

**Human Rights Watch
Briefing Paper**

**Commentary on the European Commission Proposal for a Council Directive
“on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking
in human beings who cooperate with the competent authorities”**

July 1, 2002

Introduction

In February 2002, the European Commission unveiled its Proposal for a Council Directive “on the short-term residence permit issued to victims of action to facilitate illegal immigration or trafficking in human beings who cooperate with the competent authorities.”¹ While some provisions are to be welcomed, the proposed directive is deficient in that it addresses the problem of human trafficking solely as an element of efforts to combat illegal immigration, with an emphasis on law enforcement measures, but fails to recognize the need to ensure victim protection for all trafficking victims. The proposal creates incentives—including access to social and rehabilitative services culminating in the grant of a short-term residence permit—for trafficking victims, as well migrants smuggled into the European Union (E.U.), to cooperate with law enforcement and immigration officials in investigations and prosecutions in the effort to combat trafficking and smuggling. Victim protection for persons who have suffered serious human rights violations, however—including those abuses associated with human trafficking—should not be predicated upon a victim’s cooperation with state authorities.

¹ COM(2002) 71 Final, February 11, 2002 (Short-term Permits Proposal). If approved and issued as a Council of Ministers’ directive, all E.U. member states would be required to bring their domestic legislation into conformity with the directive’s provisions: “A directive is binding on the Member States as regards the objective to be achieved but leaves it to the national authorities to decide on how the agreed Community objective is to be incorporated into their domestic legal systems.” See Klaus-Dieter Borchardt, “The ABC of Community Law,” European Commission Directorate General for Education and Culture, 2000, page 65.

The difference between trafficking and smuggling is critical to a full understanding of the requirement, according to international standards, to provide protection to all trafficking victims. “Trafficking in human beings” is the recruitment or transportation of persons by use of force or coercion for the purpose of exploiting their labor.² It is recognized as a serious human rights violation that involves abuses such as forced labor and slavery or slavery-like practices.³ “Facilitation of illegal immigration” in the proposal refers to the phenomenon of smuggling, a process by which a person gains illegal entry into a country of which he or she is not a national or permanent resident.⁴ Smuggling is not recognized as a human rights violation and is categorized under international law solely as an international crime involving the voluntary participation of migrants in smuggling networks in order to obtain illegal admission to a country.

Human trafficking thus gives rise to a category of victims, all of whom have suffered abuses recognized as international human rights violations. Their status as victims of serious human rights violations gives rise to obligations on the part of states to provide a range of remedies for such abuses.

The European Commission’s approach in the short-term permits proposal conceptualizes trafficking victims in two categories: those who cooperate with the authorities and those who, for various reasons, do not or cannot cooperate—without any attention to the protection needs common to trafficking victims. In its efforts to combat trafficking, the E.U. has consistently focused solely on law enforcement issues, such as investigating and freezing the funds of organized criminal trafficking networks and creating standard penalties for trafficking and associated crimes. It has been much slower to recognize that trafficking victims have suffered a grievous human rights abuse, including forced labor and slavery-like practices—giving rise to certain obligations on the part of E.U. member states to provide victims, in appropriate cases, with a range of possible remedies for such violations. The short-term permits proposal suffers from this one-dimensional approach to trafficking and contravenes regional and international human rights victim protection norms.

²Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Protocol), supplementing the United Nations Convention against Transnational Organized Crime, General Assembly resolution 55/25, annex II, 55 U.N. GAOR Supp. (No. 49) at 60, U.N. Doc. A/45/49 (Vol. I) (2001). Article 3(a) of the Protocol defines trafficking in persons as “the recruitment, transportation, transfer, harboring or receipt of persons, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of abuse of power or of 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.”

³Ibid. According to article 3(a), “[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.”

