

# **Trafficking in human beings from a human rights perspective – recent legislative developments at the international and European levels**

*Presentation by Angelika Kartusch, Ludwig Boltzmann Institute of Human Rights, Vienna*

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## **1. Introduction**

Trafficking in human beings is both, a consequence and a cause of human rights violations.

To start with the consequences, countries of origins for trafficking in human beings are most often countries in transition to a market economy or developing countries. In these countries, women and girls, who make up the majority of victims of trafficking world wide, are particularly affected by the overall conditions of poverty, unemployment and poor social security systems. The feminisation of poverty and the general discrimination against women and girls in law and society, make many women and girls migrate abroad for work. Labour migration often constitutes the only option to earn money to support one’s families. At the same time, especially when there is a lack of information about trafficking and legal migration possibilities, many migrants are at risk of becoming victims of trafficking. Some countries try to tackle this risk by imposing additional restrictions on the rights of their nationals, for example by refusing to issue passports to women who work in prostitution.

Once arrived in the country of destination, trafficked persons are forced into a situation of extreme dependency and violence. They are locked up, their passports are taken away, and they are subjected to physical, sexual and psychological violence. Trafficked persons receive little, if any pay and are forced to work very long hours und under unsafe and unhealthy conditions. Victims trafficked into prostitution are not able to chose their clients or to use protection against pregnancy or sexually transmitted diseases (STEs).

In this situation, trafficked persons usually have no access to redress, assistance and protection in the destination country. They are kept in isolation, do not know the local language nor their rights, and fear deportation because of their irregular residence status. Further, high debts owed to the traffickers, threats and intimidation prevent them from reporting the perpetrators. Also, many countries still do not have a sufficient legal framework and investigation tools in place to detect and prosecute cases of trafficking. If trafficked persons testify, there is often no adequate witness protection available, nor are there trained police officers and judges or victim-sensitive investigation and interrogation methods in place to avoid re-traumatisation of the victims. Many states do not provide for victim assistance, such as shelter, medical aid, legal counselling, but deport trafficked persons, irrespective of any security concerns arising from threats by the traffickers.

Finally, the cycle of human rights concerns does not end with the return of the victim to her or his country of origin. Returning home often means facing rejection and stigmatisation by the family and the social environment, being threatened by the traffickers or their accomplices, but having no access to protection; being heavily traumatised as consequence of being trafficked, but having no access to health care or psychological counselling; being unemployed, but having no access to the labour market or vocational training. These factors not only endanger the victims’ subsistence and physical integrity, but also might lead her or him to re-enter the trafficking cycle.

These conditions throughout the trafficking cycle violate several human rights of trafficked persons, for example the right to be free from slavery, slavery-like practices<sup>1</sup> and forced labour,<sup>2</sup> the right to freedom of

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<sup>1</sup> Universal Declaration of Human Rights (UDHR) Art. 4, 1926 Slavery Convention Art. 2, 1956 Supplementary Slavery Convention Art. 1, International Covenant on Civil and Political Rights (ICCPR) Article 8, European Convention on Human Rights (ECHR) Art. 4.

movement and to leave and enter her/his own country,<sup>3</sup> to physical and mental health,<sup>4</sup> just and favourable conditions of work,<sup>5</sup> to an adequate standard of living including food, clothing, and housing,<sup>6</sup> and the right to be free from discrimination.<sup>7</sup>

Several approaches exist to combat trafficking in persons. Many states focus on the combat of organised crime, illegal migration or of participation in the sex industry, whereas usually little attention is paid to the human rights abuses inflicted upon trafficked persons. The need for a human rights approach has been stressed by Mary Robinson, the former UN High Commissioner for Human Rights: “Human rights must be at the core of any credible anti-trafficking strategy.”<sup>8</sup> Now, why do we need a human rights approach towards the combat of trafficking in human beings?

First of all, instead of looking merely at the symptoms, a human rights based approach enables us to tackle the root causes of trafficking, which include for example gender-based discrimination on the labour market or in the field of education in the countries of origin. Tackling the root causes by empowering potential victims in the countries of origin is more effective than merely repressive strategies because it makes high risk groups less vulnerable to become victims of trafficking. Further, a human rights approach also looks at the consequences of trafficking and implies assistance to and protection of trafficked persons in the destination country. Assistance and protection enables victims to recover and regain control over their lives and to avoid re-traumatisation which can easily occur through criminal proceedings. The stabilisation of victims is also a necessary precondition for their cooperation with law enforcement and therefore contributes to effective prosecution. Last but not least, a human rights approach is not merely a question of effectiveness or usefulness, but it is simply a state obligation under international human rights law.

