



# More 'Trafficking' Less 'Trafficked'

Trafficking for Exploitation Outside  
the Sex Sector in Europe

GAATW Working Papers Series



Global Alliance Against Traffic in Women



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OUTSIDE THE SEX SECTOR IN EUROPE

GAATW WORKING PAPER SERIES 2011

Global Alliance Against Traffic in Women  
2011

# **MORE 'TRAFFICKING', LESS 'TRAFFICKED'**

## **Trafficking for Exploitation Outside the Sex Sector in Europe**

### **GAATW Working Paper Series 2011**

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Other titles in this series are:

2010

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- Beyond Borders: Exploring Links between Trafficking and Globalisation & Security.
- Beyond Borders: Exploring Links between Trafficking and Labour.
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In 2008-10 the GAATW International Secretariat carried out a programme on the 'linkages' between trafficking and other related fields. This programme emphasised that trafficking cannot be seen as isolated from the context within which it takes place. It has to be understood and addressed as part of the broader social, political and economic systems linked to migrants', women's and workers' rights. In 2010 GAATW produced a Series of four Working Papers, each of them locating trafficking within a specific context and/or exploring its linkage to one specific field, namely, Gender, Globalisation and Security, Labour, and Migration.

We have devoted our efforts in 2011 to deepen our knowledge on some of the issues that emerged in 2010. This Working Paper further explores the scope of what is often referred to as 'trafficking for labour exploitation', with a focus on Europe. It specifically looks at issues of identification and the assistance scenario for persons trafficked into sectors outside the sex-industry. We discuss the benefits and challenges of the legal avenues available to them and to service providers, and analyse how existing case law can be used to advance the rights of trafficked persons. Throughout, the analysis makes extensive use of on-the-ground experiences and voices of trafficked persons and service providers. By doing so, it fills a gap in existing research on the topic.

Intended readers of this Working Paper are member organisations of GAATW, and colleague organisations and groups that provide assistance to people trafficked for exploitation outside the sex sector. The knowledge produced in this report is also meant to assist policymakers and other stakeholders, including donors, involved in developing anti-trafficking measures.

**This Working Paper is a work in progress and we are looking forward to further discussions. Please share your thoughts.**

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# EXECUTIVE SUMMARY

GAATW has always proactively lobbied for a broad definition of human trafficking and has consequently critiqued a ‘traditional’ near exclusive focus on the sex industry as the primary, if not the only, site of trafficking. We have noted with interest the recent focus on what is termed as ‘trafficking for labour exploitation.’ While we are not sure that creating two separate and distinct categories such as ‘trafficking for labour exploitation’ and ‘trafficking for sexual exploitation’ is helpful, we welcome the broadening of focus.

Further, we wanted to take a closer look at this new scenario, especially in Europe, and analyse the practical and conceptual implications of the expansion of initiatives to trafficking outside the sex sector, especially for service providers and for those seeking assistance. We wanted to understand the emerging issues linked to this expansion (especially as they relate to identification and assistance). Finally, we also wanted to hear the views of service providers on looking at trafficking for sexual and labour exploitation as two distinct forms of trafficking. A working paper, as the name implies, is a work in progress, rather than a ‘final say’. Thus we look forward to discussion and dialogues with colleagues on the issues raised in this paper.

**Identification** as trafficked, or presumably trafficked, is the first step towards providing assistance and protection to those whose rights have been violated. Identification rates for trafficking for exploitation outside the sex sector are low. This is due to several reasons, including a narrow understanding of trafficking, gender and moral biases, conflicting provisions in migration and labour legislation, and other practical obstacles.

The general observation is that assistance and protection services have focused on women trafficked into the sex sector. Direct assistance providers explain that lack of identification is one of the main reasons for people trafficked into other sectors not receiving available assistance under the anti-trafficking legislation. More often than not national legislations have proved to be deterrents for identification.

Regarding assistance needs, the service providers we spoke to did not think that two distinctly different categories of assistance; one for men and another for women or one for people trafficked into the sex industry and another for those trafficked into other sectors, are needed. Instead they felt that **assistance needs** differ depending on the type or degree of exploitation. Hence a more nuanced needs assessment should be done. In other words it is the notion of assistance ‘packages’ that should be questioned and support should be tailored to meet the need of each trafficked person regardless of their gender or sector of exploitation.



For persons trafficked outside the sex sector to access justice, service providers pointed out that no single alternative **legal framework** (labour, migration or asylum) is necessarily better than the criminal justice one using anti-trafficking legislation. However, using more than one legal route certainly offers more legal options. Trafficked persons therefore are better off using more than one legal route.

Making a distinction between trafficking for exploitation outside the sex sector and within the sex sector has proven useful to some. For example, making a distinction between sex and labour trafficking has served to put the spotlight on various labour sectors in Europe which were traditionally not looked at as potential sites of trafficking. It has opened up possibilities for identification of the 'non-traditional' victim of trafficking, such as somebody trafficked outside the sex sector, or a trafficked man.

However, it was pointed out that **distinguishing trafficking per sector of exploitation can also have negative consequences**. Making such a distinction takes the emphasis away from exploitation, instead it looks at the sector and thus risks looking at all work in that sector as exploitative. Besides, it excludes the sex sector as a labour sector even though some countries have legal sex sectors and in many others sex workers are demanding workers rights.

**Overall, working on this paper allowed us to understand the practical implications of broadening of the anti-trafficking framework.**

# **INTRODUCTION: FRAMING THE ISSUE**

GAATW has always proactively lobbied for a broad definition of human trafficking and has consequently critiqued a near exclusive focus on the sex industry as the primary, if not the only, site of trafficking. **In recent years we have observed with interest that ‘trafficking for labour exploitation’ has begun to receive attention. There is a sizeable body of research on this issue now, and several conferences, meetings and campaigns have focussed on ‘labour trafficking’ situating it as something different and distinct from ‘trafficking for sexual exploitation’.**

A rising number of persons trafficked into ‘other’ sectors have been identified, some of these sectors are formal sectors and many of the identified victims happen to be men. What does this say about various sites of work? Are women trafficked into non-sex work sectors being ignored? Is there a gender divide along lines of work? Do we need to look at the labour situations in many more sectors than just the informal sector or just in sex work? GAATW, especially member organisations in Europe, were keen to find out more. GAATW felt that a desk based research as well as interviews with service providers were needed to understand various implications.

The questions we focussed on were:

- **What are the human rights implications of the expansion of anti-trafficking initiatives (including laws and national policies) to trafficking outside the sex sector?**
- **What are the emerging issues linked to this expansion?**
- **What are the implications of the expansion for service providers and for those seeking assistance?**
- **Is there really a need to look at exploitation in the sex industry and in other sectors separately?**



Photo by Yoonki Kim

## European Context: Globalisation, Security, and Migrant Labour

### Globalisation and security agenda's influence on the European state of affairs, and the attitude towards exploitation of migrant labour.

In recent decades, the way in which labour is organised has changed. Globalisation, (i.e. the progressive integration of economies and societies driven by new technologies and new economic relationships, including trade liberalisation, privatisation, and de-regulation) has seen an increased mobility of workers, but has also made their employment less secure. It has given rise to outsourcing and sophisticated but unclear subcontracting chains, and, contributed to the economic, social, and cultural marginalisation of communities, countries, and regions, within the global economy.<sup>1</sup>

The 'security agenda', which has come to define the last decade, becoming prominent after '9/11' has, similarly, resulted in the marginalisation of particular groups of migrant workers (i.e. low skilled, or from certain countries), through an increased and more openly practiced distrust of 'outsiders'. 'Security' is increasingly being used as an argument to prevent migration. Curbing migration is often called an 'anti-trafficking' or 'counter terrorism' measure. The conflating of 'illegal' migrants with either terrorists or victims of trafficking persists, making it harder for certain categories of migrant workers to enter or move within the European Union (EU), thus pushing them underground, making them more vulnerable to situations of trafficking and exploitation.<sup>2</sup>

In Europe, the opening of internal EU borders, and the expansion of the EU, has resulted in an increased mobility of workers.<sup>3</sup> Many issues which were previously 'national' ones are now seen as the European Union's issue. As the world's economic crisis progresses, the region has entered into its own financial crisis with working conditions deteriorating, both for nationals and migrants.<sup>4</sup>

At the same time, perhaps as a nervous reaction, the region has seen a major increase in political power of populist parties, characterised by, among others, nationalism, xenophobia, racism, anti-elitism, stigmatisation of foreigners and an anti-migratory discourse often linked to 'law and order'.<sup>5</sup> Worryingly, "the populist rhetoric... renders acceptable, legitimate and just, what would be unacceptable in another context of analysis and interpretation".<sup>6</sup>

## Labour Sectors Vulnerable to Exploitation and Trafficking

Sectors outside the sex industry that have been referred to as being particularly vulnerable to forced labour and exploitative labour practices, and which in Europe

also have a strong representation of migrant workers, both documented and undocumented,<sup>7</sup> include: agricultural and fishing; forestry; construction; mining, quarrying and brick kilns; manufacturing, processing and packaging; textiles and garments; hospitality services; tourism; domestic and care work (including child care and au pairs); nursing; circus; begging; and petty crime.<sup>8</sup>

**Whilst some of these work sectors follow a gender division of labour, i.e. predominantly female (for example, domestic and care work, nursing) or male (fishing, forestry, mining and quarrying), most of them are mixed.**

Exploitation of a person's labour often occurs where profit margins are small and labour constitutes a large part of the production costs,<sup>9</sup> and where low-skilled but flexible labour is available in large numbers.<sup>10</sup>

Also crucial is the visibility of the working places. In many of the named sectors, workers are hidden from the public, isolated or difficult to reach (i.e. private homes or closed communities, farms, fishing boats and so on).<sup>11</sup>

Although forced labour and exploitative labour practices are most commonly identified with the informal sector, they also take place in the formal sector.<sup>12</sup> In fact, as the OSCE has stated "Trafficking for labour exploitation arises within the formal and the informal economy and, therefore, the policies and practices to address it should include the enforcement of labour laws".<sup>13</sup> Significantly, irregular employment as such does not necessarily imply the use of force and coercion in an employment relationship. On the contrary, it has been pointed out that, in many cases, such a relationship is based on a mutual agreement between employers and migrant workers.<sup>14</sup>

Forced labour and exploitative labour practices have also been found in the public sector. A case in point is the Czech 'Tree worker case', in which migrant workers have allegedly been trafficked for exploitation of their labour in state owned forests.<sup>15</sup>

## Increased Attention to 'Trafficking for Labour Exploitation'

A literature review undertaken in preparation for this Working Paper showed an increasing number of publications on the issue of trafficking for exploitation outside the sex sector in recent years, many of which focus on Europe.<sup>16</sup>

Initially, non-governmental organisations (NGOs) and some UN agencies, such as the International Labour Organisation (ILO), published one or two publications a year addressing this issue. From 2006 this number quickly increased as new actors



(including migrants and human rights organisations, regional and national governmental organisations, academics, and trade unions to name a few) started to write about it. At the turn of the decade, more than a dozen publications were being published each year.

A closer look at these publications reveals that NGOs are author to mainly country studies, while the other actors bring out theoretical reports on abstract policies and politics, or global or regional tendencies, including broad figures. In the last few years a number of conferences and meetings in Europe have also focused on trafficking for exploitation outside the sex sector.

**Significantly, while there are many publications on the issue of trafficking for exploitation outside the sex sector, the majority make extensive use of, or 'recycle', limited existing research, meaning that the actual information on the topic is nominal. More original research in this area is required.**

Service providers' experience with trafficking for exploitation outside the sex sector is relatively new. However, a body of knowledge is slowly growing on how identification is changing, who the new actors are, and what intentions they are bringing. Service providers are experimenting with assistance measures. They are exploring if available measures are accessible and helpful to this 'new category' of trafficked persons. They are wondering if the assistance regime itself needs to be revisited, not just for those trafficked outside the sex sector, but for all trafficked persons. They are finding out which legal frameworks and tools are available to which 'categories' of trafficked persons and why, and which legal frameworks afford victims the most agency.

## Terminology: What are we talking about?

The increased attention notwithstanding, an important first step is to clarify what exactly are we talking about?

**Although the internationally agreed upon definition of trafficking in the Palermo Protocol, supplementing the UN Convention Against Transnational Organized Crime contains a broad definition of trafficking, whereby "[e]xploitation 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", most anti-trafficking policies, debates, and practices have traditionally focused on so-called 'trafficking for sexual exploitation'.**

With more attention now devoted to trafficking outside the sex industry, researchers, politicians, activists, and academics have started to make an explicit distinction between the different 'sectors' and 'forms' of exploitation. Their terminology refers to

terms such as ‘forced labour’, ‘slavery’, ‘trafficking for sexual exploitation and for labour exploitation’, and ‘other forms of exploitation’. Some of these terms have not been defined in international law (i.e. ‘exploitation’) whilst others, like ‘forced labour’, have been.<sup>17</sup>

Unclear definitions of trafficking and its describing terms, in combination with existing stereotypes about what constitutes trafficking is providing those undertaking direct assistance with challenges. As one service provider put it, “the distinction between bad working conditions and labour exploitation is less clear, and therefore trafficking for labour exploitation is harder to identify”. This leads to limited insight in the actual size of the problem, but also to limited access to assistance services for those who were trafficked for exploitation outside the sex sector, but who were not identified as such.

In addition, diversity within Europe regarding what is included in the realm of labour, and what is not poses extra difficulties. Some countries have legalised prostitution, and recognise it as work. In these countries, service providers are able to talk about labour exploitation within this context. In other countries, where prostitution is not included as a form of labour, this is more complicated.

While we recognise the importance of accurate terminology, and the fact that an unambiguous term for what is often called ‘trafficking for labour exploitation’ has yet to be found, the scope of this Working Paper does not allow us to come with suggestions for a final definition or terminology. What we have noted is that different terms are being used to name various concepts often without clear explanations or conscious decisions.

**For the purpose of this Working Paper we have decided to use the phrase ‘trafficking for exploitation outside the sex sector’ rather than referring to ‘sexual exploitation’ and ‘labour exploitation’, a distinction we find problematic as it does not acknowledge that sexual exploitation can take place in any labour sector, nor that rights of all workers should be protected, whether or not their labour has been recognised as such.**

This distinction, we think, does not help either in countries where sex work is recognised as a form of labour as it creates a useless differentiation. It, finally, stigmatises and stereotypes sex workers as inherently exploited, a view GAATW does not support. Please refer to the Annex 2 on Terminology for a further exploration of how terminology around the issue has been used in theory and practice thus far.

## Hype or Deserved Attention?

As this new 'issue' is being embraced by academics, policy makers, governmental agencies, and all kinds of assistance organisations, it is important to look at the human rights implications.

As one service provider put it: "We do not know anything; we need to know more". What issues are emerging? What are the implications on trafficked persons and their service providers, and what are the human rights implications of an expanding understanding of trafficking? Do these implications justify that we look at the issue separately?

In the research for this Working Paper, we focused on the experiences of anti-trafficking organisations who provide direct assistance to victims of trafficking, since the preceding literature review showed their voices were lacking in literature. Nevertheless, we did also include a number of other organisations that provide assistance, like trade unions, human rights institutions, organisations supporting asylum seekers and governmental agencies. Please refer to the Annex 3 on Methodology, Ethics, and Limitations for more analysis.

While this is not our 'final say' we do hope this research leads to focused advocacy and action plans to assist the Alliance in addressing trafficking for exploitation outside the sex sector. We also hope that Members feel better equipped to provide assistance to persons trafficked for exploitation outside the sex sector. Lastly, we intend it leads to strategic alliances or links with new allies (e.g. international trade unions).



# EMERGING ISSUES: IDENTIFICATION

In essence, **the identification process operationalises the definition of trafficking in human beings. It is the first step towards providing access to assistance and protection, including redress and reparation. Failure to identify a trafficked person hampers her or his access to rights.**

In spite of its importance, the identification of trafficked persons continues to be one of the main challenges in anti-trafficking work, and one of the principle barriers to States fulfilling their obligations under international law.<sup>18</sup>

The International Labour Organisation (ILO), estimates that today 2.4 million persons are trafficked into forced labour as a result of human trafficking.<sup>19</sup> The United Nations Office for Drugs and Crime (UNODC) estimates that 18% of trafficking victims identified by State authorities globally have been victims of forced labour. This percentage increases in some European and Eastern and Central Asian countries, to 35% of all identified victims.<sup>20</sup>

In Europe different initiatives have been recently developed to improve the collection of data and identification of trafficked persons.<sup>21</sup> In spite of this, quoted figures must be considered with caution. Trafficking is both a descriptive category which names a person's experience, and an administrative category that gives a person officially identified as 'trafficked' a specific legal status. As a result, figures of identified trafficked persons as quoted by different actors are highly diverse, depending on their purpose to and means of identifying and categorizing trafficked persons. Measuring trafficking has been notoriously difficult and estimates can vary due to methodological and ideological differences.

In 2008, the European Commission recommended Member States to "Establish or strengthen national mechanisms for identification and referral to services of victims of trafficking, based on agreements between law enforcement and civil society stakeholders adopting a gender perspective and a human rights approach".<sup>22</sup> In some European countries identification is the responsibility of one single agency, in others this task falls on the mandate of a diversity of bodies.

Two years later, the European Commission Group of Experts on Trafficking in Human Beings affirmed that "Procedures to identify and mechanisms to protect, assist, and socially include trafficked persons in the EU Member States are still a major concern of the Group".<sup>23</sup>

How many persons are identified as 'presumed', 'possible' or 'definite' trafficked by State authorities, and therefore, provided with assistance? According to a 2011



published report, information for the period 2008 and 2009 was available for only 16 (out of 27) EU countries, which had identified only 4,010 persons.<sup>24</sup> And among these, although internal regional differences exist, and data is limited,<sup>25</sup> **the number of persons identified as trafficked outside the sex sector is far lower than the number of persons identified as trafficked in the sex sector.**<sup>26</sup> For example:

- In 2009 Germany identified 710 persons as trafficked for exploitation in the sex sector, and 24 persons as trafficked outside the sex sector.<sup>27</sup>
- In the Netherlands, 2009 saw an increase from 3% to 12% of victims being identified as trafficked for exploitation outside the sex sector. In the first half of 2011 a total of 301 persons had been officially registered as trafficked into the sex sector, and 46 persons as trafficked outside the sex sector (26 women and 20 men).<sup>28</sup>
- Contrastingly, among the very few identifications of adults trafficked to Finland by mid-December 2009 (36),<sup>29</sup> 27 had been subjected to 'labour exploitation' and 8 to 'sexual exploitation'.<sup>30</sup>

## Service Providers' View on Reasons Behind Low Identification Rates

There are a number of factors contributing to the low identification rates of trafficked persons outside the sex sector.