⁴ Protocol Against the Smuggling of Migrants by Land, Sea and Air (Smuggling Protocol), supplementing the United Nations Convention Against Transnational Crime, General Assembly resolution 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001). Article 3 of the Smuggling Protocol states that “(a) ‘smuggling of migrants’ shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident; (b) ‘Illegal entry’ shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State; (c) ‘Fraudulent travel or identity document’ shall mean any travel or identity document: (i) That has been falsely made or altered in some material way by anyone other than a person or agency lawfully authorized to make or issue the travel or identity document on behalf of a State; or (ii) That has been improperly issued or obtained through misrepresentation, corruption or duress or in any other unlawful manner; or (iii) That is being used by a person other than the rightful holder.”

Human Rights Watch is a private international nongovernmental organization that monitors human rights violations in over seventy countries worldwide. Human Rights Watch is currently engaged in a multi-year research and advocacy project on the human rights of migrants in Western Europe. Our research began in 2000 and has thus far revealed a range of migrants rights abuses in several European Union member states, including the serious abuse of migrants and asylum seekers at the hands of human traffickers, often in complicity with law enforcement officials in E.U. member or accession states.⁵ We have also conducted trafficking research and advocacy in the Balkans, the United States, Thailand, and Japan.⁶

Based on our research and advocacy on the issue of human trafficking, we submit this commentary on the February 2002 European Commission short-term residence permit proposal. The following are some preliminary comments addressing the general conceptual framework of the proposal, as reflected in the “Background” section of the proposal’s “Explanatory Memorandum.” These comments are followed by Human Rights Watch’s critique of specific provisions in the proposed Council directive.

General Framework: A Law Enforcement Approach should not Preclude Protection

The stated aim of the proposal is “to strengthen the instruments for combating illegal immigration” by introducing a short-term residence permit for trafficking victims, “subject to conditions designed to encourage them to cooperate with the competent authorities” against their traffickers.⁷ According to the proposed directive, it “may appear to serve to protect victims. . . . This is not, however, the case: the proposed Directive introduces a residence permit and is not concerned with protection of either witnesses or victims. This is neither its aim nor its legal basis. Victim protection and witness protection are matters of ordinary national or European law.”⁸ The proposal’s lack of concern with the protection of trafficking victims is consistent

⁵ The complete set of research, advocacy and policy documents addressing migrants rights concerns in Western Europe can be found on the Human Rights Watch web site at: <http://www.hrw.org/campaigns/migrants/>

⁶ See the Human Rights Watch anti-trafficking campaign web page at: <http://www.hrw.org/about/projects/traffcamp/intro.html>

⁷ Short-term Permits Proposal, section 2.

⁸ *Ibid.*, 2.3. The proposal states that the legal basis for the short-term residence permit is article 63(3) of the Amsterdam Treaty, which reads:

The Council...shall, within a period of five years after the entry into force of the Amsterdam Treaty, adopt: (3) measures on immigration policy within the following areas: a) conditions of entry and residence, and standards on procedures for the issue by Member States of long term visas and residence permits, including those for the purpose of family reunion, b) illegal immigration and illegal residence, including repatriation of illegal residents.

The E.U.’s choice of basing the short-term residence permits proposal on article 63(3) should not preclude the inclusion in the proposal of adequate victim protection measures for persons who suffer human rights violations in the process of migration. Requirements for conditions of residence, standards for the issuance of residence permits, and measures for the repatriation of illegal residents should take into account the fact that some migrants will be victims of traffickers. They will thus have suffered serious human rights abuses—for example, forced labor—requiring action by the state under international standards to provide a remedy to such victims, in appropriate cases, including a range of social, medical and psychological services in the interest of protecting victims from further abuse and assisting in the rehabilitation of victims. See pages four and five herein for international standards relating to the protection and rehabilitation of victims of serious human rights abuses.

with the failure of the E.U. in the context of other anti-trafficking initiatives to recognize both the obligation and the imperative for such protection measures.

