude bilateral or multilateral agreements with one another on the matters dealt with in this Convention, for purposes of supplementing or strengthening its provisions or facilitating the application of the principles embodied in it.
- 3 Without prejudice to the object and purpose of the present Convention and without prejudice to its full application with other Parties, Parties which are members of the European Union shall, in their mutual relations, apply Community and European Union rules in so far as there are Community or European Union rules governing the particular subject concerned and applicable to the specific case.
- 4 Nothing in this Convention shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of *non-refoulement* as contained therein.

Chapter IX – Amendments to the Convention

Article 41 – Amendments

- 1 Any proposal for an amendment to this Convention presented by a Party shall be communicated to the Secretary General of the Council of Europe and forwarded by him or her to the member States of the Council of Europe, any signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43.
- 2 Any amendment proposed by a Party shall be communicated to GRETA, which shall submit to the Committee of Ministers its opinion on that proposed amendment.
- 3 The Committee of Ministers shall consider the proposed amendment and the opinion submitted by GRETA and, following consultation of the Parties to this Convention and after obtaining their unanimous consent, may adopt the amendment.

- 4 The text of any amendment adopted by the Committee of Ministers in accordance with paragraph 3 of this article shall be forwarded to the Parties for acceptance.
- 5 Any amendment adopted in accordance with paragraph 3 of this article shall enter into force on the first day of the month following the expiration of a period of one month after the date on which all Parties have informed the Secretary General that they have accepted it.

Chapter X – Final clauses

Article 42 – Signature and entry into force

- 1 This Convention shall be open for signature by the member States of the Council of Europe, the non member States which have participated in its elaboration and the European Community.
- 2 This Convention is subject to ratification, acceptance or approval. Instruments of ratification, acceptance or approval shall be deposited with the Secretary General of the Council of Europe.
- 3 This Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date on which 10 Signatories, including at least 8 member States of the Council of Europe, have expressed their consent to be bound by the Convention in accordance with the provisions of the preceding paragraph.
- 4 In respect of any State mentioned in paragraph 1 or the European Community, which subsequently expresses its consent to be bound by it, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of the deposit of its instrument of ratification, acceptance or approval.

Article 43 – Accession to the Convention

- 1 After the entry into force of this Convention, the Committee of Ministers of the Council of Europe may, after consultation of the Parties to this Convention and obtaining their unanimous consent, invite any non-member State of the Council of Europe, which has not participated in the elaboration of the Convention, to accede to this Convention by a decision taken by the majority provided for in Article 20 *d.* of the Statute of the Council of Europe, and by unanimous vote of the representatives of the Contracting States entitled to sit on the Committee of Ministers.

- 2 In respect of any acceding State, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of deposit of the instrument of accession with the Secretary General of the Council of Europe.

Article 44 – Territorial application

- 1 Any State or the European Community may, at the time of signature or when depositing its instrument of ratification, acceptance, approval or accession, specify the territory or territories to which this Convention shall apply.
- 2 Any Party may, at any later date, by a declaration addressed to the Secretary General of the Council of Europe, extend the application of this Convention to any other territory specified in the declaration and for whose international relations it is responsible or on whose behalf it is authorised to give undertakings. In respect of such territory, the Convention shall enter into force on the first day of the month following the expiration of a period of three months after the date of receipt of such declaration by the Secretary General.
- 3 Any declaration made under the two preceding paragraphs may, in respect of any territory specified in such declaration, be withdrawn by a notification addressed to the Secretary General of the Council of Europe. The withdrawal shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of such notification by the Secretary General.

Article 45 – Reservations

No reservation may be made in respect of any provision of this Convention, with the exception of the reservation of Article 31, paragraph 2.

Article 46 – Denunciation

- 1 Any Party may, at any time, denounce this Convention by means of a notification addressed to the Secretary General of the Council of Europe.
- 2 Such denunciation shall become effective on the first day of the month following the expiration of a period of three months after the date of receipt of the notification by the Secretary General.

Article 47 – Notification

The Secretary General of the Council of Europe shall notify the member States of the Council of Europe, any State signatory, any State Party, the European Community, to any State invited to sign this Convention in accordance with the provisions of Article 42 and to any State invited to accede to this Convention in accordance with the provisions of Article 43 of:

- a any signature;
- b the deposit of any instrument of ratification, acceptance, approval or accession;
- c any date of entry into force of this Convention in accordance with Articles 42 and 43;
- d any amendment adopted in accordance with Article 41 and the date on which such an amendment enters into force;
- e any denunciation made in pursuance of the provisions of Article 46;
- f any other act, notification or communication relating to this Convention
- g any reservation made under Article 45.

In witness whereof the undersigned, being duly authorised thereto, have signed this Convention.

Done at Warsaw, this 16th day of May 2005, in English and in French, both texts being equally authentic, in a single copy which shall be deposited in the archives of the Council of Europe. The Secretary General of the Council of Europe shall transmit certified copies to each member State of the Council of Europe, to the non-member States which have participated in the elaboration of this Convention, to the European Community and to any State invited to accede to this Convention.