## **2. States’ obligations under international human rights law to protect the rights of trafficked persons**

States are under an obligation under international human rights law not only to refrain from violating the human rights of individuals, but also to take positive steps to ensure that individuals are able to enjoy these rights. States are obliged to act with due diligence to prevent, investigate and punish human rights violations and to provide victims with possibilities for compensation.<sup>9</sup>

So the question is, what are states obliged to do to protect the human rights of trafficked persons?<sup>10</sup> As time is limited, I will focus in the following on victim assistance and protection in the destination countries, and leave the prevention aspect aside.

- States need to protect trafficked persons from intimidation and retaliation by the traffickers. This includes for example police escorts, witness relocation, change of identities, in court video link testimonies and providing victims with information about the release of the traffickers.
- States need to ensure that trafficked persons are not deported when there is substantial evidence that it is unsafe to return home. It is essential that victims have a residence status in the destination country at least during criminal proceedings. This should include access to assistance services, such accommodation, food, medical care, psychological and legal counselling. If required by humanitarian

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<sup>2</sup> ILO Convention No. 29 Art. 1 and 4, ILO Convention No. 105 Art. 1 and 2, ICCPR Art. 8, ECHR Art. 4.

<sup>3</sup> UDHR Art. 13, CCPR Art. 12.

<sup>4</sup> International Covenant on Economic, Social and Cultural Rights (ICESCR) Art. 12.

<sup>5</sup> ICESCR Art. 7, UDHR Art. 23 para. 1.

<sup>6</sup> ICESCR Art. 11.

<sup>7</sup> ICESCR Art. 2, ICCPR Art. 2, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Art. 2, 5, 6, 11.

<sup>8</sup> *UN High Commissioner for Human Rights, NGO Consultation with UN/IGOs on Trafficking in Persons, Prostitution and the Global Sex Industry*, Geneva, Palais des Nations, 21-22 June 1999.

<sup>9</sup> See for example *Inter-American Court of Justice, Velasquez-Rodriguez case*, 29 July 1988, *European Court of Human Rights, Airey v. Ireland*, 9 October 1979 and *X and Y v. Netherlands*, 26 March 1985.

<sup>10</sup> See also *CEDAW Committee, General Comment No. 19 on violence against women*, 1992, para. 9.

<sup>10</sup> The following list of obligations is drawn from legally binding and soft law instruments of international human rights law, including the UDHR, the ICCPR, the ICESCR, the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, the ECHR, and the Council of Europe Committee of Ministers Recommendations R (85) 11 and R (2000) 11.

reasons or security concerns, states need to ensure that trafficked persons can obtain a permanent residence status, which might also include asylum.

- States need to inform victims about their rights, including the right to claim compensation, about existing assistance facilities, the nature and course of proceedings, the outcome of investigations and the release of the trafficker.
- States need to provide victims with adequate and competent translation and legal assistance services free of charge.
- States need to ensure that trafficked persons do not suffer further harm and traumatisation as consequence of their participation in the investigation in and prosecution of the traffickers. This includes measures such as allowing victims to be accompanied by a trustee and interviewed by judges and police officers of the same sex, ensuring that police officers, judges and prosecutors are trained and sensitised towards the needs and particular situation of trafficked persons, reducing the numbers of interviews and avoiding, as far as possible, the confrontation with the trafficker.
- States need to ensure that trafficked persons have access to compensation for harm suffered, either during criminal or in separate civil proceedings.

### **3. Recent international and European developments – achievements and shortcomings regarding victim’s human rights**

In recent years, trafficking in persons has been addressed by the international community at various occasions. In December 2000, the UN has adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the Convention Against Transnational Organised Crime (“Trafficking Protocol”) of 2000.<sup>11</sup> At the European Union level, the Council in May 2001 adopted the Framework Decision on combating trafficking in human beings.<sup>12</sup> Further, a EU Directive on the residence status of victims of trafficking and smuggled persons is currently being drafted.<sup>13</sup>

#### *The UN Trafficking Protocol*

The Trafficking Protocol establishes several minimum standards regarding the prosecution and prevention of trafficking as well as on victim assistance and protection. Its most important achievement lies in its Article 3, which establishes the first ever international, legally binding definition of trafficking in persons:

- the recruitment, transportation, transfer, harbouring or receipt of persons, *[act]*
- 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, *[means]*
- 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.” *[purpose]*

<sup>11</sup> UN GA Res A/55/383, 2 November 2002. The text is available online at [www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf). The Protocol is not yet in force. As of 2 June 2003, the Protocol has been ratified by 26 parties. The entry into force requires 40 ratifications. Further the Protocol can only enter into force after the Convention has entered into force, which has so far been ratified by 37 parties.

<sup>12</sup> Council Framework Decision of 19 July 2002 on combating trafficking in human beings (2002/629/JHA), OJ L 203, p 1.