In February 2001, Human Rights Watch criticized the December 2000 Commission Proposal for a Council Framework Decision on Combating Trafficking (Trafficking Proposal)⁹ for its failure to provide adequate victim and witness protection mechanisms.¹⁰ We noted that E.U. member states had recently completed negotiations on the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol), supplementing the United Nations Convention against Transnational Organized Crime, which many E.U. member states had signed. Article 2 of the Protocol calls on states parties “to protect and assist” the victims of trafficking, “with full respect for their human rights.” Article 6 encourages states to implement measures for the physical, psychological, and social recovery of victims. In particular, the Protocol calls on states, “in appropriate cases,” to consider providing victims with housing; counseling and information; medical, psychological and material assistance; and employment, educational, and training opportunities.¹¹ The Protocol also calls upon states to permit trafficked persons to remain in country temporarily or permanently in appropriate cases.¹² Human Rights Watch urged the E.U. to ensure that such protections were included in its Framework Decision.

The Trafficking Proposal provided virtually no protections for trafficking victims, focusing instead on definitions and on penalties for traffickers. In a December 2001 revised version of the proposal, it was acknowledged that “[t]rafficking in human beings constitutes serious violations of fundamental human rights and human dignity and involves ruthless practices such as the abuse and deception of vulnerable persons, as well as the use of violence, threats, debt bondage and coercion.”¹³ There was no concomitant provision, however, for adequate protection and assistance to victims. Article 7 of the proposal is titled “Protection and Assistance to Victims,” but provides no concrete protection measures at all, instead focusing on the special vulnerability of child trafficking victims. Throughout the course of deliberations on the proposal, nongovernmental organizations were assured that, although it did not include protection measures, victim and witness protection would be addressed in a separate document.

Against this backdrop, in February 2002, the Commission issued the proposal for short-term residence permits under consideration here. To our dismay, the proposal perpetuates the E.U.’s disregard for victim protection obligations. The explanatory memorandum accompanying the document bluntly states that only certain trafficking victims—those considered “useful” for the purpose of investigating, arresting, and prosecuting traffickers—will be informed about and

⁹ COM(2000) 854 Final, December 21, 2000.

¹⁰ Human Rights Watch Briefing Paper, *Recommendations regarding the Proposal for a Council Framework Decision on Combating Trafficking in Human Beings*, February 2001, at <http://hrw.org/backgrounder/wrd/trafficking-framework.htm>

¹¹ Article 6. No indication is given in the Protocol as to which cases would qualify as “appropriate” under this article.

¹² Article 7: “(1)...each state party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. (2) In implementing the provision contained in paragraph 1 of this article, each state party shall give appropriate consideration to humanitarian and compassionate factors.”

¹³ Council of the European Union, Proposal for a Council Framework Decision on Combating Trafficking in Human Beings, 14216/01, Limite, DROIPEN 97/MIGR 90, December 3, 2001, preamble, paragraph 3.

be entitled to apply for the short-term permit and thus enjoy the benefit of a “reflection period” that includes access to a range of victims’ services. The proposal then refers to the March 2001 Framework Decision on the status of victims in criminal proceedings¹⁴ and a November 1995 Council resolution on the protection of witnesses in the framework of the fight against international organised crime¹⁵ as adequately covering the victim and witness protection needs of trafficking victims.

Neither of these documents was adopted with the very special needs of trafficking victims in mind, however. They do not specifically contemplate the range of abuses particular to trafficking victims, who often suffer under conditions of forced labor or servitude at the hands of exploitive “employers” and under the surveillance of brutal transnational trafficking networks. Moreover, as with the E.U. directive, neither of these documents applies to victims who do not cooperate in some manner with the authorities in the context of a criminal proceeding. Thus, those trafficking victims who cannot or will not cooperate with authorities could be subject to immediate arrest, detention and deportation. This approach ironically punishes the trafficking victim, categorizing her or him solely as an undocumented migrant subject to expulsion, without any recognition that he or she is a victim of a serious rights abuse.