Significantly, the concept of trafficking for exploitation outside the sex sector is relatively new and States in Europe have only recently begun to criminalise the act in their national laws. Further, direct service providers note:

- A very narrow understanding of the concept of trafficking in human beings by State agencies in charge of identification, which still associates trafficking with the exploitation of women into the sex sector and, therefore, pays far less attention to trafficking into other forms of exploitation and to men as victims.
- Gendered assumptions about exploitation and moralistic views about prostitution.
- Conflicting agendas of government agencies and civil society organisations, and conflicting provisions of immigration and criminal and labour laws.

**Very narrow understanding of the concept of trafficking in human beings by State agencies in charge of identification.**

**Trafficking in persons is still mostly associated with the exploitation of women in the sex sector. This has a direct impact on the identification of trafficked persons outside the sex sector.**

For example, in 2009 UNODC reported that “The profile of the victims is highly influenced by local laws and priorities, which often focus on child victims and victims of sexual exploitation (usually women). With this caveat in mind, in the 61 countries where the gender and age of the victim were specified, two thirds of the identified victims were women and 13% were girls. In the 52 countries where the form of exploitation was specified, 79% of the victims were subjected to sexual exploitation.”<sup>31</sup>

Even if the definition of trafficking does not differentiate between sectors of exploitation there is a general lack of awareness that trafficking can also happen outside the sex sector. As the two following cases show, **those in charge of formal identification often perceive exploitation outside the sex sector as ‘less serious’ than exploitation in the sex sector, and the indicators of trafficking are often missed out, or dismissed as ‘just bad working conditions’:**

### **Potentially trafficked persons not informed of their rights**

In 2007 approximately 55 workers, most of them Rumanians, were found in an asparagus farm in Someren (The Netherlands). Although the various authorities that were in touch with them were aware of at least six different indicators of exploitation, the workers were not informed of their right to a reflection period under the B9 regulation, were not given adequate shelter, were not reported to CoMensha (the national reporting and registration point for trafficked persons) and, when more than half of them said that they would prefer to return to Romania without their money than return to the farm, the municipality arranged a bus and made them sign an agreement that they would repay the cost of the journey to the municipality. The group left for home that same day.<sup>32</sup>

### **Illegal workers or trafficked persons?**

In September 2011, the Spanish police (in coordination with labour inspectors) arrested eight people in Barcelona for, allegedly, exploiting dozens of South Asian workers in restaurants and phone shops. According to the police, working conditions were ‘appalling’; workers did not speak Spanish or Catalan (the local language), were undocumented and did not have a contract. The presumed exploiters have been accused of breaches of administrative and labour laws, but not of trafficking in persons. Presumed victims have been accused of working illegally and their deportation process has started.<sup>33</sup>

As one interviewee observed, the increase in the number of trafficked persons identified outside the sex sector is linked to a greater understanding of trafficking, which enables those in charge of identification to be conscious of the indicators, and cases that in the past were dismissed could now be recognised. Unfortunately this seldom happens and more often than not those trafficked outside the sex sector are not recognised as trafficked and, therefore, cannot access the rights availed to them.

Indicators are essentially the tools used to identify a trafficked person. Indicators have been developed by, for example, the OSCE (list of indicators of coercive means and evidence of forced labour),<sup>34</sup> the ILO,<sup>35</sup> and specialised NGOs. While there are slight differences between ‘traditional’ and ‘new’ indicators of trafficking (that is between indicators for trafficking in and outside the sex sector) service providers and outreach workers have expressed that **most of the indicators of trafficking can be applied to both exploitation inside and outside the sex sector. One service provider warned that “We have to be careful not to stereotype, and stigmatise the sex sector by developing completely new sets of indicators for different sectors”.**



### Gendered assumptions about exploitation, and moralistic views about prostitution

Since trafficking (and anti-trafficking) has mostly been framed around ‘sexual exploitation’ and the ‘vulnerability to sexual exploitation’, **women have almost exclusively been the target of State anti-trafficking measures, including identification.** These measures can often be characterised as protectionist: “The

stereotyping of women as victims of traffickers is so great that the authorities of industrialised countries overlook the possibility that men might be trafficked, and consequently exclude them from the services and protection that all victims of forced labour require".<sup>36</sup>

**The identification of trafficked persons is highly gendered.** The stereotype is that women are more 'vulnerable' to exploitation than men, and in 'greater' need of assistance persists. As a result, **women are more often identified as 'trafficked', and males in similar circumstances to women are generally considered "undocumented migrant workers", or "exploited workers" rather than potential victims.**<sup>37</sup>

This is compounded by the 'moral' dimension of identification. Trafficking into the sex sector is generally perceived as 'worse' than trafficking for exploitation into other sectors because often many still see the sex industry as 'inherently damaging' or 'abusive', or 'exploitative'. The label 'victim', it seems, fits better a woman trafficked into the sex sector than a person trafficked outside it. Interviewees often pointed out that, generally, **exploitation in the sex sector is perceived by authorities as a more serious crime, a graver violation of personal integrity, than exploitation outside it.**

It further seems that for those officially in charge of identification it is easier to 'connect' indicators of trafficking (i.e. of low or no pay, extreme working hours, bad living conditions, limited or no freedom of movement, withdrawal of passport and other documents, debt bondage) to situations in the sex industry (in which mostly women are found) than to situations in other sectors where trafficking is known to occur (such as restaurant, agriculture, construction, hospitality, domestic work and so on), but which are, often, gender mixed.

Most assistance providers that we interviewed expressed that, **for a case of trafficking outside the sex sector to be positively identified, a larger number of indicators need to apply** because a person exploited outside the sex industry is usually not considered as 'severely exploited' as a women trafficked into this sector is.

This line of thinking poses the danger of hierarchically ranking 'exploitation' and 'victimhood': **women trafficked for exploitation in the sex sector are more often viewed as victims by officials, prosecutors, and judges.** The scenario in which they 'lack choices', and are in 'need of help' is much stronger in these cases. **To those trafficked outside the sex sector much more agency is granted, especially if they are men,** and they are, therefore, perceived as having 'taken part', or having been 'active' in their migration process. When their migration was 'irregular', their having been 'active' in it works against them, and they are often seen as having committed a crime, or classified as 'smuggled', even if it resulted in a trafficking situation. Their agency, more often than not, 'outweighs' their exploitation.

**To turn the person trafficked outside the sex sector into a ‘deserving victim’ the balance needs to change, which is normally achieved when aggravated circumstances apply.** For example, in cases related to trafficking for exploitation in the sex sector the fact that the victim was able to leave the premises where exploitation took place is hardly ever used to deny that trafficking has indeed happened. In cases of other forms of exploitation the victim often needs to have been confined (and “almost chained”, an assistance provider pointed out) for authorities to identify her or him as trafficked. Similarly, if there is no physical violence cases are harder to identify as trafficking, notwithstanding that often forms of violence and coercion are more subtle in instances of trafficking outside the sex sector.

As reflected by the NGO La Strada Czech Republic, “Police perceive prostitution as an environment associated with crime, and therefore they are more inclined to identify trafficked persons within this sector”. They also note the ‘low social sensitivity’ regarding what they call ‘labour exploitation’ and observe that “less usual or new forms of trafficking go unnoticed in practice”.<sup>38</sup>

#### **Men are not seen as ‘exploited enough’ to be called ‘trafficked’**

In 2010 a group of lawyers assisted by a local NGO contacted the Czech Republic police to denounce what seemed to be a case of trafficking for exploitation in forestry of dozens of men from Vietnam, Mongolia, Bulgaria, Romania, Belarus, Moldova and the Slovak Republic. The case was first brought to the attention of one NGO working with the Vietnamese community and a group of attorneys who learned about it from Vietnamese workers who asked them for help.

In spite of the existence of a number of indicators of trafficking, including deception in relation to the Vietnamese workers’ legal status (workers’ were in a situation of irregularity as students, rather than as employees), conditions and type of work (they had signed a training contract believing it was a work contract), extreme long working hours (they worked between 10 and 12 hours of hard labour each day, seven days a week) and pay levels and frequency (workers had been promised a net income of approximately EUR 395 – 588 per month; instead they were supposed to pay to their employer a ‘training fee’ of EUR 20,- per month; with the exception of one foreigner who received a salary for the month of March 2009, no worker got paid what he was promised), the police did not identify it as a trafficking case on the basis of the fact that the workers had kept their passports with them, were free to move and did not experience threats of violence.



## Conflicting agendas and legal provisions

Conflicting agendas of government agencies and civil society organisations, and conflicting provisions of immigration and criminal and labour laws further contribute to low identification rates.<sup>39</sup>

State authorities tend to prioritise a criminal law enforcement approach to anti-trafficking, including identification. A focus on criminal law enforcement emphasises the punishment of the culprit over the trafficked persons' protection and support, which is often made conditional to her or his availability to testify during criminal proceedings, or to collaborate with law enforcement authorities.

The Legal Frames section of this Working Paper contains an analysis of the advantages and disadvantages of the criminal justice framework in the protection of the rights of the trafficked person, but we would like to draw attention to the conflation of criminal laws and immigration laws and its impact on identification:

Trafficked persons often (although not always) lack a legal status allowing them to work. **By focusing exclusively on the migratory status, immigration policies fail to assess whether a person has been trafficked or severely exploited and, therefore, often fail to identify instances of trafficking.** The migrant is primarily seen as an 'illegal migrant' and therefore, placed in a detention center to wait for deportation.

### Germany: Immigration priorities take precedence over human rights of worker

In Germany, local law enforcement must report undocumented individuals to immigration officials, making it very difficult for trafficked persons without legal documents to access remedies for trafficking violations. An example of the negative impact of this policy is evidenced in the story of H, a Vietnamese migrant worker who travelled to Germany for work. H incurred debts to the broker who facilitated her transit and employment in Germany with the agreement that she would work to re-pay the loan.

Upon arrival in Germany H was sent to work as a domestic worker for a family, with no pay until her debt was repaid. H was held captive, worked seventeen-hour days and seven days per week. Eventually, she tried to flee her working establishment, and was attacked by associates of her trafficker. With nowhere to turn to, H sought help from the police, describing her captivity and exploitation, yet, as a matter of policy her case was referred to immigration. H was treated as an undocumented migrant, her trafficking case was given neither sufficient attention nor credence. She is currently in detention and will be deported soon.<sup>40</sup>

When a migrant person works lawfully, **immigration laws tie working visas to a single employer. This makes the person vulnerable to exploitation and abuse, and is often used by the employer to get her/his submission.** As mentioned by the OSCE: “The fewer options available to a migrant to change employer, the more vulnerable s/he is to being exploited”.<sup>41</sup>

Civil society organisations often (although not always) see identification as a step in protecting the human rights of trafficked persons and as a gate in promoting their access to rights (including assistance), redress and remedies.

**Civil society organisations question the compartmentalisation between criminal, labour and immigration policies, that often characterises governments’ agenda. On the ground experience shows their blurriness and intersections and therefore, a need to address them jointly.**

In some instances State authorities and civil society organisations have found ways to cooperate by establishing formal or informal mechanisms of cooperation that have resulted in a stronger identification process; in many other countries this is not the case and State agencies do not grant NGOs any role in the identification process.<sup>42</sup>

Finally, it is important to point out the impact that perceptions on migration, and growing anti-migration discourses in Europe can have on the identification of trafficked persons outside the sex sector. **Increasing moves to criminalise migrants might influence how exploited labour migrants are less likely seen as victims of human rights violations** but rather as persons ‘ready to endure bad working conditions’, or ‘ready to work for less money than locals’.<sup>43</sup>

## What are Specific Emerging ‘Barriers’ to Identification of Trafficking Outside the Sex Sector?

### Lack of ‘self-identification’ among trafficked persons

**Persons not perceiving themselves as ‘trafficked’ or as ‘victims’ is a factor that has received a lot of attention in recent research on exploitation outside the sex sector.**<sup>44</sup> This situation has been linked to several elements:

- Gender: men being generally more reluctant to accept that they have been trafficked than women.
- Irregular status: victims being undocumented and therefore, ‘preferring’ to endure exploitation rather than to turn themselves in to the authorities for fear of detention and deportation.

- Acceptance of a substandard salary, since compared to the country of origin the income has improved.<sup>45</sup>
- 'Temporariness': migrant workers enduring a situation on the basis that it is time-bound and will end at one point.<sup>46</sup>

Is this 'lack of self-identification as trafficked' something new, or specific to forms of trafficking outside the sex industry?

- The 'label' victim is per se problematic, regardless of the sector to which a person has been trafficked. Direct assistance providers have overwhelmingly pointed out that, often, persons trafficked into different sectors are resistant to be seen (and to see themselves) as victims of a crime. This is not to deny that, of course, there are many examples of persons who self-recognise as trafficked and exploited, but to point out that 'victim of trafficking' is a category in which many trafficked persons do not recognise themselves.
- The word 'victim' has negative connotations linked to elements of powerlessness, defencelessness and passivity that represents the opposite of what a trafficked person is: a woman, or a man, who has taken the initiative and the proactive step to travel to another place to improve her or his life. The migration experience might have turned out badly, but this does not erase her or his agency and self-determination. For many, being a 'victim' contradicts their self-image and does not encompass their identity.
- Element of stigmatization: a 'victim of trafficking' is, more often than not, still seen by authorities and the general public as synonymous to a person (overwhelmingly women) who worked in prostitution.
- Lack of familiarity with a highly complex concept: to self-identify as something, a person must be familiar with the term, as well as with the procedures around it. This is something that seldom happens, especially amongst those who are in a country or in an environment different than their own, possibly with an irregular status, and often with limited or no knowledge of the local language.

Therefore, based on the experience and observations of assistance providers, **a lack of self-identification as 'trafficked' happens equally often to men and women, and equally often to those trafficked inside and outside the sex sector.**

### **'Practical obstacles' to reach trafficked persons**

Another emerging issue often referred to when addressing identification of trafficking cases outside the sex sector refers to the practical obstacles to reach this group of trafficked persons:

- Isolation and diversity of working sites (i.e. domestic work, agriculture, restaurants, care givers, forests or construction).
- ‘Cultural differences’.
- Lack of indicators.
- Language.

**Methods of identification have remained relatively constant despite an increasingly broadened understanding of trafficking:** hotlines, drop-in centers, awareness-raising campaigns and outreach are still used by civil society organisations, whilst government bodies still focus on raids (mostly focused on particular industries), inspections at working sites and immigration controls at borders.

But **the recognition that trafficking can happen in a wide range of working sites has extended the number of actors that can potentially get in touch with trafficked persons.** To the ‘traditional’ ones (border police, security forces, immigration authorities, specialised NGOs, migrant rights and asylum organisations, community or faith-based organisations, doctors or hospital staff, sex workers’ clients, and private persons) ‘new’ ones (labour, tax, and occupational health & safety inspectors, municipalities, and trade unions) have been added.

It is worth noting that, already in 2004 the EU Experts Group recommended that: “In light of the little experience that is gained with the identification of trafficked persons in other sectors than the sex industry, specific attention should be paid to information and training of labour unions, labour inspections and other labour related agencies in order to enable them to identify and properly refer trafficked persons. A specific budget line should be created to develop specific methods and information materials, targeted at those sectors where trafficking is likely to take place: such as domestic work, construction, agricultural labour and the garment industry”.<sup>47</sup>

### Labour inspectors

Notwithstanding national differences, labour inspectors promote and monitor enforcement of labour protection regulations and react in case of non-compliance. They have access to working sites and to workers, something that, often, is much more difficult for other actors. **Over the last years there has been an increased recognition of labour inspectors’ role in anti-trafficking in Europe.**<sup>48</sup>

Some of the **main challenges that on-the-ground organisations have noticed in the involvement of labour inspectors in anti-trafficking** are:

- Their mandate, which does not involve identifying trafficking cases; their interest lies in whether workers have a contract and documents to work.
- Their focus, which often is on distinguishing between documented and undocumented workers and controlling the migratory status of workers and the breaches of the immigration law.



- Their understanding of trafficking, which is often limited to and characterised by their mandate and focus (for example, often labour inspectors conflate 'being undocumented' with 'being exploited', without considering that a documented worker can also be trafficked or severely exploited, as it often happens).
- A limited knowledge of the workers' context (their background) and experiences; as one social worker put it: "they do not know how to 'talk' to them".
- Visits to working sites are also often too sporadic, investigations too lengthy and penalties too light for labour inspections to act as a deterrent against exploitation.

All these gaps have also enhanced the mistrust of the workers towards labour inspectors. They are often perceived as government officials, who are there to 'punish' workers rather than to assist them.



On the other hand, labour inspectors are mandated to check the working conditions and whether workers are receiving their salaries (and thus, there is indeed potential for them to identify instances of trafficking), but presently this seldom happens.

## Trade Unions

**With the expansion of anti-trafficking to sectors outside the sex industry, trade unions have become increasingly involved in anti-trafficking work in Europe.**<sup>49</sup> Trade unions with an interest in trafficking tend to frame trafficking in persons as a violation of labour rights, closely linked (although different from) to forced labour.

Trade unions bring some **new and positive elements** to anti-trafficking, namely:<sup>50</sup>

- An acknowledgment of ‘victims’ as active agents on the labour market.
- A recognition that trafficking and the global labour market (including globalisation and recruitment industry, de-regularization and under-protection of workers) are intrinsically linked.



- Experience in defending workers' interests through their participation in social dialogue and collective bargain processes.
- Experience in using the labour system to seek remedies, especially regarding negotiation and mediation and compensation through labour laws.<sup>51</sup>

Some of the **weaknesses** trade unions have that anti-trafficking organisations could help with and some of the main challenges anti-trafficking organisations refer to when working with trade unions are:

- A limited gender perspective: the sectors in which unions operate are usually male-dominated and belong to the formal sector of the economy, which means that areas of work with a dominant female presence (such as domestic work, care, or au pair work), are unrepresented in trade unions.
- Views towards migrants in general, and undocumented migrants in particular. Integrating migrants into European trade unions' structures and membership has been often challenging. Undocumented migrants cannot frequently join trade unions and documented migrants find barriers such as language or union fees.<sup>52</sup>

**As with labour inspectors reality on the ground is diverse and positive and negative experiences of collaboration between trade unions and anti-trafficking organisations exist. But in most countries we focused on, cooperation is starting and offers a great potential.** For example, in the Czech Republic tree forest case mentioned above the Czech-Moravian Confederation of Trade Unions was able to use its position to bring the case to the national tripartite body and lobbied for the rights of the workers to be respected.

