

ECONOMIC COMMISSION FOR EUROPE

Regional Preparatory Meeting
for the 10-year Review of Implementation of the Beijing Platform for Action
14-15 December 2004

(Item 7 of the provisional agenda)

Paper by the Office of the UN High Commissioner for Human Rights
and the Office of the UN High Commissioner for Refugees

HUMAN RIGHTS AND HUMAN TRAFFICKING

One of the most serious challenges facing human rights today is the crime of human trafficking, with large numbers of people, especially women and children, tricked, sold or otherwise coerced into situations of exploitation, forced labour or slavery-like-practices. Trafficking represents the denial of the right to liberty and security of the person, the right to freedom from torture, violence, cruelty or degrading treatment, the right to freedom of movement, the right to home and family, the rights to health and education – everything that makes for a life with dignity. By its very definition, trafficking in human beings constitutes a gross human rights violation.

Yet, despite its overwhelming human rights dimensions, trafficking continues to be addressed primarily as a “law and order” problem and dealt with mainly within the crime prevention framework. Victims of cross-border trafficking are criminalized and prosecuted as illegal aliens, undocumented workers or irregular migrants, rather than treated as victims of a crime. Women and young girls who are trafficked into the sex industry are penalized on charges of prostitution or as a result of their illegal entry or stay, instead of receiving assistance as victims. Trafficking as a crime needs to be prevented, the perpetrators prosecuted and the rule of law strengthened. However, it is crucial that in all anti-trafficking interventions the human rights of the victim remain paramount and at the centre of the interventions. This represents a challenge as well as an objective for UN agencies, including OHCHR and UNHCR. It is indeed a challenge for the entire human rights community.

Recently crucial standards have been set. The UN Convention Against Transnational Organized Crime came into force in September 2003, and the two Palermo Protocols, one on trafficking and the other on migrant smuggling entered into force soon after¹. These are vital instruments to address the issue of human trafficking and related matters. In addition, the International Convention on the Protection of the Rights of All Migrant Workers and their Families entered into force in July 2003. Members of the 60th session of the Commission on Human Rights in March-April 2004 have established a new mandate – the Special Rapporteur on Trafficking in Human Beings, Especially Women and Children. The member states of the European Union adopted a directive on the granting of short-term residence permits to victims of trafficking under certain conditions² and the Council of Europe is in the process of drafting a new convention against trafficking. In developing detailed human rights based responses to each stage of the trafficking cycle, the High Commissioner for Human Rights issued the Recommended Principles and Guidelines on Human Rights and Human Trafficking in July of 2002. This is a key tool which aims to integrate the human rights of victims of trafficking at all levels of anti-trafficking interventions. Taken together, the Recommended Principles and Guidelines are a useful contribution for the development of human rights approach to trafficking, its practical implementation as well as evaluation.

¹ The Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children and the Protocol Against Smuggling of Migrants.

² Legislative Resolution on the Proposal for a Council Directive on Short-Term Residence Permit Issued to Third-Country Victims of Trafficking in Human Beings or to Third-Country Nationals who Have Been Subjects of an Action to Facilitate Illegal Immigration who Cooperate with the Competent Authorities (14432/2003-C5-0557/2003 – 2002/0043 (CNS), 9 March 2004.

Reports coming in would appear to indicate that in fact more people are being trafficked than ever before³. The pool of potential victims in most parts of the world is growing on account of widespread inequalities, insecurity of food and livelihood, violence, conflict, discrimination leading to displacement. The report presented by the Special Rapporteur on the human rights of migrants of the Commission on Human Rights to the General Assembly in 2004 highlighted the three most important challenges of international migration: first, the extent and the high proportion of women's migration and the increase in the number of countries of origin, second, the difficulty of obtaining recognition of the human rights of migrants, and lastly, the need for rights-based migration management. Increasingly restrictive immigration policies and impermeable borders of many wealthy states lead those desperate for work to turn to unscrupulous traders in human beings. In her report, the Special Rapporteur notes that women are lured by recruitment agencies and many end up as victims of trafficking. ⁴Traffickers are able to operate with impunity because of inadequate law enforcement and protective measures for migrants, and in some instances, due to corruption amongst relevant officials.