No other victims of human rights violations are required to cooperate with authorities in criminal investigations or proceedings in order to enjoy the protection of the state, including potential mechanisms for rehabilitation and in some cases, compensation for abuses. Numerous human rights instruments provide a right to a remedy for victims of violations of international human rights and humanitarian law.¹⁶ Such “remedies” have traditionally focused on the right to a hearing before an impartial tribunal to hold accountable perpetrators of such abuses. In recent years, however, the notion of what constitutes a remedy has broadened to include reparations, compensation, restitution and rehabilitation of victims.¹⁷

In an April 2002 resolution of the United Nations Human Rights Commission, the commission “[r]eaffirmed that, pursuant to internationally proclaimed human rights principles, victims of grave violations of human rights should receive, in appropriate cases, restitution, compensation, and rehabilitation.”¹⁸ The resolution called upon the international community to give “due attention to the right to a remedy and, in particular, in appropriate cases, to receive

¹⁴ OJ L 82, March 22, 2001.

¹⁵ OJ C 327, December 7, 1995.

¹⁶ For example, Universal Declaration of Human Rights (UDHR at article 8); International Covenant on Civil and Political Rights (ICCPR at article 2); International Convention on the Elimination of All Forms of Racial Discrimination (CERD at article 6); Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT at article 11); and the Convention on the Rights of the Child (CRC at article 39); European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR at article 13). The E.U. Charter of Fundamental Rights expressly prohibits trafficking in human beings (article 5) and provides for an effective remedy for human rights violations (article 47).

¹⁷ For example, article 75 of the Rome Statute, establishing the International Criminal Court (ICC), requires the court “to establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.” Notably, this article does not require that victims cooperate with investigations and prosecutions conducted by the ICC.

¹⁸ United Nations Commission on Human Rights Resolution (Resolution) 2002/44, April 23, 2002, preamble.

restitution, compensation, and rehabilitation, for victims of violations of international human rights law.”¹⁹ It referenced as a guide to doing so the draft “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law” (Basic Principles).²⁰ The draft Basic Principles, though yet to be adopted, are based on principles and guidelines in conformity with existing international law, “taking into account all relevant international norms arising from treaties, customary international law, and resolutions [of U.N. charter-based bodies].”²¹ The Basic Principles echo the call for states to provide assistance to and protection of victims and witnesses of human rights and humanitarian law violations²² in the form of access to justice, reparation, restitution, compensation, and rehabilitation.²³ Significantly, in conformity with international instruments that do not require a victim to cooperate with law enforcement or judicial authorities in order to secure one or more of the range of remedies available, the Basic Principles state that “[a] person’s status as ‘a victim’ should not depend on any relationship that may exist or may have existed between the victim and the perpetrator, or whether the perpetrator of the violation has been identified, apprehended, prosecuted, or convicted.”²⁴

Human Rights Watch’s research, in Greece and the Balkans in particular, indicates that trafficking victims often will not or cannot cooperate with the authorities for a variety of reasons. Often the victim fears retaliation from the traffickers or corrupt officials in the country of origin. Trafficking victims who have left children at home are particularly vulnerable to these threats. Many trafficking victims also understand that law enforcement officials in the country to which they are trafficked may be complicit in trafficking networks; many victims are thus reluctant to engage with such officials in any manner. Some trafficking victims may view the incentives to cooperate with the authorities skeptically, understanding that many so-called protection measures are only temporary and do not provide the type of safety and security they may need in the long term.²⁵ Finally, our research has revealed that many migrants are apprehended, detained, and deported as a matter of first course, their status as undocumented migrants trumping their status as victims of trafficking.²⁶

¹⁹ Resolution, paragraph 1.

²⁰ United Nations Commission on Human Rights, Final Report of the Special Rapporteur, Mr. M. Cherif Bassiouni, submitted in accordance with Commission resolution 1999/33, E/CN.4/2000/62 at Annex, January 18, 2000.

²¹ *Ibid.*, paragraph 7.

²² Draft Basic Principles, principle 5.