## What Can We Learn? What Steps Can We Take?

**In order to identify persons trafficked outside the sex sector, involved actors need to make a shift in their understanding of trafficking.**

First of all, they must learn 'to see'. But this 'seeing' must not be based on morals and gender stereotypes. It must be based on an understanding of trafficking true to its original definition, that is, an understanding of trafficking as happening in a wide diversity of work sectors and to both men and women. And it must be based on the centrality of the trafficked persons' rights, rather than on the implementation of criminal and migration laws.

It is thus, crucial to base identification on objective indicators that encompass the complex nature of trafficking. Indicators that, aside from certain elements, do not need to be different according to the sector of exploitation. There is no need to 'reinvent the wheel'. Much can be learned from the experience and indicators already developed to identify victims of trafficking in the sex sector.

GAATW member organisations in Europe have used a wide diversity of outreach strategies to reach a broad range of potentially trafficked or severely exploited persons (both inside and outside the sex sector). Many of the organisations are born out of the migrant's rights movement, or have built alliances with these type of organisations. They are also exploring linkages with trade unions.

An important element to look further into (and to promote through anti-trafficking work) is the involvement of persons trafficked outside the sex sector in the design of outreach strategies and identification indicators. We need to ask ourselves: what do trafficked persons gain by being identified as such? What do they lose? The following chapters will look into those issues.

# **EMERGING ISSUES: ASSISTANCE**

**Assistance and support to trafficked persons are guaranteed by international law.**<sup>53</sup> States are responsible for assisting and protecting all trafficked persons, and ensuring their access to adequate physical and psychological services. It is important to note that this responsibility must be applied without discrimination, regardless of gender or the sector the person has been trafficked into.

In spite of this, reality shows that **those who have been trafficked outside the sex sector, and particularly trafficked men, have less access to assistance services.** In other words, protection and assistance services are overwhelmingly provided to women trafficked for exploitation in the sex sector.<sup>54</sup>

Confirming this, in 2006 the OSCE stated that “Trafficking has been primarily addressed through the lens of sexual exploitation; increasingly, however, the international community is waking to the realisation that trafficking is occurring in critical numbers in other forms as well.”<sup>55</sup> Similarly, two years later the European Commission recognised that “As regards trafficking for labour exploitation, the legislative framework has been recently completed, and thus implementation [of assistance services] is even less advanced [than trafficking for the purpose of sexual exploitation]”.<sup>56</sup>

## Unequal Access to Assistance: Sector of Exploitation

Why have persons trafficked into the sex sector been the main beneficiaries of the available assistance and protection services, when the legal definition of trafficking does not make a distinction between sectors of exploitation?

**Trafficking for exploitation outside the sex sector has received less recognition in European national laws than trafficking for exploitation in the sex sector.**<sup>57</sup>

Some countries have only very recently included trafficking outside the sex sector in their law, for example:

- The Czech Republic adopted a new and inclusive definition of trafficking only in January 2010, thus becoming compliant with the Council of Europe Convention and the 2002 EU Framework Decision.
- Spain’s legal definition of trafficking became compliant with the two mentioned instruments only in December 2010. That same year a comprehensive plan to combat trafficking in human beings for the purpose of sexual exploitation (therefore, not including trafficking outside the sex sector) was launched. The Spanish government argued that combating trafficking for exploitation in the sex sector was the main

priority and that a parallel comprehensive plan covering exploitation outside the sex sector would be developed at a later stage. By mid-2011 the date for its completion had not yet been set.

The identification of persons as trafficked outside the sex sector has been (and still is) very problematic, which impacts on their (lack of) access to assistance services as developed in the previous section of this Working Paper.

While the general observation is that assistance and protection services have focused on women trafficked into the sex sector, direct assistance providers interviewed for this research state that they have proactively conducted outreach in a wide range of working sites outside the sex industry and that they have, occasionally provided assistance to women trafficked into other sectors, including domestic work, hospitality, agriculture, or hawking.

## Unequal Access to Assistance: Gender

Similar to the question about differentiating between sectors, we ask ourselves — and interviewees— why women have been the main beneficiaries of the available assistance and protection services, when the legal definition of trafficking does not make a distinction between men and women?

(Lack of) identification depending on gender has shaped the assistance services provided to trafficked persons. Until very recently, men have hardly been identified as trafficked and, therefore, have had very limited access to specialised assistance services. For example, 85% of La Strada Poland's clients between 2004-2006 were women, whilst only 15% of them were men.<sup>58</sup>

Once identified as trafficked, there seems to be consensus about the fact that **there is a shortage of services available to trafficked men**. In many countries accommodation for trafficked men is not available (for example, Portugal, Austria and Luxemburg),<sup>59</sup> and when available, the number of spaces are often insufficient. Without exception, all persons interviewed for this research pointed this out.

An additional challenge comes from the **mandate of the organisations providing assistance**. For many, their primary responsibility lies in providing assistance to trafficked women, and the organisations have had to adapt (or are in the process of adapting) their mandate to assist men as well.

External limitations play a role. For instance, **donor requirements pose a challenge to assisting trafficked men**. Some service providing organisations are funded by Ministries, Departments or Funds linked to women's issues and cannot, officially, provide assistance to men. In spite of the 'tendency' to focus more on trafficking for exploitation outside the sex sector many European governments have no specific funds to cover assistance to victims of this form of trafficking.

Finally, **law** sometimes complicates the provision of assistance services to trafficked men. For example, Germany's criminal code includes two separate provisions: one related to Human Trafficking for the Purpose of Sexual Exploitation (Criminal Code Section 232) and another one related to Human Trafficking for the Purpose of Labour Exploitation (Criminal Code Section 233). Whilst support services exist for the first group, mainly composed of women, they are not yet available (although it is being discussed) for the second group of victims, which is a mix of men and women.

## Different Assistance Needs Depending on Gender and Sector?

Existing literature on the subject (as well as some interviewees) seems to assume that assistance needs of those trafficked outside the sex sector are different from the needs of those trafficked into the sex sector. Persons trafficked outside the sex sector are being described as 'fairly independent men' with 'short-term needs' somehow limited to accommodation and a new job (so they can continue fulfilling their family breadwinner role). Those trafficked for exploitation in the sex sector are often described as 'dependent women' 'in need of long-term assistance', including shelter, counselling and health services. Their need for a new source of income is hardly ever mentioned, even if in reality they may be, and often are, their family's main source of economic support.

As limited as the experience of providing assistance to persons (both men and women) trafficked outside the sex sector is, and cautioning that analysis is still at a very early stage, **most assistance providers interviewed do not, in principle, consider the needs of persons trafficked outside the sex sector to be necessarily different than those trafficked into the sex sector. Nor, in their experience, do men and women have inherently different needs.**

They addressed the urgent need to demystify the idea that all trafficked persons have the same assistance needs and have called for a more detailed analysis based on both sector and type of exploitation, on personal context, and gender.

And they have also cautioned against generalisations and stereotyping that can (and often do) result in over-protective and disempowering assistance services to trafficked women, or result in not giving enough support to men who want and need it.

A look at how assistance programmes to trafficked persons originated and have developed is crucial to understanding the challenges they are facing now:

Most of the assistance services are based on practices and experiences stemming from the work with women trafficked for exploitation in the sex sector. This means that most service providers have developed their assistance programmes and gained experience on the basis on this specific clientele. This is only natural since this is the



main category of identified trafficked persons as showed in the previous pages.

In this regard, in 2007 the ODIHR Anti-Trafficking Programme acknowledged that the National Referral Mechanisms model is “Based on practice and recommendations to address trafficking for sexual exploitation drawing on the contributions of many specialised civil society organisations and law enforcement authorities working on sex trafficking”.<sup>60</sup> Importantly, historically there has also been more money for this assistance.

Services provided to trafficked persons are shelter-based and designed in one single package of services including accommodation, psychological, medical, social, legal, financial and employment assistance. This package is offered to all trafficked persons generally without addressing specific and individual needs.

These inherent elements shaping assistance services hamper the needed nuanced analysis of trafficked persons' needs.

## Providing Assistance Services

On the basis of our interviews with assistance providers these are the some of the consequences that the distinctions in gender and sector might have, or are having, on the provision of services to trafficked persons:

- A trafficked woman with similar needs to those of a trafficked man probably will not require all the assistance package offered to her. However, this situation, which in the case of a man might be looked at as him having 'different needs', will go undetected in the case of a woman. She will be perceived as an 'easy client', and will probably finish the assistance programme 'sooner'.
- Practice shows that injuries and trauma suffered by women trafficked into, for example, domestic work can be worse than those of women trafficked into the sex sector, who are not always equally traumatised. However, often it is assumed that women trafficked outside the sex sector are not as traumatised as those trafficked into the sex sector.
- Women and men might express their needs differently due to gender roles and ideas about masculinity. For example, according to some researchers, trafficked men have indicated that accepting assistance might be seen as a sign of weakness that impacts on their (self) image as a man.<sup>61</sup> Similarly, a recent action research study by La Strada Moldova described how men who had returned to Moldova after migrating abroad rarely spoke about their negative migration experiences in fear that they would damage their image as men and their roles as family breadwinners, while women in that same study felt this fear to a much

lesser extent.<sup>62</sup>

- However, it is important to look carefully into the different sectors where exploitation happens and pull out their singularities so assistance is shaped accordingly: stigma (associated to prostitution), sexual violence (which can relate both to men but mostly to women, and may occur both within and outside the sex sector), isolation of working sites, exploitation having taken place as part of a big group, or relationship with the employer to name a few.



## What Can We Learn? What Steps Can We Take?

Assistance providers have consistently emphasised that it is too early to have a final response to the question of whether assistance needs of men and women, and of those trafficked outside and into the sex industry are different. Initial experience seems to signal that they are not necessarily so, but there is a need for more research and analysis to confirm this.

In the mean time, it is important to question assistance programmes in the light of assumptions related to gender and the sectors of exploitation. Although many service providers intend to do so, they also acknowledge that their daily work often does not allow time to ‘stop, research, analyse and transform’. Reacting to the changing profile of ‘clients’ is often done on an ad hoc basis.

The notion of 'assistance to trafficked persons' needs to be reconsidered, so that it is tailored to each person regardless of her or his gender, or the sector of exploitation.

We do recognise that there has to be a balance between meeting individual needs of trafficked persons, and the capacities of assistance providers. Aiming at completely tailor-made assistance processes for each individual might not be realistic, but more flexibility and adaptability of assistance programmes would contribute to meeting the needs of trafficked persons (whether men or women, whether trafficked for exploitation in the sex sector or outside it), which in the end is a form of justice.

Also for policy makers, there is still a long way to go. They often continue to see trafficking as essentially taking place in the sex sector and to women. It is often assumed that there is a 'gender division' in trafficking; for example, the 2011 EU Directive states in its Article 3 that "This Directive recognises the gender-specific phenomenon of trafficking and that women and men are often trafficked for different purposes. For this reason, assistance and support measures should also be gender-specific where appropriate". This assumption of trafficked men and women having different needs on the basis of their gender and the sector they have been trafficked too needs to be carefully checked against evidence.

Lastly, it is paramount that persons who have been trafficked and received assistance services are integrated in their analysis and design.

#### **Interesting Initiatives: the Low Threshold Department**

The "low threshold department" is a recent pilot initiative (2010) from La Strada Czech Republic that tries to "provide more services to less trafficked persons". The department attends to the needs of persons who do not necessarily fall into the trafficking definition but have suffered exploitation outside the sex sector. Assistance services are framed on the concept of "work, exploitation and needs" and, although initially the department received requests mainly from men, the number of women receiving assistance has steadily increased. Clients are reached through the organisation's hotline and outreach services, but assistance services are especially tailored. They include legal and social counselling (especially for the preparation of civil claims and support when contacting authorities) and short term humanitarian and crisis assistance (including food and money for public shelters). The results of this pilot project will be used to evaluate the assistance services to trafficked persons provided by this organisation.

# **EMERGING ISSUES: LEGAL FRAMEWORKS**

The inclusion of trafficking as a punishable crime in national laws has been the main legal avenue to bring perpetrators to justice and redress to trafficked persons. However, as noted already, the understanding of what constitutes the crime of trafficking is expanding. With this expansion, other legal contexts, such as civil labour courts are increasingly being used to provide redress.<sup>63</sup> In this section **we address the opportunities and challenges of anti-trafficking and other legal frameworks in contributing to achieving greater protection of the rights of those trafficked for exploitation outside the sex sector.** Like in previous chapters, we ground this in the experiences of trafficked persons and service providers.<sup>64</sup>

## Anti-Trafficking's Criminal Justice Framework

Key anti-trafficking instruments relevant to Europe, include the Palermo Protocol, the Council of Europe Convention, several EU Directives, and national legislation.<sup>65</sup>

As the UN protocol which focuses on human trafficking is part of the convention on transnational organised crime the predominant international framework is one of criminal justice. This is primarily a crime control tool, rather than an instrument to stop rights' violations and exploitation. Accordingly, repressive strategies are used, including harsh punishments. Such punishments push traffickers—and their victims— underground and put the trafficked person's interest second place, specifically, they are only relevant as witness for the prosecution. More empowering strategies, like class action lawsuits, can sometimes be more effective for crime control, because they support the interests of the victim, bring cases out of the individual sphere, and inform the public.<sup>66</sup>

Most European States have included trafficking for exploitation outside the sex sector in their anti-trafficking laws. Exceptions to this are Estonia and Poland, which have not yet finished revising their legislation to include all forms of exploitation, and Hungary, which reportedly has not yet conformed to the required definition.<sup>67</sup> Spain has also adopted a new law that focuses on sexual exploitation of smuggled migrants, thus excluding other forms of exploitation and those who came from other EU countries, as they are not 'smuggled' across Spain's border.<sup>68</sup> Furthermore, France's legislation describes trafficking for exploitation outside the sex sector with the phrase 'conditions of work incompatible with human dignity'.<sup>69</sup> Local NGOs however underline that the Court's interpretation of what constitutes 'human dignity' is very restrictive, and convictions consequently are disappointing.<sup>70</sup>

### Criminal Justice Through the Eyes of Trafficked Persons and Assistance Providers

Service providers interviewed have traditionally focused on the criminal justice system to support trafficked persons.

## The benefits of criminal justice system:

- **Justice:** The importance of the opportunity to convict a perpetrator should not be underestimated. Trafficked persons confirm that it satisfies their sense of justice when the perpetrator is punished and can no longer do harm, and that it can be an important step in the process of recovery, as they regain a sense of trust and confidence.<sup>71</sup>
- **Evidence Collection:** Police are allowed to search locations and to bring witnesses, and they provide testimonies and evidence as part of the procedure itself, whereas in other legal frameworks (like civil labour court), the burden of providing this information is on the lawyer, who is often not equipped (due to mandate or expertise) to do so.
- **Access to Services, Including Residence Permit:** The often mentioned advantage is that residency is granted for the duration of the legal proceedings, and some countries offer the opportunity to stay afterwards on humanitarian grounds.

## Many repressive aspects of the criminal justice system apply to all trafficked persons:

- **Conditionality of Assistance:** The benefits offered in anti-trafficking assistance programs are often available only if the victim cooperates with law enforcement. Priorities of law enforcement may change during the proceedings, leading to an end of the proceedings, and thus to an end of assistance.<sup>72</sup> This makes the benefits insecure and unreliable.
- **Stigma:** Trafficking is stigmatised as intrinsically linked to prostitution,<sup>73</sup> and to being a 'victim' rather than a 'migrant whose labour has been exploited'. An interviewee reminds us that in Germany, the label is not 'merely' a verbal one, but an actual stamp in the passport of the victim.
- **High Risks:** Risks for trafficked persons include deportation on the basis of migratory status.<sup>74</sup> In some countries corruption among local authorities and their contacts with mafia are an additional risk. Service providers observe that those who are afraid of the police and of institutions do not benefit from the anti-trafficking framework.
- **Emotionally Demanding:** Testifying in court forces the victim to relive a traumatising experience, often repeatedly.
- **Lengthy Proceedings:** A long term commitment is required while engaging with the criminal justice system, which not all victims are able to or deem necessary. Sometimes they are able to access benefits through other means. For others the weight of risks and emotional demands is too high to commit themselves to entering lengthy court procedures.
- **Repressive Sentences Limit Convictions:** Service providers and trafficked persons claim that as a result of tough sentences, law enforcement is hesitant to apply the law, unless they are very sure of a conviction. Combined with the limited number of convictions, victims know that their chances of finding justice are equally limited.



Service providers and their clients observe that there are challenges to accessing justice, which are specific for persons trafficked for exploitation outside the sex sector:

- **Law Enforcement Prioritizes Trafficking within Sex Sector:** Police must choose which cases they will investigate. One interviewee informs us that although the Public Prosecution Office prioritizes human trafficking cases in general, more often than not the focus is on sexual exploitation and organ trafficking. While this might change when the priorities are revised, for now those **trafficked persons whose labour has been exploited outside the sex sector cannot expect much police attention for their case.**
- **Not accessible for trafficked persons not identified or labelled as such:** Criminal justice is intended for all trafficked persons. The benefits it offers are accessible to those who are identified as trafficked persons, and often only to those who agree to help in the prosecution process. However, the legal definition of a 'trafficked person' is often interpreted very narrowly; rather than focussing on men or women trafficked for exploitation in any sector. As a result, **the benefits of the criminal justice framework are often only accessible for women trafficked for exploitation in the sex sector.**

### Who Are Missing Out on Anti-Trafficking's Criminal Justice?

While an important group benefits from the anti-trafficking measures, a closer look at the opportunities and limitations of the anti-trafficking criminal justice framework also reveals that other **categories of people are excluded and cannot access these benefits, or choose not to use their entitlements since high risks are also attached to them.**<sup>75</sup>

In the UK 527 cases of potentially trafficked persons were registered by the National Referral Mechanism (NRM). Another 130+ persons were not referred to the NRM, "primarily because they did not see the benefit of being referred or were afraid that it would have adverse impact on them because of their immigration status".<sup>76</sup>

Service providers and trafficked persons have mentioned four main groups who miss out on anti-trafficking's criminal justice:

### EU Citizens Trafficked within the EU

Among the people missing out often is the category of EU citizens trafficked within the EU, or otherwise legally residing in the country. Recent research, as confirmed by the interviewed service providers and government officials, found that EU citizens

make up a large share of those identified as trafficked. For instance, in Portugal, about half of identified trafficked persons were legal residents. In the UK this rate was similar, namely 47 out of 91 positively identified persons.<sup>77</sup>

Interviewees state that only a fraction of them choose to use the anti-trafficking program offered by law enforcement and go to criminal court. The remaining persons prefer to access assistance from NGOs or through other frameworks.