Measures by states to tighten their immigration controls and reform their asylum systems may negatively impact the ability of persons in need of international protection to access asylum. Faced with a restricted access, people may turn to smuggling channels as the only feasible means to find safety. This has led into a blurring of the lines between refugee movements and the movement of persons motivated for reasons other than international protection needs. The resulting mixed flows are thus comprised of victims of trafficking, smuggled migrants and smuggled refugees and asylum seekers.

The human rights dimensions of trafficking are evident. Trafficking and related practices such as debt bondage, forced prostitution, forced labour and slavery-like practices are violations of the most basic rights, rights which are acknowledged as belonging to all human beings, irrespective of their sex, nationality, social status, occupation or other difference. Trafficking is inherently discriminatory and provides an illustration of the way in which multiple discrimination operates. Ethnic, gender and class discrimination deny basic life opportunities and choices to a vast number of the world's women and girls, whose precarious social, economic and legal situation, renders them particularly vulnerable to trafficking and related exploitation. As a large number of trafficked persons are female, trafficking is usually considered to be a gendered phenomenon. There is increasing evidence that racial, social and economic marginalization and displacement constitute considerable risk factors and facilitate the work of traffickers of disadvantaged groups including boys and men. These elements of disadvantage also determine the treatment received by trafficked persons in the countries of destination. Refugees, especially refugee women and children, are particularly vulnerable targets for trafficking rings. The rings operate in armed conflict and other situations of insecurity, chaos, lawlessness, family separation and vulnerabilities resulting from displacement, loss of access to livelihood and lack of legal status.

³ See, for example, Special Rapporteur on Violence Against Women, Its Causes and Consequences to the Commission on Human Rights, E/CN.4/2003/75/Add.1, 27 February 2003.

⁴ UNDOC A/59/377.

A human rights approach to trafficking in persons is based on two fundamental principles:

- Human rights must be at the core of any credible anti-trafficking strategy; and
- Anti-trafficking interventions must be developed from the perspective of those who most need their human rights protected and promoted, i.e from the perspective of the trafficked person as well those who are particularly vulnerable.

These two principles are interrelated. Placing human rights at the centre of anti-trafficking analysis and interventions ensures that the factors which create the vulnerability to trafficking are addressed. This means that poverty, inequality and discrimination which are the root causes of the phenomenon, are confronted. Such an understanding allows for addressing prevention issues at the same time as providing assistance to the victims of trafficking and setting up protective measures so that their human rights are not violated further. The resort to a genuine human rights approach enables a focus on the needs and the rights of the trafficked person and creates the context for integrated and comprehensive anti-trafficking strategies which address prevention, prosecution and protection in a holistic manner.

A human rights approach also demands an acknowledgement of the responsibility of governments to protect and promote the rights of all persons within their jurisdiction. This responsibility translates into legal obligations on governments towards eliminating trafficking and related exploitation. At a minimum, states should have accepted an obligation to provide information to trafficked persons on the possibility of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and to render assistance to trafficked persons, giving special attention to the needs of minors and children to enable them to obtain remedies to which they are entitled. Some trafficked women may be considered refugees under the definition contained in the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, as a result of the trafficking experience and the inability or unwillingness of their country of origin to protection against such harm.

While slavery, sexual exploitation and other aspects of trafficking can clearly be categorized as serious human rights violations and the fear of being subjected to such practices equated to a fear of persecution, it is not the act of trafficking alone that qualifies the victim as a refugee but the causal link between the trafficking and one of the Convention grounds of race, religion, nationality, membership of a particular social group or political opinion. Victims of trafficking who have a well founded fear of persecution for Convention related grounds should have access to asylum procedure and not be limited to the grant of temporary residence permit. In equal measure, victims of trafficking who do not have a well founded fear of persecution in their country of origin should not be pushed towards the asylum system as a means of attaining a legal status in the countries to which they have been trafficked. The 2002 UNHCR Guidelines on gender-related persecution and membership of a particular social group provide background information and guidance relevant to the consideration of trafficking in the context of asylum.⁵

⁵ UNHCR Guidelines on International Protection on Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees (2002)

The trafficked person realizes that she or he is a victim of trafficking mostly upon being placed in situations of forced labour and exploitation in the countries of destination, a human rights approach therefore places added responsibility on governments of destination countries. This translates into addressing the demand for exploited and forced labour, establishing enforceable labour standards, creating mechanisms for proper victim identification, efficient prosecution of traffickers and above all, extending unconditional support and assistance to trafficked persons. The human rights obligations of countries of destination are therefore crucial for these entail dealing with the entire gamut of anti-trafficking interventions, from prevention to prosecution and protection. Countries of destination cannot assume that human trafficking is only a problem of countries of origin, because the demand for trafficked persons and their confinement into sites of forced labour occurs within their own borders. Countries of destination need not only to revisit those policies which might inadvertently contribute to the human rights violations of trafficked persons but they also need to put in place special provisions which will enable the victims of trafficking to recover and reclaim their lives as human beings.