²³ *Ibid.* Principle 11 states that remedies include access to justice, reparation for harm suffered, and access to factual information concerning the violations suffered. Principle 22 defines restitution as the restoration of the victim to his or her original situation before the human rights violation(s) occurred, including restoration of liberty; legal rights, social status, family life, and citizenship; return to one’s place of residence; and restoration of employment and return of property. Compensation is defined at principle 23 and entails “economically assessable damage” resulting from human rights violations, including physical or mental harm; lost opportunities, including education; material damages and loss of earnings; harm to reputation or dignity; and costs required for legal or expert assistance, medicines and medical services, and psychological and social services. Principle 24 states that rehabilitation should include medical and psychological care as well as legal and social services.

²⁴ *Ibid.*, principle 9.

²⁵ The short-term permits proposal suffers this last defect. Not only are the permits reserved only for those victims deemed “useful” to the authorities, according to article 16, the permit “shall not be renewed” if the conditions outlined in the proposal’s text, including the victim’s “usefulness,” “cease to be satisfied.”

²⁶ Human Rights Watch Memorandum, *Trafficking of Migrant Women for Forced Prostitution into Greece*, July 2001, at <http://www.hrw.org/backgrounder/eca/greece/index.htm>

There remains a serious gap in terms of specific protection measures for all victims in the burgeoning European-wide anti-trafficking regime. The general protections included in existing decisions and resolutions noted above create a legal vacuum in which victims who do not cooperate with authorities in criminal proceedings are left without any protection at all. In failing to provide for such protection for all trafficking victims, the E.U. falls short of international standards for protection of victims of human rights violations.

*Human Rights Watch urges the Council to reconsider the general framework for this proposal and to include victim protection measures for **all** trafficking victims, whether or not they are able to cooperate with law enforcement officials in their efforts to combat trafficking.*

Commentary on General Provisions

Article 4: Safeguard. We welcome the inclusion of a provision stating that the proposed directive is without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments. In this regard, we recommend that article 4 be amended to include language expressly recognizing that the prohibition against *refoulement*—the prohibition against returning any person to a territory where her or his life or freedom would be in danger—is a principle of customary international law. It is also enshrined in the European Convention for the Protection of Human Rights and Fundamental Freedoms (article 3), the E.U. Charter of Fundamental Rights (article 19) and the U.N. Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment (article 3).

Our research, in Greece and Bosnia-Herzegovina in particular, indicates that many trafficking victims facing deportation are likely upon return home to be subject to serious human rights violations in the form of reprisals or being reintegrated into the trafficking network. One International Organization for Migration (IOM) official told Human Rights Watch that trafficked women deported from Greece were at grave risk of subsequent abuse because they were often repatriated by bus or train and thus vulnerable to traffickers working land routes.²⁷

We recommend that article 4 read: *This directive shall be without prejudice to the protection extended to refugees, to beneficiaries of subsidiary protection and persons seeking international protection under international refugee law and without prejudice to other human rights instruments. No person should be returned to a territory where there are substantial grounds for believing that she or he could be in danger of being subjected to torture, or other serious human rights violations, including forced labor or other slavery-like practices.*

Article 7: Information Given to Victims. This article states that “[p]ersons who are identified by the competent authorities as victims within the meaning of Article 1 shall immediately be informed of the possibility of obtaining the short-term residence permit provided for by this Directive.” “Victims” in article 1 are defined as “third-country nationals who are victims of offences constituted by the action to facilitate illegal immigration or by trafficking in human beings (hereafter referred to as ‘victims’) who cooperate in the fight against the perpetrators of these offences.”

²⁷ Human Rights Watch interview, Daniel Esdras, IOM chief of mission, Athens, November 7, 2000.