For this group of people, the benefits of EU enlargement combined with the conditionality of assistance and its risks, are reasons to choose not to access the benefits of the anti-trafficking framework.

With the EU enlargement migrants from some Eastern European countries can now move freely within the EU, and labour markets have opened up to most of them, albeit with restrictions. Before the EU enlargement, a large percentage of identified trafficked persons belonged to these nationalities (Rumanian, Bulgarian, Polish). Today, they are still among those who are trafficked or exploited. What did change is that now they are considered EU citizens and on the basis of that have access to a residence permit in other EU countries.<sup>78</sup> **For EU citizens the main draw of entering these assistance programs, the residence permit, is no longer an incentive.**<sup>79</sup>

### **Persons Exploited but ‘Not Severely Enough’ to be called ‘Trafficked’**

Exploitation is often considered inherent to trafficking in the sex sector. In other sectors, however, it is questioned where labour exploitation becomes severe enough to be called trafficking.

One attempt to clarify the boundaries of what constitutes trafficking is the 2010 report *Between decent work and forced labour: examining the continuum of exploitation*.<sup>80</sup> This term acknowledges that “for working people there is a continuum of experiences ranging from decent work through minor and major labour law violations, to extreme exploitation” which may be the outcome of trafficking. In line with GAATW’s recent research and evidence showed by GAATW’s members in Europe,<sup>81</sup> this research further comments on the “lack of clear definitions that might help mark the transition points” between working conditions in one situation and in another, and the fact that a person’s working conditions may change over time. This makes it hard to describe the problem and its causes, and find solutions and practical responses to deal with the problem.

Critically, what matters in this complexity is that people who experience multiple violations, but not the exact combination that constitutes the trafficking definition, are not able to access justice through the anti-trafficking framework.

### **Acquittal of perpetrator on grounds that not all indicators of trafficking can be proved**

In this case the defendant was accused of aiding and abetting human trafficking. While several indicators of trafficking were met, the Court acquitted the defendant, based on its interpretation of what constitutes exploitation in the context of trafficking.

The defendant was an employer who recruited several Polish persons to work as domestic staff in the Netherlands and arranged work for them as cleaners. The workers were either not being paid or were being paid less than the minimum wage. They depended on the defendant for accommodation and income, making it difficult for them to leave. The defendant abused the workers' ignorance about their rights and position. In its ruling, the Court acknowledged each of the above as indicators of trafficking: poor working conditions, multiple dependencies, and misrepresentation or coercion respectively. It further stated that the defendant deliberately abused the vulnerable position of the Polish workers. Nonetheless the Court judged that these situations were not excessive enough to constitute an infringement of fundamental human rights. Therefore, the Court ruled that the case could not be regarded as trafficking.<sup>82</sup>

### **Trafficked Persons Not Recognised as Such**

**An ambiguous definition of trafficking, especially when it comes to 'other forms of exploitation', in combination with stereotypes around gender, and additional requirements on the amount of suffering needed, often 'disqualify' persons trafficked for exploitation outside the sex sector from being identified as trafficked.** Of those who are not identified as trafficked, third country nationals without regular migration status have to immediately return, while EU nationals can stay but do not receive financial or other assistance.

### **People Who Are Afraid of Law Enforcement**

Service providers highlighted that **if trafficked persons, including those trafficked for exploitation outside the sex sector, "are afraid of the police and of institutions [they] do not benefit from the anti-trafficking framework"**. It is important to realise that this fear is real and substantial. Research shows numerous cases of trafficked persons in alien detention, since their migratory status took precedence over their status as trafficked person.<sup>83</sup> Before repatriation, risk assessments are often lacking. A recent court case in the UK was an unfortunate way of making clear how law enforcement underestimated the chances of re-trafficking.<sup>84</sup>

## Alternatives in Criminal Justice: Forced Labour and Slavery

**For those who aren't eligible for anti-trafficking assistance programs, but for whom the criminal justice frame per se is not an obstacle, other means of finding (criminal) justice exist. An important route is that of forced labour and slavery.**

International instruments that can be used in this respect include the ILO Conventions 29 and 105 on Forced Labour. All European countries have ratified these two Conventions, and thus have criminalised forced labour in their national legislation. France is the exception to other European countries, as its penal code does not include the offence of forced labour or slavery.<sup>85</sup> What comes nearest is their anti-trafficking law with the phrase 'conditions of work incompatible with human dignity', which however as said has a narrow interpretation and disappointing convictions.<sup>86</sup>

**The legal instruments around 'forced labour' might bring redress, especially for those who are not recognised as being trafficked because the sector in which they were exploited is not covered under anti-trafficking law. This route upholds one important benefit of criminal justice, namely that it allows for prosecution of the perpetrator —for the offence of subjecting another person to forced labour— and thus may bring 'justice' to the trafficked person.**

Other criminal and civil frameworks might provide access to assistance and justice to persons trafficked for exploitation outside the sex sector, and to those who miss out on the anti-trafficking framework. These alternatives include smuggling (criminal justice), labour courts, and migration and refugee law (civil justice). The experience of service providers and trafficked persons interviewed is too limited to elaborate on their challenges and benefits. Nevertheless, an overview of the experiences of service providers with these alternatives is presented in the Annex 4, Alternative Legal Frameworks, to this Working Paper (page 77).

## Does Criminal Justice Need to Differentiate Sectors of Exploitation?

**Anti-Trafficking legislation in some countries has made a clear division between trafficking for prostitution and trafficking into other sectors. An example is the German Criminal Code, which distinguishes between Human Trafficking for the Purpose of Sexual Exploitation, under Section 232, and Human Trafficking for the Purpose of Labour Exploitation, under Section 233. We question the usefulness of having such 'dual frame' which differentiates sectors of exploitation. Does it lead to better rights protections for a larger number of trafficked persons?**

## Philosophical Considerations

A 'dual framework' has been linked to a 'hierarchy of suffering': "people in different situations might be entitled to varied levels of assistance, thereby risking creating a 'hierarchy of suffering' or 'deserving and undeserving' groups of workers".<sup>87</sup> **The focus and aim should be the protection of the labour and human rights of all workers, irrespective of their migratory status or sector of exploitation**, their nationality, gender, educational background, age, race, or other markers.

Rather than 'adding' a frame by splitting up the anti-trafficking framework, service providers suggest to combine the existing frameworks of anti-trafficking, labour, and other rights. They suggest to recognise sex workers' rights, while also being aware that trafficking happens in other sectors. What we can learn from existing anti-trafficking work is that drawing a moralistic and clear line between 'good' and 'bad', between 'victim' and 'exploited but not badly enough' works counterproductively.<sup>88</sup> We would like to stress that much **more analysis is needed to oversee the long-term human rights consequences, to prevent any collateral damage when maintaining the distinction.**

## Political Considerations

Differentiating so-called 'sex trafficking' and 'labour trafficking' implies that sex work is not work. Whilst it is a reality that in many countries sex work is not recognised as labour, this separation shapes access (or lack of access) to rights (for example claim of unpaid wages or compensation) and reinforces stereotypes around gender and victimhood: e.g. with women being 'trafficked for sexual exploitation' and men 'trafficked for labour exploitation'. Whether or not the option is kept open to include sex work in the labour framework, **any reinforcement of gender or other stereotypes would have long-term detrimental effects on the anti-trafficking efforts and the protection of human rights of migrants.**<sup>89</sup>

## Legal Considerations

Another question in this respect would be whether one sector warrants separate legislation. The experiences of service providers, lawyers, academics, and government agencies with the German dual law provide concrete answers to this question.

Provisions for assistance to trafficked persons, according to the Criminal Code, are the same regardless of the sector of exploitation. However, German interviewees observe unequal access to remedies in reality. Support structures have been developed for those trafficked for exploitation within the sex sector, but for those exploited in other sectors, and especially for men, the support structures are (still) limited.

Compared to the sex sector, only a low number of cases of trafficking for exploitation in other sectors reach courts. Experience on the ground shows that prosecutors are reluctant to identify cases of trafficking for exploitation outside the sex sector as

criminal cases, because workers in these sectors are afforded more agency and are seen as having taken an active part in being trafficked.

This division has also created separate specialised police units dealing with either sector of trafficking. However, coordination among them is inadequate. It seems that those focusing on trafficking for exploitation outside the sex sector are starting from scratch and not utilising experiences already developed in another unit.

Finally, it has been noted that the provisions of trafficking for exploitation outside the sex sector are not being used to address labour exploitation in the sex sector, even though prostitution is recognised as labour in Germany. This evidences a mentality which does not see sex workers as having labour rights that could be violated.

Experience shows one **advantage of having two distinct provisions is that it has helped to put the idea of compensation and remuneration on the table.** However, this is mainly true for the provision that deals with exploitation outside the sex sector. Discussions on compensation, let alone remuneration, in the sex sector are less advanced, in spite of Germany's recognition of prostitution as labour.

Some sex work organisations have stated that they would prefer a single anti-trafficking law which explicitly covers all sectors, including the sex sector, since “[t]his would provide equitable outcomes across all labour sectors”.<sup>90</sup>

Besides, do we really want more laws? On one hand, legislation on for instance compensation already exists.<sup>91</sup> On the other hand, from practice we can confirm that laws are not always successful in protecting or supporting the rights of trafficked persons.<sup>92</sup> Instances where migration laws precede trafficking laws are plentiful, with negative effects on the rights of trafficked persons. Previous research by GAATW, in particular *Collateral Damage*, has showed how anti-trafficking and related legislation resulted in harm done, rather than rights protections. **It would be better to ensure proper implementation of existing laws.**<sup>93</sup>

## Practical Considerations

**For the short-term, it may be helpful to differentiate as this may increase public awareness on trafficking for exploitation in sectors other than the sex sector. Once this is achieved the distinction ceases to be useful.**

**A legal distinction between sectors of trafficking could potentially enhance cooperation between anti-trafficking organisations and allies in other fields, like trade unions or labour inspectors.** This can be seen in the increased involvement of these two actors in the anti-trafficking scene. This is a welcome move and areas for further discussion have been pointed out in the previous chapter and in one of GAATW's Working Papers of 2010.<sup>94</sup>

However, there are alternative views too, cautioning that this “parallel structure of the



anti-trafficking discourse that either looks at exploitation in the sex sector or at any other industries does not contribute to gain clarification of the phenomenon nor does it help to create measures for intervention". **We need to be aware of potential collateral damage.** For example, as the previous two chapters showed, it is true that indicators for either 'type' of trafficking are generally the same and only minor differences exist depending on the industry where trafficking has happened. Also, assistance needs of those who have suffered exploitation outside the sex sector show only minor differences compared to those who were exploited in the sex sector.

## What Can We Learn? What Steps Can we Take?

When analysing the opportunities and challenges that the anti-trafficking criminal justice framework presents to those trafficked outside the sex sector, it becomes clear that they are largely similar to those already known to apply to persons trafficked within the sex sector.

**Two additional challenges to rights protection and justice, specific for persons trafficked outside the sex sector are law enforcement prioritizing trafficking within the sex sector, and limited access due to lack of identification.**

These limitations in identification and convictions particularly, combined with high risks and stigma, result in large categories of trafficked persons who miss out on the entitlements of the anti-trafficking framework or choose not to use it. Alternative criminal or civil frameworks are not necessarily better, but do afford new sets of advantages (and challenges) that anti-trafficking instruments do not offer, specifically—but not exclusively—to those who were trafficked for exploitation outside the sex sector.

It is important to realise that service providers and trafficked persons weigh their options: they make choices based on their estimation of the risks and benefits involved in using a specific legal frame, in the light of their personal needs, their migration status and gender background, and the chances of success.

**For the short term, a distinction between sectors of exploitation might be helpful to increase awareness on trafficking for exploitation in sectors other than the sex sector. Once this is achieved the distinction ceases to be useful. Legal, political, and philosophical considerations do not warrant addressing trafficking for exploitation outside the sex sector as a separate issue. Instead, service providers suggest rights-based implementation of existing laws.**

**Service providers, trafficked persons, academics, and persons affected by anti-trafficking legislation (such as sex workers and migrants) suggest that the long-term effects of such distinction seem detrimental to rights protections of trafficked persons and others affected by anti-trafficking legislation. More**

**analysis is needed to oversee the long-term human rights consequences, to prevent any collateral damage when maintaining the distinction.**

A frequently mentioned observation of service providers and trafficked persons is lack of experience in using existing relevant legal frameworks is. Trainings and other means to build capacity are needed for anti-trafficking NGOs on working with the civil justice framework of labour courts. They are also needed for migrant rights organisations, trade unions, and other service providers, on the anti-trafficking framework. Similarly, they are needed for labour, migration, and other lawyers, and for courts, to understand the anti-trafficking framework, and be able to offer the full range of rights protections to persons trafficked for exploitation outside the sex sector.

When trying to add the benefits of other legal frameworks to our work, and exploring the boundaries of the trafficking definition, we need to maintain the gains achieved over the years. Hence we reiterate the need to ensure that agency, a human rights approach, and the voices of those affected by trafficking remain at the centre of our work.<sup>95</sup>

### **Interesting Initiatives**

#### **Adding the Benefits of Other Legal Frameworks to Anti-Trafficking Measures**

Both in The Netherlands and in Germany, as well as in other countries where sex work is recognised as work, service providers have started cases to claim unpaid wages for a person trafficked into the sex sector. In this respect it should be noted that using labour law for those trafficked into sex work is in an explorative stage. Several service providers reflected on their own practices in this respect, some admitting they had not taken this option into account before. Lawyers who commonly deal with exploited migrant workers are not specialized in labour laws, and often do not take into account the possibility of claiming unpaid wages for those trafficked into sex work.

#### **Responding to a Lack of Relevant Expertise**

Several initiatives exist where service providers try to manage with the observed lack of relevant experience among courts, lawyers, and colleague NGOs they work with. For instance, some service providers deliberately use the expertise of labour lawyers to deal with courts that are not familiar with trafficking. Others combine both frameworks and include labour related claims (e.g. for unpaid wages) in the criminal proceedings, or file separate claims simultaneously in criminal and civil proceedings. The respective service providers mention positive experiences thus far.

# CASE LAW

**In International Law, victims of trafficking, have a right to remedy,<sup>96</sup> and a fundamental right to access justice,<sup>97</sup> regardless of their age, gender, education, or whether they are citizens of the country in which they are trying to claim their rights.**

In legal terms, international law defines what is needed to remedy the situation caused by a human rights violation. A remedy includes having:

- Equal and effective access to justice.
- Adequate, effective and prompt reparation for harm suffered.
- Access to relevant information concerning violations and reparation mechanisms.

However, access to justice for those who have been trafficked remains a challenge in anti-trafficking. Even if the number of countries with specific anti-trafficking legislation has increased in the last decade, the implementation of the anti-trafficking law is still challenging. Problems with identification and poor legal knowledge mean that most victims never become aware of their rights. Even if they do, lack of training and resources to police, poor prosecutions, weak legal systems, discrimination, conditionality of the assistance to cooperation with the police and other authorities to name some factors make bringing trafficking cases to court a long and arduous road. The result is that **a vast majority of victims of trafficking do not enjoy their right to access the justice system.**<sup>98</sup>

**This being the case for those ‘traditionally’ viewed as trafficked (women trafficked for exploitation in the sex sector), it is even more so for those who do not fit the ‘profile’: women and men trafficked for exploitation outside the sex sector.**

## Little Evidence and Limited Cases of Prosecution

In spite of the existence of numerous reports and research about trafficking in persons (including some of them focusing on trafficking for exploitation outside the sex sector) **getting accurate figures of the actual number of investigations, prosecutions and convictions of trafficking cases is extremely hard.** This difficulty is not new to trafficking and has been pointed out several times.<sup>99</sup>

In the European context, whilst some countries (such as Germany and Bulgaria) publish official statistics of number of cases and convictions, in other countries figures need to be requested to a variety of sources, or are scattered amongst different agencies. Most countries do not provide information about the number of investigations, prosecutions and convictions or this takes a long time to become available. NGOs, for example, have noted that much information about the anti-trafficking responses of government agencies is not freely available. Even government officials experience some difficulties in getting hold of it.<sup>100</sup>

In this context, **trafficking for exploitation outside the sex sector is often not officially reported, either because there have not been cases, or because the information is not disaggregated into sectors of exploitation where trafficking happened.** For example, the US State Department Trafficking in Persons (TiP) report reviewed 40 European countries in its 2010 report. 21 of them did not include data disaggregated according to the form of trafficking, and for 17 countries this data was incomplete. Only in two countries the data was disaggregated.<sup>101</sup>

Given these limitations we have tried to compile the available data and provide an overview of anti-trafficking law enforcement in Europe:

- According to the UNODC convictions for trafficking offences increased 30% between 2003 and 2007 in Europe, although this report does not provide actual figures.<sup>102</sup>
- According to the TiP report, there were 36 prosecutions of cases of trafficking outside the sex sector in Europe on 2009, and 48 in 2008. A total of 47 convictions in cases of trafficking outside the sex sector were reported for Europe in the same period (28 in 2009, and 19 in 2008).<sup>103</sup> However, these 47 convictions took place in only eight European countries: Bulgaria (6), Croatia (2), Germany (19), Hungary (2), Netherlands (2), Russia (12), Sweden (2) and UK (2).

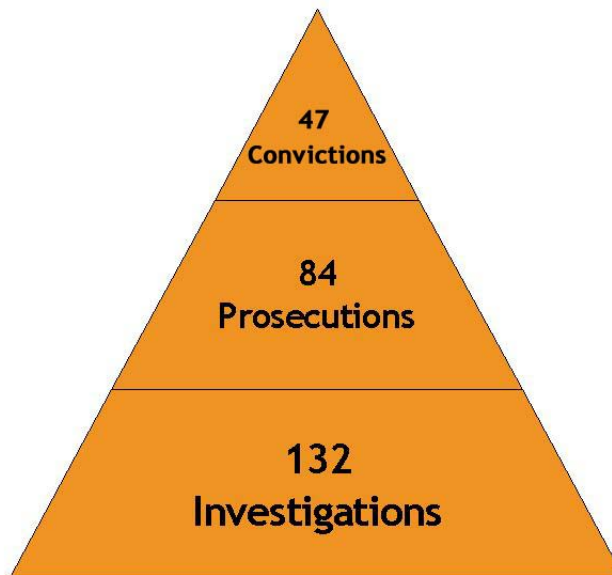


Figure: Investigations, prosecutions and convictions of trafficking for exploitation outside the sex sector in Europe in 2008-2009.<sup>104</sup>

Whilst we have tried to confirm these figures they should be taken cautiously as they might not be totally accurate. Nevertheless, what they show is how minimal the number of actual convictions are for trafficking outside the sex sector.