A human rights approach to trafficking also requires enhanced bilateral and multilateral cooperation between countries of origin and destination in order to address the root causes of trafficking from the standpoint of prevention and to achieve sustainable reintegration of the trafficked person into society, be it in the country of origin or destination, from the perspective of assistance and protection.

Finally, a human rights approach to trafficking implies that all parts of the international community should integrate human rights into their analysis of the problem of trafficking and into their responses. This is the only way to retain a focus on the trafficked person, to ensure that trafficking is not simply reduced to a problem of migration, a problem of public order, a problem of law enforcement, or a problem of transnational crime

Concerns and Recommendations:

1. Victim Identification

Ensuring appropriate identification of victims of trafficking based upon clear distinctions between irregular migrants, trafficked persons, and smuggled persons. Trafficked persons should not be subjected to summary deportations prior to appropriate identification nor held in detention including immigration detention.

and UNHCR Guidelines on International Protection on the Membership of a Particular Social Group within the Context of the Article 1A (2) of the 1951 Convention and its 1967 Protocol Relating to the Status of Refugees.

2. *Residency and reflection*

An adequate reflection period must be provided to victims in order to make informed decisions in a safe environment, and necessary support services should be extended to the victims. Possibility of residency in the destination country should be extended in case the victim cannot return to the country of origin. In cases where the inability to return is linked to a well founded fear of persecution, victims should be given access to asylum processes to determine their claims. Residency status should not be contingent upon the victim's willingness to cooperate during the prosecution process, since victims must often fear reprisals from traffickers.

3. *Protection and Support*

Protection and support to victims of trafficking is not to be conditional on cooperation with law enforcement for the prosecution of traffickers or willingness to provide evidence during court proceedings. Nor should protection and assistance be conditional on willingness to return to country of origin. Assistance should include the entire range of services needed for victims to recover and reclaim her/his human rights. States should ensure adequate access to asylum procedures to those victims of trafficking that apply for asylum.

4. *Repatriation and resettlement*

Repatriation to a country of origin, if facilitated, should be safe, sustainable and, as far as possible, voluntary. The possibility of resettlement in a third country should also be considered and explored in appropriate cases. Victims of trafficking in need of international protection fulfilling the 1951 criteria for a refugee status, should be provided with a durable solutions of either local integration in the country of asylum or possibly of resettlement to a country where protection can be guaranteed.

5. *Special measures for children*

Special care should be taken to protect the rights of children (up to the age of 18 years) at all stages. Procedures should be established for the rapid identification of child victims; they should never be subjected to criminal procedures or sanctions for offences related to their situation. In addition, specialized programmes and policies should be adopted to protect and support child victims of trafficking and those vulnerable to it. Age-sensitive and other measures need to be taken to reunite the child with her or his family or to otherwise meet her or his best interests, in line with the Convention on the Rights of the Child and its Optional Protocol.

6. *Migration and Immigration Policies*

Trafficking is largely being dealt within the context of transnational organized crime, law enforcement and border control. Efforts to apprehend and prosecute traffickers should be encouraged. However, it is important to recognise that the growth in trafficking networks is closely linked with the discrepancy between the number of persons who wish to migrate and the legal opportunities for them to do so. While such discrepancies remain, it will be

difficult to address trafficking in an effective way. States of destination should consider reviewing their immigration policies to develop greater opportunities for lawful and mutually beneficial migration.

7. *Holistic and Integrated Approach*

The human rights of the victims of trafficking should be at the centre of response strategies. Responding to and preventing trafficking requires a holistic and integrated approach taking into account the complexity of the problem and its links to migration, asylum, organized crime, human rights, violence against women and unequal economic development. Multidisciplinary cooperation and coordination is required among policy makers, law enforcement and border officials, prosecutors and judges, local authorities, employers, trade unions, NGOs and international organizations.