Our research has revealed that law enforcement authorities are often complicit in trafficking. In Greece, for example, the Minister of Public Order told Human Rights Watch that police officers responsible for investigating trafficking offenses had been implicated as operatives in trafficking networks.²⁸ In a 1997 report on trafficking of women to Poland for the purpose of forced prostitution, the U.N. special rapporteur on violence against women noted:

Non-governmental organizations and women's groups confided in the Special Rapporteur that women victims of trafficking and prostitution do not entirely trust the police. Mistrust in the police was seen as a major obstacle, especially in countries of destination. Police are considered to be tough on illegal immigrants, such as women trafficked for forced prostitution, and police raids on brothels were seen in a negative light. Living on the margins of society, women victims do not naturally consider the police as friendly and supportive. The Special Rapporteur also detected the belief that the police often collude with the agents of prostitution and trafficking and could, therefore, not be trusted. The same perception existed among women's groups working with prostitutes. They argued that their research showed that police officials and local government officials facilitated and profited from the trade in women and girls, so that abuses of women victims were ignored and traffickers and middlemen protected. It is their belief that the culture of impunity of traffickers stems from their collusion with the police.²⁹

In many E.U. member states, trafficking victims' first contact with the criminal justice system results from being apprehended by the police or immigration officials. The fact that some members of the law enforcement establishment are or might be implicated in trafficking—and the perception of trafficking victims that such collusion exists—is a bar to victims coming forward.

Article 7 of the short-term permits proposal assumes good faith on the part of law enforcement officials in member states despite evidence that trafficking thrives not only from well-organized criminal networks but also from official collusion. In this context, it is untenable for the police or other law enforcement officials to be the sole decision makers regarding who is and who is not a trafficking victim for the purposes of issuing the proposed short-term residence permit.

Article 7 currently carves out a role for expert nongovernmental organizations in transmitting the information about the possibility of securing a short-term residence permit, but does not appear to provide a role for these organizations to be involved in the initial decision regarding who qualifies as a victim of trafficking. The explanatory memorandum rightly acknowledges that some member states may take the view that victims would prefer to deal with members of associations or nongovernmental organizations rather than representatives of the state.

²⁸ Human Rights Watch interview, Michalis Chrysochoidis, Greek minister of public order, Athens, November 17, 2000.

²⁹ Report on the mission of the Special Rapporteur to Poland on the issue of trafficking and forced prostitution of women (24 May to 1 June 1996), E/CN.4/1997/47/Add.1, December 10, 1996, paragraph 90.

Moreover, given our concern that protection measures be extended to all trafficking victims, we recommend that information on the full range of victim protection measures, including benefit of a short-term residence, be made available to all victims of trafficking.

Human Rights Watch recommends that article 7 be amended to state: *Persons who are identified by the competent authorities as trafficking victims—in consultation with nongovernmental organizations expert in immigration, trafficking issues, and women’s rights—shall immediately be informed of the full range of victim protection measures available in the member state, including the possibility of obtaining the short-term residence permit.*

Article 8: Reflection Period. Article 8 provides for a thirty-day reflection period during which a victim would have access to certain measures of assistance and care while deciding whether or not to cooperate with the authorities. Article 9 provides for a package of assistance measures, including housing, emergency medical and psychological treatment, social welfare support, legal assistance, interpretation/translation, and attention to the special needs of the “most vulnerable.” Article 8(2) states that during this reflection period “it shall not be possible to enforce any expulsion order against [the victim].” The explanatory memorandum states that although authorities may not expel victims during the reflection period, they may issue an expulsion order that is not immediately enforceable.

We are deeply concerned about the negative impact that the possibility of having an expulsion order issued if trafficking victims come forward will have. Those victims who do come forward will undoubtedly view a member state’s ability to issue an expulsion order—pending execution based on whether a victim cooperates with the authorities—as a coercive measure intended to force them to cooperate. The “talk or walk” nature of the process—coupled with the temporary nature of the residence permit—is not likely to serve as an incentive for victims to come forward. Moreover, the possibility of an expulsion order dangling over the reflection period could put pressure on some vulnerable trafficking victims to cooperate against their will, even putting themselves at risk of retaliation or further abuse. This hardly constitutes a process in which victims can use a reflection period to recover physical and mental strength in an environment of security.