## Existing European Case Law

Court rulings are often hard to obtain. Some of the **main obstacles identified by GAATW members and allies in accessing relevant case law** are:

- Court rulings are often not systematized, but scattered in a number of tribunals.
- Often only a short summary of the original court decision is available.
- Court rulings must sometimes be purchased at a very high price (which is often an unrealistic option for organisations with limited resources).
- Court rulings are normally in the local language. They need to be translated, at a minimum, into English to be accessible to a wider community, which is expensive and, therefore, often another unrealistic option for organisations with limited resources.<sup>105</sup>

Given these limitations we have decided to look at two court rulings in two different cases of trafficking for exploitation outside the sex sector. One was ruled by the Netherlands Supreme Court, and the other by the German Federal Supreme Court. Whilst the first one has helped to define key concepts and will, therefore, be very relevant for the future enforcement of anti-trafficking law, the second one embeds the misconceptions and challenges when proving justice and restoring rights.

### Case 1: The Netherlands ‘Chinese Restaurant’ Case<sup>106</sup>

‘Chinese restaurant case’ LJN: BI7099/ Supreme Court – decision of 27, October 2009

Gender (males) / Nationality (Chinese)/ Legal status (undocumented)

#### Summary of the Case

The chef and sous-chef of a Chinese restaurant were charged with human trafficking of Chinese undocumented workers who worked on an average 11 to 13 hours a day, six days a week, for a monthly wage of €450 to €800 (which would have equalled a maximum of €3.20 an hour). They had only five days off per month and had to share bedrooms above the restaurant.

In its ruling, “the appeal court found that the suspects had not taken any initiative or action with respect to the Chinese persons. The Chinese persons had approached

the restaurant themselves and come to the Netherlands to work. Under those circumstances, the appeal court found that it could not be proved that the suspects had consciously abused the vulnerable position of the Chinese by taking them in and housing them. The appeal court also found that there was no question of exploitation, deciding that although the situation was 'socially undesirable' it had not been shown that the working conditions were in themselves bad. Furthermore, the Chinese received the money they earned and, according to the appeal court, it could not be said of the Chinese that they did not have any reasonable choice but to work or to reside in the restaurant (even if they were undocumented).<sup>107</sup>

The chef and sous-chef were convicted of people smuggling but not of human trafficking. The public prosecution service appealed this case to the Supreme Court.<sup>108</sup>

### **Supreme Court Decision**

The public prosecution service appealed to the Supreme Court primarily on the grounds that the Den Bosch appeal court had wrongly interpreted the elements, 'abuse of authority arising from the actual state of affairs' and 'abuse of a vulnerable position', of the offence of trafficking in human beings, which the defendants had been charged with under Article 273a of the old Dutch Criminal Code. It also complained that the appeal court had not provided sufficient reasons for its finding that there had not been 'exploitation' in the Chinese workers case.<sup>109</sup> The Supreme Court was, therefore, asked to rule whether the appeal court verdict was correct.

The Supreme court ruled that in order to prove abuse it is enough to 'show conditional intent on the part of the suspect with respect to those circumstances'.<sup>110</sup> Therefore, even if the Chinese workers had 'accepted' their working conditions, the 'defendants' intention to abuse them could be proved by the circumstances the Chinese workers were in (working undocumented with no realistic alternatives) which amounted to a vulnerable position.

The Supreme Court did not give a general definition of what constitutes 'exploitation' stating that it depends on the circumstances of the case. However, it provided a list of factors that should be taken into account to assess whether exploitation had occurred. These factors include the nature of the work, the duration of the work, restrictions imposed on the worker/s, and the employer's economic benefits. In this assessment, the Court stated that standards in Dutch society should be adopted as the frame of reference for weighing those factors. In addition, it ruled that to prove exploitation it was not necessary for the victim to be actually exploited.

The Supreme Court noted that the appeal court's finding that there had not been exploitation was incomprehensible. Particularly given the lack of further reasoning provided for such a decision and especially considering the circumstances of the workers (long working hours, very little time off, salaries below standards and poor living conditions).



The Supreme Court, therefore, referred the case back to the appeal court in Den Bosch.

### **Significance of the Supreme Court Decision**

The significance of the Supreme Court ruling draws on the following elements:

- It provides guidance on the means needed to commit the offence (abuse of a vulnerable position).
- It takes into account the circumstances the victims were in (the fact that they were undocumented and, therefore, more vulnerable to abuse on the grounds of their immigration status) to determine abuse.
- It provides guidance on the concept of exploitation.
- It references Dutch wages and working conditions standards to determine whether exploitation has taken place. This is particularly important as often worker's 'agreement' to bad working conditions is quoted as a 'challenge' to prove exploitation outside the sex sector.

**This case can, therefore, be used by lawyers and advocates to point out that the immigration status of trafficked persons is an element contributing to their vulnerability to exploitation and that national labour standards determine their abuse.**

According to the Dutch National Rapporteur "The number of convictions for other forms of exploitation has risen since the Supreme Court's judgment in the Chinese restaurant case. Up to June 2010, a total of 18 different cases —almost every one of which involved a number of suspects— had come before the courts, and nine of them had led to convictions".<sup>111</sup>

### **Case 2: German Federal Supreme Court Decision<sup>112</sup>**

Document number 3 StR 507/09 / Federal Supreme Court – decision of 13 January 2010

Gender (men and women) / Nationality (Moroccan) / Legal status (special residence permit for occupation as "artists" in folklore shows; residence and work permit tied to one employer).

### **Summary of the Case, and Federal Supreme Court Decision**

In its decision the Federal Supreme Court revoked a judgment of the Hannover Court of First Instance on the grounds that the composition of the chamber was not correct. In addition, the Supreme Court stated that the findings of the Hannover court do not justify a conviction for trafficking for the purpose of labour exploitation. The Supreme Court referred the case back to the Court of First Instance in Hannover for rehearing. The legal proceedings are still pending as of September 2011.

In its judgment, the Hannover court had sentenced a man to a term of imprisonment totalling three years and six months for trafficking for the purpose of labour exploitation (§233 German Criminal Code) and human smuggling of immigrants (§96 German Residence Act).

In 2003 the accused entered into contractual agreements with approximately 25 Moroccan men and women. They agreed to perform as artists in his, so called, 'folklore events'. The accused agreed to pay 33 Euro per show, in addition to food and accommodation to each of the contracted men and women. Contracts were limited to one year and had to be renewed upon expiry. Due to less number of customers, and in order to save money, the accused did not pay eight of the contracted persons at all, or only very little money, and did not enrol them on the sickness insurance scheme which is compulsory under German labour law. The workers were accommodated in inadequate rooms that lacked sanitation. The court in Hannover considered these circumstances as strikingly disproportionate when compared with the terms of employment of other employers (major criterion of §233 Criminal Code).

The victims did not speak German. They did not have enough money to live on and, therefore, were dependent on the accommodation and food the accused provided them with. Their resident permits were legally tied to the business of the accused. As a consequence, they could not change employer without losing their residence permit and putting themselves at risk of deportation. Additionally, they had planned to remain in Germany, which among other preconditions, requires lawful residence for a period of 5 years without a break. The accused was aware of the circumstances and the motives of the victims. Therefore, the court found that the situation fitted the legal criterion of abuse of vulnerability specific to foreigners (major criterion of §233 Criminal Code).

According to the Supreme Court however, the findings of the First Instance Court did not suffice for a conviction for trafficking for labour exploitation. The Supreme Court pointed out that the previous court lacked findings on whether the accused made the victims take up the job offered, or prevented them from leaving it (third main criterion of §233 Criminal Code).

In its ruling, the Supreme Court outlined how to define the criterion 'to make somebody take up, or remain in an exploitative work relationship'. According to the Supreme Court, it requires only a causal act, which can be any kind of offer to accept a job, or which can be seen in simply creating an opportunity for a job. While doing so, the perpetrator has to intend to influence the victim's will in order to make him or her take up or continue a job. In consequence, the Supreme Court ruled, cases in which the victim was already exploited before the job offer, or in which the victim, regardless of his or her vulnerable situation, decided to accept the job knowing about the exploitative circumstances, are not punishable pursuant to §233 Criminal Code.

The Supreme Court ruled that the Hannover court had only stated that the victims had agreed to the extension of their work contracts because they wanted to remain in Germany, but had not elaborated on whether the offer of the accused caused their decision to accept the exploitative circumstances, or if the victims were determined

to continue the work right from the beginning, regardless of the working conditions known to them.

The Hannover court has now to clarify this aspect in the framework of the pending proceedings.

### **Significance of the Federal Supreme Court Decision**

The impact of the decision of the Federal Supreme Court has to be assessed against the background of the general difficulties in applying the provision on trafficking for labour exploitation existing since the law came into force in 2005. Enforcement agencies have been pointing out that, among other challenges, they struggle with the construction and wording of the provision, including too many preconditions and lack of clarity regarding the constituent elements of the crime. In addition, the construction of the provisions makes law enforcement dependent on the witness' statement. These problems cause uncertainty as regards the applicability of the provision and have resulted in very low conviction rates. All this has created a situation in which law enforcement agencies tend to switch to alternative provisions which allow a conviction of the perpetrators but do not properly address the victims' rights violations.

**The ruling of the Federal Supreme Court has intensified these general difficulties, has led to an even more restrictive interpretation of the Labour Exploitation provision in the German Criminal Code, and has failed to acknowledge the background against which people accept to work under exploitative working conditions.**

After this ruling, law enforcement agencies are inclined to close preliminary investigations in cases when victims knew about their exploitative working conditions, as their personal situation (for example, lack of knowledge of German language and laws, lack of legal documents to work, or poverty) is not deemed relevant.



## European Court of Human Rights<sup>113</sup>

### 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (CoE Convention) Article 4

1. No one shall be held in slavery or servitude.
2. No one shall be required to perform forced or compulsory labour.
3. For the purpose of this article the term forced or compulsory labour' shall not include:
  - any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 of this Convention or during conditional release from such detention;
  - any service of a military character or, in case of conscientious objectors in countries where they are recognized, service exacted instead of compulsory military service;
  - any service exacted in case of an emergency or calamity threatening the life or well-being of the community;
  - any work or service which forms part of normal civic obligations.

The two most relevant ECHR final judgments related to trafficking in persons are the *Siliadin v France* case (2005), and the *Rantsev v Cyprus & Russia* case (2010).

### ***Siliadin v France* (Application no. 73316/01)<sup>114</sup>**

#### **Summary**

The applicant, a Togolese national, was brought to Paris on a tourist visa by a French national of Togolese origin. She was promised that she could attend school and that her immigration status would be regularised once she had paid for the cost of her air ticket. Instead the applicant was forced to work as an unpaid domestic servant for four years during which she had to work 15 hour days, without leave, and without remuneration. The perpetrators that forced her to remain as their unpaid housemaid threatened that she could be arrested and deported as a way of controlling her. In her application to the ECHR the applicant complained that French criminal law was inadequate to protect her from being held in 'servitude' or 'at the very least' insufficient to protect her from the "forced and compulsory" labour she was "required to perform" which, in 'practice', she argued 'made her a domestic slave'. She argued that France had not fulfilled its obligations under article 4 of the Convention.

#### **Ruling and Significance**

The case provides significant case law on CoE member State's obligations under article 4.

The court ruled that the applicant had not been subjected to slavery (because the perpetrators did not exercise "a genuine right of legal ownership over her, thus reducing her to the status of an 'object'"), but accepted that she had been subjected

to forced labour and servitude. In doing so it provided definitions for both forms of exploitation under article 4.

Another significant element of the Court decision is that it considered States under an obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4, that is, it ruled that States have positive obligations under Article 4.

And finally, Ms Siliadin was awarded €26,209.69 for costs and expenses. As she had made no claim for compensation in respect of damage sustained, the Court made no award.

**In its ruling the Court provided a definition of slavery, servitude and forced labour and stressed the importance of following the rules of court in making a claim for just satisfaction (compensation).<sup>115</sup>**

### **Rantsev v Cyprus & Russia (Application number 25965/04)<sup>116</sup>**

#### **Summary**

The applicant was the father of a young woman who died in Cyprus where she had gone to work in March 2001 on an artiste visa. After three days working as an artiste in a cabaret she left her job. 10 days later she was in a discotheque, where the manager of the cabaret she had worked for “found” her. He took her to the police asking them to declare her illegal and to detain her. The police concluded that she was not illegal and refused to detain her but they asked the cabaret manager to collect her from the police station because he was her employer, and therefore, deemed responsible for her and to return with her later that morning. Ms Rantseva was taken by the cabaret manager to a private house. One hour later she was found dead in the street below the apartment. It remains unclear whether she died as a result of falling from the window trying to escape or whether she was, in fact, murdered as claimed by the applicant.

The applicant complained that Cyprus had violated the CoE Convention because it had failed to protect the victim when she was alive, failed to adequately investigate the circumstances that led to her death, and failed to punish the perpetrators involved in her trafficking, ill-treatment and death. The applicant also complained that Russia violated the Convention because it failed to protect the victim from the risk of being trafficked, failed to investigate the alleged trafficking, and failed to conduct investigations into her death. The applicant also complained that Cyprus inhibited his access to Court proceedings.

In April 2009 the Cypriot government acknowledged violation of Articles 2 (right to life), 3 (prohibition of torture etc.), 4 (prohibition to be held in slavery or servitude), 5 (Right to liberty and security) and 6 (Right to fair trial) of the CoE Convention and offered to pay pecuniary and non-pecuniary damages to the applicant. Nevertheless, the Court continued with the case, as they saw an opportunity to further develop case law related to Article 4.

### **Ruling and Significance**

In its ruling the Court found Cyprus guilty of violating three positive obligations under Article 4 of the CoE Convention:

- States must adopt an appropriate legislative and administrative framework to prohibit and punish trafficking;
- States must protect the victims of trafficking; and
- States are obliged to investigate the crime once it had happened).

It also confirmed that Russia had violated Article 4 on account of its failure to investigate how and where Ms Rantseva had been recruited and, in particular, to take steps to identify those involved in her recruitment or the methods of recruitment used. By holding both countries accountable **the Court recognised that responsibility lies on countries of origin, transit and destination.**

Another crucial element of this ruling is that the Court stated that trafficking (even if not expressly recognised by Article 4 of the CoE Convention) falls within the mentioned Article 4 (which prohibits slavery, servitude and forced labour). It is important to remember that the CoE Convention was written in 1950, a time when 'trafficking in persons' was not 'known'.

The Court ruled that the Cypriot Government had to pay Mr Rantsev €40,000 non-pecuniary damage and €3,150 for costs and expenses, and that the Russian Government had to pay €2,000.<sup>117</sup>

### **Relevant Pending Cases at the ECHR**

In addition to these two final judgments, a number of cases are pending to be heard at the ECHR. Some of them refer to State's breach of Article 4 in cases of trafficking outside the sex sector, or forced labour. By the time of writing this working paper relevant cases were:

#### **E. Kawogo v. United Kingdom** (application no. 56921/09)

The applicant, a Tanzanian national having arrived in the United Kingdom on a domestic working visa valid until November 2006, was made to work daily for the parents of her previous employer, from 7 a.m. till 10.30 p.m., without payment, for several months after her visa expired. She escaped in June 2007. She complains she was subjected to forced labour, in breach of Article 4.

#### **C. N. v. United Kingdom** (application no. 4239/08)

The applicant, an Ugandan national, claims that —escaping sexual abuse in Uganda— she arrived in the United Kingdom with a false passport. Upon arrival, she had her documents confiscated and was made to work for free, being on call day and night, for an elderly person suffering from Parkinson. She was kept in isolation and was threatened repeatedly with violence and expulsion. She complains in particular that the UK breached Article 4 as she couldn't claim protection in the British courts given that the law applicable at the time did not include the offences of servitude and forced labour.



The case of C.N. has already led to fundamental reform in UK law. Recognising there was a gap in UK law, parliament enacted the offence of holding someone in 'slavery, servitude and forced or compulsory labour' [Section 71 of the Coroners and Justice Act 2009 UK] which made it a criminal offence for a perpetrator to subject an individual to forced labour or servitude. Previously a perpetrator that had held the individual in slavery, servitude and forced or compulsory labour had to be involved in the act of trafficking the individual for exploitation, or had knowledge, or believed that the individual had been trafficked for exploitation.<sup>118</sup>

## What Can We Learn? What Steps Can We Take?

Access to justice for those trafficked outside the sex sector is crucial if we want their human rights recognised and redressed. Although the number of such cases reaching the European national courts is increasing, existing case law is still very limited.

Experience so far shows how inadequate the understanding of trafficking outside the sex sector is among lawyers, prosecutors, and judges.

There is an urgent need to train these actors, not just on the concept of trafficking as a distinctive crime, but especially on its intersections with migration and labour and how these impact on the position of vulnerability and abuse of power: the means by which trafficking takes place.

There is also an urgent need of gaining knowledge: Which countries in Europe are at the forefront in prosecutions and convictions? Which elements in their national anti-trafficking laws are facilitating this? How is trafficking outside the sex sector characterised according to their juridical practice?

But knowledge without analysis is not enough: Which crimes are being proved in cases of trafficking outside the sex sector? How are the subtle forms of coercion and abuse being addressed?

Court decisions from other countries enable human rights advocates to better represent trafficked persons at court. They facilitate the understanding and broaden the knowledge base of those in charge of administering justice.

Finally, we must not limit our use of case law only while seeking justice for trafficking outside the sex sector. Decisions related to trafficking for exploitation in the sex sector might be equally relevant to cases of trafficking in other sectors. Good, empowering rulings in cases of exploitation in the sex sector should be applied to cases of exploitation outside it as well. For example, indicators considered sufficient in one sector should allow for convictions in other sectors too: Why would a door need to be locked in the case of a trafficked domestic worker when that is not required in the case of a woman trafficked for prostitution?



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# CONCLUSION

After a 'traditional', almost exclusive, focus on trafficking into the sex industry the last years have witnessed how the anti-trafficking movement is turning towards trafficking for exploitation outside the sex industry.

In GAATW, an organisation that has always maintained that trafficking takes place in many work sites, and is intrinsically linked to migration, gender, labour, and its wider context, we have welcomed this move to a more inclusive understanding. At the same time, we have felt the urgency to take a closer look at this new scenario. This working paper focussed on Europe following the interest of our member organisations in that region. Similar explorations can be made in other regions too. We tried to analyse the situation from the perspective of service providers and where feasible trafficked persons as their views were missing in existing research.

What we have observed is a mixed scenario. GAATW member organisations have used diverse strategies to reach out to a broad range of potentially trafficked or severely exploited persons (both inside and outside the sex sector). They, consequently, have experience (although limited) in providing assistance to women (and sometimes men) trafficked into many work sectors.

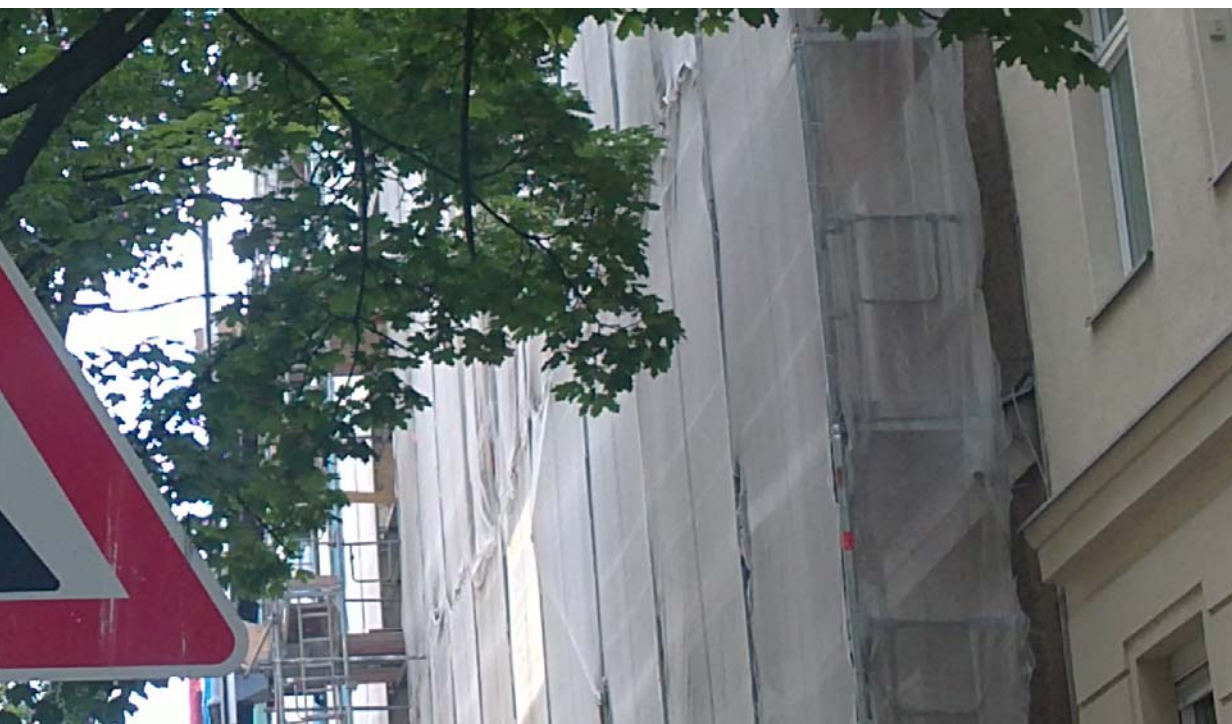
At the same time, those we have interviewed in the course of our research have, without exception, pointed out that there is not enough experience. They have emphasized the need for experience sharing across countries and regions. "We don't know yet", "It seems that", or "We need to know more" have been expressions often heard. We hope that this collation of experiences and insights will go some way towards addressing the sense of isolation and inadequacy which service providers feel.

Based on our research, we have noted certain common elements that stand out in the European region in anti-trafficking initiatives outside the sex sector. Those are:

- In spite of a growing trend in addressing 'trafficking for labour exploitation', an understanding that trafficking primarily takes place in the sex industry and to women prevails in the anti-trafficking sector. This perception might be influencing the identification process for persons trafficked outside the sex sector, including men.
- Views on gender and moral positions about prostitution persist. Consequently women trafficked into the sex sector are more often perceived as 'victims' by authorities, than women and men trafficked outside it. It appears that law enforcement accords more agency to people working outside the sex industry.



- 'New actors', such as trade unions, and labour inspectors, are entering anti-trafficking work. This is a welcome step and this is certainly the right time to ensure that all actors follow a rights based approach to trafficking.
- Migration and labour laws have an enormous impact on the vulnerability of migrant workers to trafficking. A trafficked person's 'illegal' status often determines her/ his identification as such, as well as her/ his access to assistance provisions. This, combined with the gender and moral biases mentioned above has, again, an enormous impact on the lack of rights protection of persons trafficked outside the sex sector.
- There is undeniably a dearth of assistance services available to trafficked men, most of whom are trafficked outside the sex sector. There is, consequently, very limited practical experience in this field. Whilst on one hand it is often mentioned that trafficked men's needs are 'different' than those of trafficked women, it is important to analyse whether these differences rely on assumptions on gender and masculinity, or on real needs as expressed by the trafficked persons.
- In relation to the point above, our research indicated that assistance needs of trafficked men and women are not determined by their gender or sector of exploitation, as by their individual situations. While it is possible that certain elements in the trafficking experience (such as sexual violence, the isolation of the working site or the relationship with the trafficker) shape the assistance needs, much more analysis is needed.



- The number of cases of trafficking outside the sex sector reaching the Courts, although increasing, is still extremely limited. Most European countries, barring a few, now have legislation that criminalises all forms of trafficking. However, law enforcement continues to prioritize cases of trafficking into the sex sector. Police, judges and prosecutors still do not have adequate understanding of the crime in all its forms. So moralistic views and assumptions on gender continue to influence their decisions and actions.

Whilst more research is needed in various regions, the way we approach anti-trafficking will also shape the conclusions we reach. If we think that trafficking into sectors outside the sex industry is different and needs to be addressed separately from 'trafficking for sexual exploitation' we will probably come up with a totally new set of indicators, new methodologies for assistance and new laws. Our research findings caution against this. There are surely differences, but, are we talking about a completely 'new issue'? No. Do we need to look at them as two distinct 'sets of trafficking'? Certainly not. While dealing with trafficking outside the sex sector we will need to adapt, experiment and try out new strategies, but there is no need to reinvent the wheel. We can learn from the knowledge gained in the recent decades. We must call for a better, non-biased, right-based implementation of the current laws. We have to stop looking at trafficking as separated from the context it takes place in. While developing anti-trafficking initiatives we must use the experience of those who have been trafficked and of those who assist them in regaining control of their lives.

# RECOMMENDATIONS TO GOVERNMENTS

## General Recommendations

1. Implement legal and policy changes that recognise that human rights standards and the Palermo Protocol apply to all trafficked persons, including those trafficked outside the sex sector.
2. Ensure that national anti-trafficking legislation defines concepts such as forced labour, coercion, abuse of power and abuse of a position of vulnerability in accordance with international standards.
3. Ensure that work permits are not tied to one single employer and changing employers is allowed.
4. Counter racism, xenophobia and anti-migration laws, policies and practices that contribute to exploitation and trafficking.

## Identification

1. Ensure recognition that trafficking occurs in different sectors:
  - a. Ensure that immigration laws and procedures in no way impede the identification of trafficked persons.
  - b. Develop guidelines and procedures for the identification of trafficked persons, with support from civil society organisations specialised in anti-trafficking.
  - c. Ensure knowledge and familiarity with relevant indicators among those in charge of identification.
  - d. Ensure inclusion of all trafficked persons in identification mechanisms that States are obliged to establish.
2. Train labour inspectors in the identification of trafficked persons, with support from civil society organisations specialised in anti-trafficking in these trainings.
3. De-link labour inspection from immigration remits so that undocumented workers can report abuse without having to fear for their residency in countries of destination.



4. Promote ways of cooperation and collaboration with trade unions, migrant rights organisations, asylum seekers' support organisations and other collectives that may encounter trafficking cases.
5. Establish referral mechanisms for those who want to stay outside the realm of law enforcement, in cooperation with unions, labour inspectorates, and other actors.

### Assistance, including legal assistance

1. Ensure that national anti-trafficking legislation complies with international law, which makes no distinction of the sector into which a person has been trafficked, nor of the person's gender in terms of access to assistance.
2. Ensure that assistance programs are available to trafficked persons without distinction on the sector of exploitation or the person's gender.
3. Conduct analysis at the national level, in partnership with civil society organisations specialised in anti-trafficking, on the assistance needs of trafficked persons on the basis of gender and the sector of exploitation and implement assistance accordingly
4. Develop assistance programs, with support from civil society organisations specialised in anti-trafficking, which are flexible and adaptable to the needs of trafficked persons, as expressed by them.
5. Develop training for those providing legal assistance to trafficked persons addressing the lack of knowledge of the different available legal frames (including anti-trafficking, migration, labour, refugees, smuggling), and provide practical guidance on how to take cases to criminal or civil courts.
6. Ensure that the protection of and support for trafficked persons is not made conditional upon cooperation with law enforcement agencies, but is based on the persons' human rights.
7. Ensure access to compensation for trafficked persons.
8. Ensure that trafficked persons can exercise their right to access justice without fear of its possible consequences, and independently of their legal status.

# ANNEX 1: ACKNOWLEDGMENTS

We are indebted to numerous individuals and organisations who generously shared their experiences, concerns, doubts and challenges in the process of writing this Working Paper.

GAATW member organisations in Europe collectively encouraged the International Secretariat to look at the way trafficking outside the sex sector is becoming a 'new big issue' in the region and at its implications from a human rights perspective, especially for service providers. Initial discussions started in 2008, the plan took shape in 2010 at the GAATW International Members Congress, and in 2011 at a regional meeting held in the city of Barcelona we firmed it up. 'Thank you' to all of you.

A number of member organisations made a special effort to support the International Secretariat in the field trip phase of the research.

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# ANNEX 2: TERMINOLOGY

This Working Paper uses the term 'trafficking for exploitation outside the sex sector', rather than other frequently employed terms such as 'trafficking for labour exploitation', 'forced labour', or 'slavery'. The first chapter briefly explained this.

**However, we consider it relevant to take a closer look at the way relevant legal instruments deal with this category of trafficking and how others analysed the terminology.**

This annex is not meant to be exhaustive but to showcase some examples of the way terminology has been applied so far.

## The Palermo Protocol

The 'Palermo Protocol'<sup>119</sup> contains the internationally accepted definition<sup>120</sup> of trafficking in human beings, and therefore has facilitated a common understanding of the phenomenon.<sup>121</sup>

The Palermo Protocol's definition of human trafficking is hard to operationalise, due to its complicated wording and because some of the key terminology used remains undefined. For instance, the definition of trafficking states that "[e]xploitation 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". While, 'forced labour' is defined in other international treaties, 'other forms of exploitation' are not. Considering that not all exploitation of labour amounts to forced labour, there is a gap in the definition.

## ILO Conventions 29 and 105

ILO Conventions 29 and 105 deal with forced labour.<sup>122</sup> Their strength is in their priority as so-called Fundamental Conventions which promote fundamental principles and rights at work and their near universal ratification by State Parties: 175 and 171 respectively.<sup>123</sup> All European countries have ratified the two Conventions. C29 prohibits forced labour and sets its scope to include all kinds of "work or service exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily", and hence can be used by trafficked persons and their lawyers to find redress in those cases where the sector into which a person has been trafficked is not recognised in national legislation (e.g. domestic work, sex work),

or the person is not traditionally seen as victim (e.g. men). The Convention includes a number of exceptions by the state, like military service, prison labour, and emergencies. Convention 105 adds specificity to that Convention's exceptions, thus further demarcating its boundaries.

## European Regional Instruments

The **Council of Europe** (CoE) Convention on Trafficking<sup>124</sup> uses the exact same definition of trafficking as the Palermo Protocol, but includes stronger human rights provisions and acknowledges the lack of definitions of the concepts mentioned within the trafficking definition. It solves these partly by adding explanatory notes and referring to case law, and partly by leaving it open for national legislators. For instance, the Convention's Explanatory Report explicitly mentions that trafficking does not require that exploitation has actually taken place, when the acts or means were for the purpose of exploitation.<sup>125</sup> Besides, it elaborates what constitutes 'The abuse of vulnerability'.<sup>126</sup> However, it also notes that, since the Palermo Protocol on which the Convention is based lacks clear definitions, it is up to European national legislation to define which forms of exploitation constitute a crime under the Convention and which do not.<sup>127</sup> The Convention to date has been formally acknowledged as a standard to respect and implement by all EU States except the Czech Republic,<sup>128</sup> and has been adopted by 34 out of 47 Council of Europe Member States. About half of them have declared that the applicability of the Convention is limited to their nationals only.<sup>129</sup> Fortunately, the new 2011 Directive of the Council of the EU addresses this major gap in legislation.

The Council of the **European Union** has issued a number of relevant Directives. One of them is the recently adopted 2011 Directive,<sup>130</sup> with which the Council replaced the 2002 Framework Decision.<sup>131</sup> This new Directive notes that trafficking can occur in several sectors of work like "the sex industry or... construction work, the agricultural sector or domestic servitude" and it contains an expanded definition of trafficking, which now includes exploitation for the purpose of begging and criminal activities. Besides, the Directive establishes jurisdiction over the offence when the crime was committed in another country but the criminal is a national of that State, and suggests a similar cross-border approach in case the victim is a national or habitual resident, if the offender is a habitual resident, or if the benefiting person is established in that State. It further defines that "a position of vulnerability means a situation in which the person concerned has no real or acceptable alternative but to submit to the abuse involved".<sup>132</sup> The Directive applies to all Member States except Denmark.<sup>133</sup> EU member States are to implement the Directive by 6 April 2013.

Another instrument is the Residence Permit Directive,<sup>134</sup> which introduces a residence permit intended for victims of trafficking as an incentive to cooperate with the authorities in prosecution of the perpetrator. All European states, except the UK, Ireland and Denmark have adopted this Directive. The Directive uses the definition of trafficking as in the 2011 Directive, and explicitly includes victims who entered a State legally or illegally. While it is appreciated that trafficked persons are entitled to

remain in the country, GAATW thinks this assistance should not be made conditional on their cooperation with law enforcement. More on this can be found in the Chapters on Assistance, and on Legal Frames, and in GAATW's brochure 'Recognise the Right to Assistance'.<sup>135</sup>

Lastly, the EU Directive on Employers' Sanctions<sup>136</sup> Article 2 defines particularly exploitative working conditions as "working conditions, including those resulting from gender based or other discrimination, where there is a striking disproportion compared with the terms of employment of legally employed workers which, for example, affects workers' health and safety, and which offends against human dignity". Employment in this Directive includes work that is regulated under national law, but also activities in accordance with established practice for an employer or temporary work agency, thus broadening the scope of what is considered work and the sectors in which a person's labour can be exploited. Article 9 makes employing illegally staying non-EU nationals under particularly exploitative working conditions a serious criminal offence, and the Directive suggests States grant victims of this offence with residence permits under a similar arrangement as the 2004 Residence Permit Directive intended for trafficked persons.

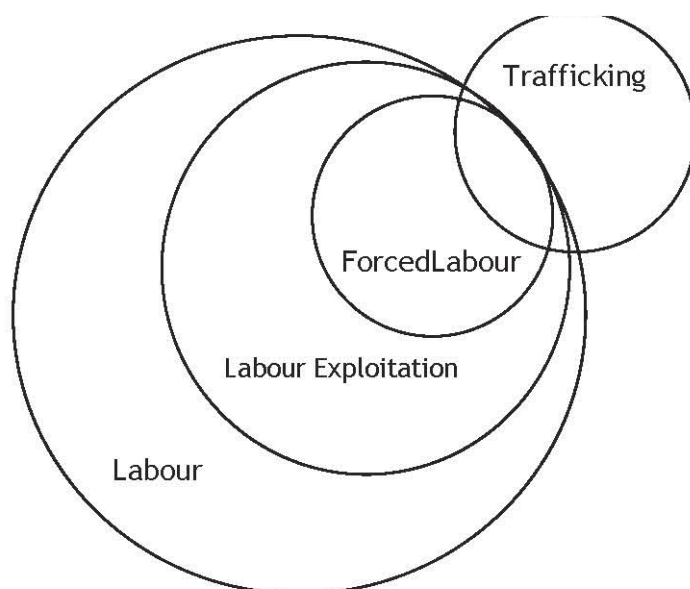
## Case Law

Besides international and regional legal instruments, case law, such as those presented at the European Court of Human Rights (ECHR) provide insight in terminology. Important cases in this respect are those of *Rantsev vs. Cyprus and Russia*, and *Siliadin vs. France*. More on these cases and their implications for among others terminology can be found in Chapter 3 on Cases.

## Trafficking: Labour and Human Rights Standards and their Universality

GAATW's 2010 Working Paper series<sup>137</sup> and Feminist Participatory Action Research<sup>138</sup> described the complex realities of migrant workers' lives. This complex reality, in combination with the earlier mentioned issue of lacking definitions, make it sometimes hard to pinpoint whether labour exploitation is severe enough to be called trafficking.

GAATW's Working Paper on Trafficking and Labour in particular, discusses the overlaps and differences between trafficking and exploited labour. It visualizes them as a set of concentric circles plus an overlapping circle, and stresses the importance of expanding rights for agency.<sup>139</sup>

Figure: Overlapping definitions<sup>140</sup>

Each of the circles in this figure can be bigger or smaller, depending on the category of workers we look at. Local workers will experience smaller chances and circles of labour exploitation and forced labour than migrant workers, for whom those circles would occupy a larger share of the labour circle. For migrant women workers, all circles would be larger than those of migrant workers in general.

Others, such as Skrivankova,<sup>141</sup> talk about a ‘continuum of exploitation’, “ranging from the positive extremity (desirable situation) of decent work to the negative extremity of forced labour (most serious form of labour exploitation)”, to show that a discrepancy between given working conditions and minimum labour standards is the key indicator of an exploitative labour condition. Or, more broadly, this involves human rights standards.