Thus, *Human Rights Watch recommends that article 8 be amended to require that member states refrain from issuing an expulsion order against a victim of trafficking until the reflection period is over.*

In this regard, *Human Rights Watch also recommends that all persons found to be victims of trafficking be granted such a reflection period in which to receive care and assistance, whether or not the authorities think that the victim might be willing to cooperate or be deemed useful to an investigation or prosecution.* As the proposal stands, it appears that only those trafficking victims who “show a clear intention to cooperate, substantiated, for example, by an initial, material declaration to the authorities responsible for the investigation or prosecution” would be eligible for the reflection period and the residence permit³⁰ (emphasis added). Indeed, the explanatory memorandum acknowledges that victims of trafficking are “in a vulnerable and

³⁰Short-term permits proposal, Chapter II: Procedure for issuing the short-term residence permit, article 10.

dependent position” and that they have “survived often traumatic experiences.” The reflection period is intended to allow “victims enough time to recover physically and psychologically.”

As it currently reads, the proposal provides this reflection period in order to enable victims to make a sound decision regarding whether or not they will cooperate with the authorities. The vulnerability, dependency, trauma, and need for physical and psychological recovery aptly described in the explanatory memorandum, however, apply to *all* trafficking victims, not just those who might be deemed useful to an investigation and subsequent prosecution. The U.N. High Commissioner for Human Rights and the U.N. High Commissioner for Refugees, in a joint commentary on the E.U. Proposal for a Council Framework Decision on Combating Trafficking in Human Beings, urged the E.U. to incorporate into the Framework Decision protection and assistance mechanisms for victims as “basic obligations.”³¹ The high commissioners stated that “victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting authorities to act as witnesses in criminal proceedings.”³² This view goes to one of the essential flaws of the short-term permits proposal: rehabilitation services and other remedies that serve to protect victims cannot be made available only to those victims who cooperate with state authorities. All trafficking victims have a right to remedies for the violations they have suffered.³³

Article 10: Issue and Renewal of the Residence Permit. According to the proposal, upon completion of the reflection period, the authorities will make a final determination regarding a victim’s “usefulness” and in appropriate cases issue the short-term residence permit. The permit would be granted for a six-month period and could be renewed for periods of six months, provided the authorities are satisfied that the victim remains “useful.”

This article says nothing about what happens to those victims who decide not to cooperate or are not determined to be “useful” after the reflection period. The explanatory memorandum appears to leave it to member states to determine other forms of protection (e.g. humanitarian leave to remain) for trafficking victims. However, in keeping with our recommendation that article 4, which provides safeguards in terms of human rights and refugee protection, *we recommend that article 10 be amended in conformity with the principle of nonrefoulement, to emphasize further that no person should be expelled or deported where there are substantial grounds for believing that she or he could be in danger of being subjected to torture or other serious human rights violations.*

³¹ United Nations High Commissioner for Human Rights, Observations by the United Nations High Commissioner for Human Rights and the United Nations High Commissioner for Refugees on the Proposal for an E.U. Council Framework Decision on Combating Trafficking in Human Beings, at [http://www.unhchr.ch/Huridocda/Huridoca.nsf/\(Symbol\)/HR.GVA.OHCHR.STM.CHR.01.04.En](http://www.unhchr.ch/Huridocda/Huridoca.nsf/(Symbol)/HR.GVA.OHCHR.STM.CHR.01.04.En), as of June 28, 2002, paragraph 6.

³² Ibid.

³³ Ibid. The high commissioners noted that “Victims of human rights violations, such as trafficking, have a right under international law to be provided with access to adequate and appropriate remedies. The effective exercise of this right requires that States provide trafficking victims with information on the possibilities of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and legal and other assistance to enable them to obtain the remedies to which they are entitled,” paragraph 10.

Conclusion

Human Rights Watch urges the E.U. to bring the community into conformity with international standards and practice by providing adequate protection—in the form of one or more of the full range of remedies available—to all trafficking victims, regardless of whether or not they cooperate with law enforcement officials in the fight against illegal immigration. Such an effort would make a positive contribution to the growing recognition of trafficking as an egregious human rights violation and provide much-needed leadership at the community level for the protection and rehabilitation of trafficking victims.