Labour rights too are human rights.<sup>142</sup> While each of the European countries has labour laws that meet a certain level of labour standards, this standard is not equal for all persons. Often, migrant workers are excluded, are not covered by labour law, and thus are more easily exploited<sup>143</sup>. However ILO Convention No. 97 that 18 Council of Europe member states<sup>144</sup> have ratified says that, “Migrants are entitled to all labour rights attached to their employment regardless of status including payment of minimum wage, non-discrimination, payment of damages for workplace accidents or health problems caused by the employment, etc.... Especially when workers have a precarious or irregular residence status, they still enjoy the human right to organise, join a union and bargain collectively to claim their human rights at work. Effective compensation is a right for trafficked workers...”.<sup>145</sup>

It is also important to note that “Governments have the obligation to respect, protect and fulfil human rights of people within their jurisdiction.<sup>146</sup> Governments are thus responsible for developing adequate regulation, implementing action plans and effective monitoring to eradicate forced labour and trafficking”.<sup>147</sup>

# ANNEX 3: METHODOLOGY, ETHICS, LIMITATIONS

## Methodology

The genesis of this research is a discussion among GAATW members in Europe in 2008. At this meeting, they exchanged their experiences and challenges in conducting awareness raising, outreach and identification, and in providing assistance to persons trafficked outside the sex sector. The meeting identified a need to gather more knowledge on this issue and to analyse it from a practical human rights perspective. The GAATW International Members Congress in 2010 further elaborated this call for research, and the GAATW International Secretariat agreed to take up the task in 2011.

The first stage was a literature review to find out what information existed on trafficking for exploitation outside the sex sector in Europe.<sup>148</sup>

The outcomes of the literature review were presented during a meeting in early 2011 and major gaps were identified. These included the absence of the service providers' and trafficked persons' perspective, and a human rights analysis of the implications of the expansion of the anti-trafficking framework.

A research outline and plan were developed, which emphasised:

1. Interviews with NGOs providing assistance to trafficked persons to find out about their experiences first hand, as well as —where feasible— interviews with trafficked persons to find out their perspective.

Interviews with 29 service providers, trafficked persons, and a few lawyers, researchers, and government officials were held during a field trip in June 2011 to Europe, and in the period June-October 2011 several others were contacted over email, Skype, and telephone. A full list of interviewees and resource persons can be found in the Annex 1: Acknowledgements.

2. Simultaneous desk-based research focused on deepening the analysis of the initial literature review, including background research on legislation, cases, and existing knowledge regarding identification and assistance.

Central to the analysis was making use of GAATW's long and extensive knowledge and analysis of anti-trafficking, and incorporating past lessons into the present expansion of our understanding and analysis.

The feminist context GAATW emerged from in 1994 was largely informed by the violence against women movement and feminism from the global South. Rather than assuming a simplistic 'global sisterhood', GAATW noted that class, race, ethnicity and other factors impact on women's choices and strategies for livelihood. When the anti-trafficking movement started taking shape in the late '90s and in the first decade of the 2000s, GAATW placed at the core of its work the promotion and the protection of the human rights of the migrating woman. Additionally, GAATW recognised that while some migrant women have many vulnerabilities, they still exercise agency, however limited their space might be. By defending these arguments GAATW played a big role in strengthening and broadening the anti-trafficking framework. GAATW and her allies had put together a set of human rights standards for treatment of trafficked persons and pushed for a broader definition human trafficking that would recognise that trafficking also takes place outside the sex sector and to both women and men.<sup>149</sup> In 2007, based on a multi country research GAATW also drew attention to the 'collateral damage'; i.e the human rights violations caused by zealous but misguided anti-trafficking policies.

**Following up on our previous work, two principles guided the development of the research methodology.**

**First, the recognition that migrants make choices and strategies that are largely defined by their class, race, ethnicity and other factors. And that, even when in a vulnerable situation or when their options are limited, they assert their power and ability to make choices.**

**Secondly, the acknowledgement that it is paramount to prioritise the voices of the exploited and trafficked migrant workers, and of their assistance providers (that is, the voices of those who are affected by anti-trafficking policies).**

## Ethics

Critical to this research was creating a space in which the voice of those affected by trafficking could be heard; however, of equal importance was ensuring their physical and psychological safety. In undertaking the research we were always careful not to re-traumatise victims, and make sure that they do not face danger for having shared the information. We also wanted to ensure that the information is presented in a truthful and respectful manner, free from stereotypes, and giving space for the agency of the person.

Accordingly, in undertaking interviews with trafficked or severely exploited persons we prioritised confidentiality, the creation of a trustful environment, and sharing of



information about the research. These were also important elements in all interviews conducted (with service providers, academics, government officials etc) and relevant sections of the interviews have been made available to concerned persons or organisations prior to publishing.

Equally important to us was the issue of terminology. We are very aware that words categorize groups of people, label individuals, and have consequences in terms of stereotyping, victimization, and attribution of agency. As explained in the Annex 3 on Terminology, we have tried to find a way to use words without causing harm. However, this has been a daunting task and we are aware that the perfect phrases may not have been found.

**Furthermore, while trying to understand distinctions between trafficking for exploitation within and outside the sex sector, it has been important to recognize the rights of all migrant workers, men and women; documented and undocumented; exploited, trafficked, or working under good conditions; and to ensure that no 'collateral damage'<sup>150</sup> was being done.**

## Limitations

The European anti-trafficking scenario (including national policies and measures, and their implementation) is very diverse.

**Existing information is also partial and limited. We have tried to draw general conclusions, but the diversity of the region and the limited information available should be kept in mind.**

The number of countries visited and included in this Paper is not exhaustive. The European region has many more States than could be covered by our research. We have, therefore, aimed to cover a broad range of countries from several sub-regions within Europe, and while it was not possible to visit all members in their countries, we did consult all of them via email and/or skype as well as colleagues from some other organisations for their input. We also reviewed a wide range of existing literature on trafficking outside the sex sector in the region.

This Working Paper uses the phrase trafficking of exploitation 'outside the sex sector'. As mentioned in the Introduction, the number of sectors—excluding the sex sector—where exploitation and trafficking occur is large. Clubbing all sectors into one category, thus, can hardly do them justice. However, since there is little in-depth research on many employment sectors, except domestic work, and little is known regarding characteristics of workers, perpetrators, methods of trafficking and recruitment, and idiosyncrasies of victim experiences, we chose to use a bulk category.

# ANNEX 4: ALTERNATIVE LEGAL FRAMEWORKS

**Trafficked persons weigh up the risks and benefits of becoming involved in criminal proceedings against traffickers, and may choose not to use the anti-trafficking framework.** Service providers therefore have used other frameworks to offer assistance to those ‘blurry’ cases that are hard to fit under the legal definition of trafficking, or to support victims for whom criminal justice is not an option.

Service providers and trafficked persons are exploring to what extent other frameworks give access to additional benefits which cannot be obtained through the criminal justice route; to what extent they protect the rights of trafficked persons; and to what extent they attribute agency to the trafficked person.

This Annex gives an overview of initial experiences collected during the research for this Working Paper. They are by no means exhaustive.

## Alternatives in Criminal Justice: Smuggling

Smuggling and Trafficking fall under the same UN Convention against Transnational Organised Crime. Rights protections for smuggled persons do exist in the Protocol itself, and more are accorded in the Savings Clause (though they have yet to be developed through soft law).<sup>151</sup>

The Smuggling Protocol includes the concept of ‘aggravated smuggling’, to refer to those circumstances during smuggling under which a person’s life is put in danger or a person is treated inhumanely. As such, the smuggling frame could, theoretically, be used to provide justice as an alternative to the anti-trafficking frame. GAATW has explored this possibility on the basis of the experience of migrant rights’ activists. Experience has shown that there seems to be no inherent human rights ‘added value’ in using the ‘aggravated smuggling’ terminology since there are high risks of creating another justice frame where the human rights of the victims are secondary.<sup>152</sup>

In Europe, Belgium seems a positive exception. The country incorporated the ‘aggravated smuggling’ concept in its combined anti-trafficking and anti-smuggling laws. Persons who were not necessarily identified as trafficked but fall in this category have access to the same rights protections that are accorded to trafficked persons.<sup>153</sup> However, there is no new route to justice for trafficked persons here, since if they are trafficked and want criminal justice, they go through the anti-trafficking channels. For more information please refer to the other Working Paper in this series.<sup>154</sup>

Consequently, **among service providers and trafficked persons there is limited appeal to use the smuggling framework.** None of the interviewed service providers mentioned having experience with using it.

## Alternatives in Civil Justice: Experiences with Labour Courts

The civil justice framework provides a road to redress for those trafficked persons for whom criminal justice is not an option. Labour courts are an important civil justice instrument.

The labour court opens new doors for those who do not wish to cooperate with law enforcement in criminal procedures. **The labour framework allows the trafficked person to stay outside the realm of law enforcement as much as possible,** or completely outside of it. Some trade unions avoid going to the authorities and purposely do not take cases of labour exploitation to the police to have them identify a person as trafficked, precisely because of the earlier mentioned risks for the person. Labour courts can offer benefits —like payment of wages— that for some might be more useful than those offered by anti-trafficking programs, for instance for those who already have a regular migratory status. **And it provides chances of redress for those who are not recognised as trafficked** due to obstacles linked to identification or the narrow criminal justice definition of a trafficked person, and for those who were exploited but 'not severely enough'. But these same benefits —and the labour court's limitations— also apply to those who are eligible for the anti-trafficking programs and the use of other criminal justice instruments.

When focusing on labour rights, several international labour instruments can be used, some of which have been ratified by only a few countries in Europe, while others, like the ICESCR have been widely ratified.<sup>155</sup> An elaborate list of international instruments related to labour rights is included in GAATW's 2010 Working Paper on the linkages between trafficking and labour, which also details which categories of people are eligible for or miss out on the entitlements in each of these instruments.<sup>156</sup> The labour rights as described in the main instruments have been laid down in national penal codes: a right to —equal wages, to fair working conditions, to join a trade union, to social security, and to a minimum subsistence.

**Nearly all interviewed service providers have explored the labour framework, and experienced both benefits and challenges in doing so.** Some of the benefits they mentioned are:

- Claim Unpaid Wages: **The opportunity to reclaim unpaid wages is extremely important.** It allows for claiming money even when it is hard identify who has to pay the compensation.

- **Relatively Quick Legal Proceedings:** Although the situation differs at regional level labour procedures are usually quicker (normally a few months rather than years) than the criminal process.
- **Migratory Status Not Taken Into Account:** **The civil justice' labour framework seems to be 'less dangerous' for the trafficked person as in labour courts [as opposed to criminal courts] the migratory status of the person is not taken into account.**
- **Emotionally Less Demanding:** Testifying in court can be draining for the victim, since they need to relive a traumatising experience. Labour laws only focus on labour claims so if the victim does not want to raise the issue of trafficking, they do not have to. As a service provider observed: "Nobody asks about their background".

On the other hand, service providers and trafficked persons describe a number of challenges:

- **No 'Justice': Money Isn't Everything:** It is not possible to get a conviction through labour law, while the need for 'justice' does exist. Or as one service provider put it: "In some cases money is not everything".
- **Lack of Experience among Service Providers:** **Service providers often have limited experience in using the labour frame for trafficking cases.** Similarly, those providing assistance in trade unions, who much more familiar with the labour frame, are normally not aware of the existence of anti-trafficking laws that can also be of use for their clients.
- **Lack of Experience among Lawyers and Courts:** The lack of experience seems to hold true for lawyers and courts as often experienced by service providers. Lawyers, and labour lawyers in particular, may often lack knowledge of the trafficking framework. One interviewee summarised that **lawyers are normally not familiar with dealing with the triangle of labour law, migration law and criminal law.** Another interviewee stated that lawyers talk about labour exploitation, about 'severe forms of labour exploitation', but not about trafficking at all. Also, the interviewee observed that lawyers specialized in labour law were not used to the trafficked client who often does not speak the local language and has limited resources. Other service providers warned that often courts are not trained either to understand the concept of trafficking in persons.
- **Victim or Perpetrator?:** GAATW's earlier research<sup>157</sup> and interviewees observe that **"those who have suffered labour exploitation are not seen as victims, but as perpetrators of immigration law breaches"**. They are often seen as "people we want to get rid of".

## Other Civil Justice Alternatives: Migration and Refugee Law

The above-mentioned legal frameworks provide some alternatives to most categories of people who would otherwise not have access to justice. However, for those who cannot (out of e.g. fear or lacking identification) or don't want to access criminal justice, but who cannot make use of labour courts either since their labour is not recognised as such (for instance domestic workers, or sex workers in countries where sex work is not recognised as labour), other legal routes are needed. Of course, **alternative routes to justice in principle are open also to trafficked person who can make use of anti-trafficking's criminal justice framework**, but would like to include the specific rights protecting benefits of other legal frameworks. The alternatives include legal frameworks dealing with migration and refugees. Internationally, migrant rights are established by among others the Migrant Workers Convention (MWC)<sup>158</sup> and the International Covenant on Civil and Political Rights (ICCPR). While **only very few of the European countries thus far ratified the MWC**,<sup>159</sup> the ICCPR has been ratified region-wide. The ICCPR includes several positive rights for migrants, including the freedom to leave a country, the freedom from arbitrary arrest or detention and procedural protections in case of detention, and the right to non-refoulement.<sup>160</sup> Refugee rights are established in the United Nations Convention Relating to the Status of Refugees of 1951 and its Protocol of 1967. It has been ratified Europe-wide. **The Refugee Convention establishes that refugees should be free from punishment for their migratory status, and the right to non-refoulement.**

Both are influenced by the present public perception of migrants in Europe. In a context of wide economic crisis this perception overall is negative: think of 'Fortress Europe' and the rise of right wing political parties that earn their growth to their repressive migration stand or the views of 'nationals come first'. This public perception is an element to take into account.

The migration status of a trafficked person plays an important role in their access to justice. While legally migrants often are entitled to a large number of rights, in practice many obstacles impede their actual access. For instance, in Germany even though undocumented migrants are entitled to claim unpaid wages at labour court, the court where they make these claims is obliged to report the person to the immigration authorities. This naturally hinders undocumented migrant workers to claim unpaid wages.

Another practical obstacle when trying to use either of these frameworks is similar to one listed earlier: a lack of experience among migration centers and lawyers. It has been often pointed out that "we need to start from zero" when it comes to the anti-trafficking knowledge of migration centers and their openness to using other legal frameworks. One interviewee complained that migration lawyers found exploitation a 'necessary evil' for their clients to keep their residence permit. **Migration lawyers often do not take into account the possibility of claiming unpaid wages for**

**sex workers when assisting clients in countries where sex work is recognised as labour.**

**There is limited experience among assistance providers with using the refugee framework to provide assistance to those who were trafficked for exploitation outside the sex sector.** Service providers have mentioned that trafficked persons resent to be identified as trafficked, since it might jeopardise their asylum claim.<sup>161</sup> Applying for asylum gives the possibility of securing the right to remain in the country for a longer period than normally offered through the residence permit of anti-trafficking programs, both in first instance and with the possibility of settlement later on. It additionally gives a large number of rights and entitlements as refugees.<sup>162</sup> It has been experienced that this frame (when the person is eligible) grants the person more rights, and is quicker than the anti-trafficking one. Also, refugees do not require a passport to access assistance, which is worthwhile for those who do not have one. The permission to stay is not checked again and again as in the anti-trafficking arrangements. Another, important benefit according to one service provider is that the person needs to tell and relive his or her story less often than in the anti-trafficking frame.

On the other hand, the procedure itself is more complicated, and your story needs to be very convincing. Additionally, refugee law can be limited since in many countries, persons seeking refugee status are barred from working for years while awaiting a decision on their asylum application.<sup>163</sup> Other countries refuse to grant refugee status at all or grant it to a very limited number of people so that the mechanism is not a viable safeguard for forced migrants.<sup>164</sup>

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This bibliography organises the resources used for this Working Paper and other interesting resources in the following categories:

- Trafficking for Exploitation Outside the Sex Sector in Europe
- Country Information
- Information on Europe
- European Legal Instruments and Case Law
- Trafficking, Labour Exploitation, and Related Frameworks

The GAATW website, [www.gaatw.org](http://www.gaatw.org), includes a section where these documents as well as other relevant resources can be accessed.

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# ENDNOTES

<sup>1</sup> See also: GAATW (2010c) Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>2</sup> See also: GAATW (2011b), GAATW (2010e), and GAATW (2007). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>3</sup> See for instance: Stana Buchowska in GAATW (2009a). Available at: [www.gaatw.org](http://www.gaatw.org)

<sup>4</sup> See also: GAATW (2010d). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>5</sup> Jamin, J. (2009).

<sup>6</sup> Ibid (p.5).

<sup>7</sup> When considering the working sectors in which trafficking is said to occur, it is important to bear in mind that 'Europe' is a diverse region with big economic, cultural and labour disparities and that, therefore, not all sectors have the same prevalence in all countries. Also, while overall the European region is mainly a region of destination, there are countries of origin and transit as well. Similarly, while the focus of this research is on the exploitation at work sites outside the sex sector during the trafficking process, exploitation may also occur during the recruitment or transportation phase. GAATW's other Working Paper in this 2011 series, on trafficking and smuggling, identifies this as a problem and looks at some of the exploitation that can happen in movement.

<sup>8</sup> See for instance: ILO/Andrees, B. (2008), ITUC (2010), and Dutch National Rapporteur in Utrecht University (2009).

<sup>9</sup> See for instance: ITUC (2010), and Dutch National Rapporteur in Utrecht University (2009).

<sup>10</sup> UK Home Office (2007), GAATW (2009d) Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>11</sup> Utrecht University (2009).

<sup>12</sup> See for instance: ITUC (2011), and OSCE (2007).

<sup>13</sup> OSCE (2007).

<sup>14</sup> ILO (2008).

<sup>15</sup> For more information please refer to La Strada Czech Republic at: <http://lastrada@strada.cz>

<sup>16</sup> Internal GAATW research results were presented at European Members Meeting in Barcelona. For more information, please contact GAATW at [gaatw@gaatw.org](mailto:gaatw@gaatw.org).

<sup>17</sup> Please refer to GAATW's Working Paper on Trafficking and Labour (2010d) for definitions on Trafficking and Labour concepts, and discussions on differences, overlaps, and difficulties.

<sup>18</sup> Council of Europe Convention on action against trafficking in human beings (Article 10), and EU Directive 2011/36/EU (Article 11).

<sup>19</sup> ILO (2005b): p.10.

<sup>20</sup> UNODC/UN.GIFT (2009a): p.50

<sup>21</sup> For example, the European Commission (EC) is supporting the development of the following data collection systems: Joint ILO / EC project to develop operational indicators on trafficking in human beings for improved identification, characterisation and data collection, using the so called Delphi methodology (2009); IOM/EC and Austrian Ministry of the Interior guidelines for collecting information on trafficking, including comparable statistical indicators (2009).

<sup>22</sup> Commission of the European Communities (2008): p.11.

<sup>23</sup> European Commission Group of Experts on Trafficking in Human Beings. (2010): p.19.

- <sup>24</sup> Dottridge, M./Associazione On the Road (2011): p.83.
- <sup>25</sup> For example, the sector in which the person was, allegedly, exploited has been registered in The Netherlands and in Germany only since 2005, when exploitation in sectors other than the sex industry was criminalised.
- <sup>26</sup> See for instance: UNODC/UN.GIFT (2009b): p.21, and OSCE/Thompson, K. (2006): p.4.
- <sup>27</sup> Bundeskriminalamt (2009).
- <sup>28</sup> National Rapporteur on Trafficking in Human Beings (2010): p.97. Data cover the period until 13 June 2011.
- <sup>29</sup> The Finnish National Rapporteur on Trafficking in Human Beings. (2010): p.44.
- <sup>30</sup> In the case of one victim, the Rapporteur was unable to discover the intention to exploit.
- <sup>31</sup> UNODC/UN.GIFT (2009a): P.10.
- <sup>32</sup> National Rapporteur on Trafficking in Human Beings (2009): p.480.
- <sup>33</sup> <http://www.lavanguardia.com/20110810/54198434685/ocho-detenidos-por-explotar-a-trabajadores-en-restaurantes-y-locutorios-de-barcelona.html>
- <sup>34</sup> OSCE/Thompson, K. (2006): p.11.
- <sup>35</sup> ILO/European Commission (2009).
- <sup>36</sup> GAATW (2007): p.17. Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>37</sup> See also: R. Surtees. (2008).
- <sup>38</sup> La Strada Czech Republic/Petra Kutálková (2010): p.68.
- <sup>39</sup> Information for this section largely draws from both OSCE-ODIHR (2007c) and OSCE (2005 and 2006): p.22.
- <sup>40</sup> Franciscans International (FI) and the Global Alliance against Traffic in Women (GAATW) Joint Statement at the Human Rights Council (2011).
- <sup>41</sup> OSCE/Thompson, K. (2006): p.17.
- <sup>42</sup> See a critique of this situation at EC Group of Experts on Trafficking in Human Beings. (2010): p.7.
- <sup>43</sup> On the basis of conversations and interviews with assistance providers during the research phase.
- <sup>44</sup> Some resources looking at lack of self-identification are: ILO (2005b): p.101; EC Group of Experts on Trafficking in Human Beings Opinion No. 7/2010: p.9; OSCE-ODIHR (2007a): p.3; and FAFO & NEXUS Institute/Brunovskis, A. & Surtees, R. (2007): p.135.
- <sup>45</sup> See for example: National Rapporteur on Trafficking in Human Beings (2010): p.45; Migrant Rights' Centre Ireland/CCME (2010): p.14; European Institute for Crime Prevention and Control, affiliated with the United Nations (HEUNI) (2011); and Utrecht University (2009): p.1.
- <sup>46</sup> Anderson. B. (2010).
- <sup>47</sup> EU Group of Experts on Trafficking in Human Beings of the European Commission (2004): p.104.
- <sup>48</sup> See for example: ITUC CSI IGB/Anti Slavery International (2011); Beirnaert, J. (2011); ILO (2010); Van Dijk, F.H. and Ungureanu, R.N.(2010); and ITUC CSI IGB (2009).
- <sup>49</sup> See for example ITUC's participation at the 2010 EU Anti-Trafficking Day conference and at the OSCE 2011 Alliance Against Trafficking in Persons meeting.
- <sup>50</sup> GAATW (2010d). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>51</sup> See an analysis of trade unions' role in anti-trafficking in: Beirnaert, J. (2011).
- <sup>52</sup> For a deeper analysis on the role of trade unions in anti-trafficking please refer to: GAATW (2010d). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>53</sup> Council of Europe Convention on action against trafficking in human beings (Article 12), and EU Directive 2011/36/EU (Article 18).
- <sup>54</sup> ILO/Andrees, B. and Belser, P. (2009), and USAID (2009).



- <sup>55</sup> OSCE (2005 and 2006): p. 8.
- <sup>56</sup> Commission of the European Communities (2008): p.3.
- <sup>57</sup> See for example: EC Group of Experts on Trafficking in Human Beings Opinion No. 7/2010: p.2.
- <sup>58</sup> Dottridge, M./Associazione On the Road. (2011).
- <sup>59</sup> Ibid.
- <sup>60</sup> OSCE-ODIHR (2007a).
- <sup>61</sup> USAID (2009).
- <sup>62</sup> La Strada Moldova Report in GAATW (2010g).
- <sup>63</sup> See for instance GAATW (2010a). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>64</sup> We have anonymised the observations of interviewees, by referring to their profession rather than their name, organisation, and/or country. Please contact GAATW ([gaatw@gaatw.org](mailto:gaatw@gaatw.org)) for more information on specific observations or statements they made.
- <sup>65</sup> Please refer to Annex 2: Terminology for further details on the legal instruments and their scope.
- <sup>66</sup> GAATW (2000).
- <sup>67</sup> Dottridge, M./Associazione On the Road (2011).
- <sup>68</sup> Under Article 318.1 bis of Spain's 1995 Penal Code. See also: Dottridge, M./Associazione On the Road (2011).
- <sup>69</sup> Article 225-4-1, modified by Law No 2007-1631 of 20 November 2007: 'de conditions de travail ou d'hébergement contraires à sa dignité', as referred to in Dottridge, M./Associazione On the Road (2011).<sup>70</sup> Dottridge, M./Associazione On the Road (2011).
- <sup>71</sup> Trafficked persons Cátia, Patricia, and Larysa in: GAATW (2006): p.21, 27, and 32 respectively.
- <sup>72</sup> See for instance BlinN (2009), and GAATW (2008).
- <sup>73</sup> OSCE-ODIHR (2007a).
- <sup>74</sup> On a positive, preliminary, note, a service provider reminds us that the risk of the migratory status might change in the future: the 2009 EU Directive on Employer Sanctions states that a person is entitled to remain in a country while their labour claims are being solved. Art. 6.5 of this Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals states that "In respect of cases where residence permits of limited duration have been granted under Article 13(4) [which grants residence permits to third-country nationals for the duration of legal proceedings -of criminal offences involving particularly exploitative working conditions- under arrangements comparable to those afforded to trafficked persons], Member States shall define under national law the conditions under which the duration of these permits may be extended until the third-country national has received any back payment of his or her remuneration recovered under paragraph 1 of this Article".
- <sup>75</sup> GAATW (2010d). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>76</sup> Anti-Trafficking Monitoring Group (2010): p.24.
- <sup>77</sup> See: Dottridge, M./Associazione On the Road (2011): e.g. on p.90 and p.188, and Anti-Trafficking Monitoring Group (2010): p.26.
- <sup>78</sup> See also: Stana Buchowska in GAATW (2009a). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>79</sup> Dottridge, M./Associazione On the Road (2011): p.90.
- <sup>80</sup> GAATW (2010d) and (2010f).
- <sup>81</sup> Skrivankova, K. (2010). *Between decent work and forced labor: examining the continuum of exploitation*. JRF Program Paper: Forced Labour. York: Joseph Rowntree Foundation (p.4)
- <sup>82</sup> LJN: BB5303, The Hague District Court, 09/753182
- <sup>83</sup> See for instance: BlinN (2009), and GAATW (2007) and (2010e) available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>84</sup> 'Katya' was trafficked from Moldova to the United Kingdom, and while law enforcement identified her as trafficked, she was sent back and quickly after re-trafficked to the UK. This time, law enforcement granted her refugee status. UK Home Office paid 'Katya' damages. For more information, please contact the Poppy Project. [http://www.eaves4women.co.uk/POPPY\\_Project/POPPY\\_Project.php](http://www.eaves4women.co.uk/POPPY_Project/POPPY_Project.php)

- <sup>85</sup> Dottridge, M./Associazione On the Road (2011).
- <sup>86</sup> The only positive exception is the conviction in the 2005 case of Siliadin versus France.
- <sup>87</sup> Skrivankova, K. (2010): p.4.
- <sup>88</sup> GAATW (2000). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>89</sup> See for instance: Heide-Uhl (2011).
- <sup>90</sup> Scarlet Alliance (2011).
- <sup>91</sup> These two instruments are the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; and the Council Framework Decision of 15 March 2001 On The Standing of Victims in Criminal Proceedings (2001/220/JHA), Art.9.
- <sup>92</sup> GAATW (2009b).
- <sup>93</sup> GAATW (2007). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>94</sup> GAATW (2010d). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>95</sup> GAATW (2000). Available at: [www.gaatw.org](http://www.gaatw.org).
- <sup>96</sup> UDHR (Art.8), CCPR (Art. 2), CERD (Art. 6), CAT (Art. 14), CEDAW (Article 4-d-), CRC (Art 39)
- <sup>97</sup> GAATW (2006).
- <sup>98</sup> Commission of the European Communities (2008); or UNODC/UN.GIFT (2009b).
- <sup>99</sup> See for example: UNESCO Bangkok (2004), Special Rapporteur on trafficking in persons, especially women and children (2009).
- <sup>100</sup> Dottridge, M./Associazione On the Road. (2011): p.63.
- <sup>101</sup> US State Department (2010).
- <sup>102</sup> UNODC/UN.GIFT (2009b): p.7.
- <sup>103</sup> Own calculations on the basis of the US State Department. (2010). *Trafficking in Persons Report 10th edition*.
- <sup>104</sup> Data in the pyramid reflect the figures included in the US State Department (2010).
- <sup>105</sup> At the time of writing this paper the NGO La Strada Czech Republic was embarked on a three year project (2010-2013) aimed at increasing access to justice for persons trafficked outside the sex sector. One of its components is a collection of final judgments of this forms of trafficking. It is also worth noting that very limited case law is available at the European Union anti-trafficking website <http://ec.europa.eu/anti-trafficking>.
- <sup>106</sup> This case had not been translated into English at the time of writing; therefore, this summary relies on the analysis provided by the National Rapporteur on Trafficking in Human Beings (2009): p.505-507.
- <sup>107</sup> National Rapporteur on Trafficking in Human Beings (2010): p.85.
- <sup>108</sup> National Rapporteur on Trafficking in Human Beings (2009): p. 505-507.
- <sup>109</sup> Ibid.
- <sup>110</sup> Ibid.
- <sup>111</sup> National Rapporteur on Trafficking in Human Beings (2010): p.86.
- <sup>112</sup> This case had not been translated into English at the time of writing; therefore, this summary relies on the analysis provided by Ms Heike Rabe, 'Forced Labour Today' project coordinator at the German Institute for Human Rights.
- <sup>113</sup> The European Court of Human Rights (ECHR) was established by Article 19 of the 1950 Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (CoE Convention), to ensure the observance of the rights and freedoms listed therein. 47 States are part of the Council of Europe Convention. The ECHR judgments exert a deep influence on the national laws of member States and constitute a key jurisprudence in the field of the protection of human rights.
- <sup>114</sup> European Court of Human Rights (2005): Siliadin v France ECHR 73316/01 (26 July 2005)
- <sup>115</sup> The final judgment is available at: [http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN\\_v\\_FR.pdf](http://www.coe.int/t/dghl/monitoring/trafficking/docs/echr/SILIADIN_v_FR.pdf)
- <sup>116</sup> European Court of Human Rights (2010): Rantsev v Cyprus and Russia ECHR 25965/04 (7 January 2010)

<sup>117</sup> The final judgment is available at: [http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR\\_Serbia/ECtHR%20Judgements/English/](http://www.coe.int/t/dghl/cooperation/economiccrime/corruption/Projects/CAR_Serbia/ECtHR%20Judgements/English/)

RANTSEV%20v%20CYPRUS%20%20RUSSIA%20-%20ECHR%20Judgment%20\_English\_.pdf In 2010 the EU the Group of Experts on Trafficking in Human Beings of the European Commission issued an opinion on the Decision of the European Court of Human Rights in the Case of Rantsev v. Cyprus and Russia. It can be found at: [http://ec.europa.eu/anti-trafficking/download.action?nodeId=9ee98429-1792-4f97a965a977bd16724d&fileName=Opinion+2010\\_06+of+the+Expert+Group+on+trafficking\\_en.pdf&fileType=pdf](http://ec.europa.eu/anti-trafficking/download.action?nodeId=9ee98429-1792-4f97a965a977bd16724d&fileName=Opinion+2010_06+of+the+Expert+Group+on+trafficking_en.pdf&fileType=pdf)

<sup>118</sup> More information about these two cases is available at: [http://www.echr.coe.int/NR/rdonlyres/EBEC266A-8EA3-4826-95FE-3B1BB81B5903/0/FICHES\\_Travail\\_Forc%C3%A9\\_EN.pdf](http://www.echr.coe.int/NR/rdonlyres/EBEC266A-8EA3-4826-95FE-3B1BB81B5903/0/FICHES_Travail_Forc%C3%A9_EN.pdf); and: <http://www.airecentre.org/>

<sup>119</sup> The United Nations Convention against Transnational Organized Crime (2000), with its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (A/RES/55/25)

<sup>120</sup> “Trafficking in persons” 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.

<sup>121</sup> See also: Petra Kutálková/La Strada Czech Republic (2010): p.21.

<sup>122</sup> ILO Convention concerning Forced or Compulsory Labour, 1930, and ILO Convention concerning the Abolition of Forced Labour, 1957.

<sup>123</sup> See ILO (<http://webfusion.ilo.org/public/db/standards/normes/appl/index.cfm?lang=EN>). C29 has not been ratified by: Marshall Islands, Tuvalu, Maldives, China, Republic of Korea, Brunei Darasalaam, Afghanistan, and USA. C105 has not been ratified by: Marshall Islands, Tuvalu, Maldives, China, Republic of Korea, Timor Leste, Solomon Islands, Myanmar, Lao PDR, Malaysia (denounced), Singapore (denounced), Viet Nam, and Japan.

<sup>124</sup> The Council of Europe Convention on Action against Trafficking in Human Beings and its Explanatory Report (Warsaw, 16.V.2005) Council of Europe Treaty Series – No. 197. It has been adopted by 34 out of 47 CoE Member States. Countries who did not ratify are: Czech Republic, Estonia, Finland, Germany, Greece, Hungary, Iceland, Liechtenstein, Lithuania, Monaco, Russian Federation, Switzerland, and Turkey.

<sup>125</sup> Council of Europe Convention on Action against Trafficking in Human Beings: paragraph 87.

<sup>126</sup> Ibid: paragraph 83.

<sup>127</sup> Ibid: paragraph 85.

<sup>128</sup> Dottridge, M./Associazione On the Road (2011): p.54.

<sup>129</sup> CoE Treaty Office, List of Reservations and Declarations per Treaty, search for CETS 197. Web site accessed on 4 August 2011. <http://conventions.coe.int/Treaty/Commun/ListeDeclarations.asp?NT=197&CV=1&NA=&PO=999&CN=999&VL=1&CM=9&CL=ENG>

<sup>130</sup> Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

<sup>131</sup> Council of the European Union Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings (2002/629/JHA)

<sup>132</sup> Article 2. See also: page L101/1(3), L101/2(11), and L101/3(16) respectively.

<sup>133</sup> While initially both Denmark and UK opted out, in June 2011 the UK Minister of Immigration announced to shortly apply to formally opt in to the Directive. (Parliament United Kingdom (2011)). Denmark still opts out.

<sup>134</sup> Council Directive 2004/81/EC of 29 April 2004 on the residence permit issued to third-country nationals who are victims of trafficking in human beings or who have been the subject of an action to facilitate illegal immigration, who cooperate with the competent authorities.

<sup>135</sup> GAATW (2008).

<sup>136</sup> Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals

<sup>137</sup> GAATW (2010a). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>138</sup> GAATW (2010g). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>139</sup> GAATW (2010d): p.11-12. Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>140</sup> GAATW (2010d): p.12. Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>141</sup> Skrivankova, K. (2010): p.18.

<sup>142</sup> Beirnaert, J. (2011): p.486.

<sup>143</sup> GAATW (2010d): p.18. Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>144</sup> Albania, Armenia, Belgium, Bosnia and Herzegovina, Cyprus, France, Germany, Italy, FYR Macedonia, Moldova, Montenegro, Netherlands, Norway, Portugal, Serbia, Slovenia, Spain, UK.

<sup>145</sup> ILO Convention No. 97 on Migrant Workers, in Beirnaert, J. (2011): p.491-2.

<sup>146</sup> See for instance GAATW et al (1999b), or the more recent, Eide. A., (1987), and De Schutter, O. (2010) in Beirnaert, J. (2011): p.486.

<sup>147</sup> Beirnaert, J. (2011): p.486.

<sup>148</sup> For more information on the literature review please contact GAATW at [gaatw@gaatw.org](mailto:gaatw@gaatw.org).

<sup>149</sup> Bandana Pattanaik, as quoted in GAATW (2010b): p.13. Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>150</sup> GAATW (2007). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>151</sup> Please see annex to ICHRP (2010) Irregular Migration, Migrant Smuggling and Human Rights: Towards Coherence. Geneva: ICHRP, which expands the rights outlined in the Smuggling Protocol.

<sup>152</sup> GAATW/OHCHR (2011). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>153</sup> Article 77quater, 4<sup>o</sup> and 5<sup>o</sup>, of the Law of 15 December 1980 of Belgium.

<sup>154</sup> GAATW (2011b). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>155</sup> For instance, ICESCR has been ratified by all European countries, and includes articles both on equal pay and on fair working conditions. ILO C143 on equal pay has been ratified in Europe by Albania, Armenia, Bosnia and Herzegovina, Cyprus, Italy, FYR Macedonia, Montenegro, Norway, Portugal, San Marino, Serbia, Slovenia, and Sweden. ICRMW, on fair working conditions, has been ratified only by Albania, and Bosnia and Herzegovina.

<sup>156</sup> Please refer to GAATW (2010d): p.17-20. Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>157</sup> See for instance GAATW's Working Paper Series (GAATW 2010a). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>158</sup> UN Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, or MWC Migrant Workers Convention

<sup>159</sup> Ratifications in Europe are by Albania, Azerbaijan, Bosnia & Herzegovina, Montenegro, and Turkey.<sup>160</sup> For more information, please refer to GAATW (2010e). Available at: [www.gaatw.org](http://www.gaatw.org).

<sup>161</sup> Presentation AkiDwA at GAATW (2009c).

<sup>162</sup> Anti-Trafficking Monitoring Group (2010).

<sup>163</sup> For a thorough description of restrictions on life in asylum seeker centres and the way women exercise their agency within those circumstances, please refer to AkiDwA (2010).

<sup>164</sup> GAATW (2010e). Available at: [www.gaatw.org](http://www.gaatw.org).



# HUMAN RIGHTS

at home, abroad and on the way



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