<sup>13</sup> 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 (presented by the Commission), 11.2.2002, COM(2002) 71 final.

This definition includes all forms of trafficking, regardless of the sex of the victim (it encompasses trafficking in women, men, boys and girls) or the purpose of trafficking (it is not limited to trafficking into the sex industry, but covers for example also trafficking into domestic labour, factory work, or on the commercial marriage market).<sup>14</sup>

The Protocol and the Convention are mainly law enforcement instruments,<sup>15</sup> obliging state parties for example to criminalise trafficking, to engage in international cooperation in the investigation and prosecution of trafficking cases, to strengthen border controls or to prevent the falsification of travel and identity documents. Both instruments do include some provisions on victim assistance and protection. However, compared to the law enforcement provisions, which are absolutely mandatory, the assistance and protection provisions are very weak and leave wide discretion to state parties. For example, state parties are obliged to protect the victims' privacy and identity *in appropriate cases and to the extent possible under its domestic law*. States shall further *consider* to implement assistance measures, such as housing, counselling and medical assistance, *in appropriate cases*. Similar language is used in the Protocol provision dealing with the victims' residence status in the destination country and the Convention Article on witness protection.<sup>16</sup>

It should also be noted that the Protocol applies only to cases of trafficking that are "transnational in nature" and "involve an organized criminal group."<sup>17</sup> Mere inner-state trafficking or traffickers operating in a non-organised manner are not encompassed.

#### *EU Framework Decision on Combating Trafficking in Human Beings*

In 2001, the Council adopted a Framework Decision on combating trafficking. This document establishes the same definition of trafficking as the UN Protocol and obliges EU member states to criminalise trafficking, to establish criminal liability of legal persons and to establish certain forms of jurisdiction over trafficking cases.<sup>18</sup> However, despite intensive lobbying efforts of non-governmental organizations (see e.g. the EWLA Resolution of the 2001 General Assembly in Seville) and UN human rights bodies to have strong provisions to protect the rights of trafficked persons included, the Framework Decision does hardly provide for any measures to protect victims' human rights. Art. 7, titled "Protection of and assistance to victims" establishes three paragraphs with the following content:

- the investigation into or prosecution of trafficking shall not be dependent on the report or accusation made by a victim,
- minor victims are "particularly vulnerable victims" according to certain provisions of the March 2001 Council Framework Decision on the standing of victims in criminal proceedings,
- assistance shall be provided to family members of minor victims.

These provisions deal with a few isolated aspects of victim assistance, but fail to protect the human rights of trafficked persons in a comprehensive manner: The Framework Decision does not establish a residence status of trafficked persons in the destination country, nor does it oblige member states to provide for shelter, counselling and other assistance services. Neither does it establish any procedural rights for

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<sup>14</sup> Note that the definition consists of three components: acts, means and purpose. A combination of at least one act, means and purpose is required for a situation to constitute trafficking. For example, recruiting a person by deception into domestic work or forcibly transporting somebody to a bar where she is forced to perform sexual services constitutes trafficking. However, recruiting somebody into prostitution without any of the coercive means enumerated in Article 3 does not fall under the definition of the Protocol.

<sup>15</sup> Whereas the Trafficking Protocol includes specific provisions applicable only to trafficking in persons, the Convention focuses on transnational organised crime in general. The Convention deals for example with jurisdiction, extradition, law enforcement cooperation, witness protection and training. These provisions are also applicable to trafficking in persons: The Protocol supplements the Convention and shall be interpreted in accordance with the latter. The Convention applies *mutatis mutandis* to the Protocol, unless the Protocol provides otherwise (Convention Art. 2 and 3, Protocol Art. 1).

<sup>16</sup> Protocol Art. 6 para.s 1 and 3, Art. 7 para. 1, Convention Art. 24.

<sup>17</sup> Protocol Art. 5. The terms "transnational" and "organized criminal group" are defined in Convention Art. 2.

<sup>18</sup> Unlike the UN Protocol, it also sets a standard for penalties: the maximum penalty must be at least eight years under certain aggravating circumstances (e.g. particular vulnerability or minor age of the victim, or serious harm caused to the victim).

trafficked persons who participate in legal proceedings. With regard to procedural rights, it should be noted that such rights are outlined in the above-mentioned Framework Decision on the standing of victims of criminal proceedings, which, by definition is also applicable to victims of trafficking. However, except for one brief reference relating to minor victims, the Trafficking Framework Decision does not even refer to the Victims Framework Decision. That omission does not alter the fact that trafficked persons are already covered by the Framework Decision on the standing of victims in criminal proceedings. However, it allows to conclude that the fact that victim assistance was not a major concern underlying the Framework Decision on combating trafficking in human beings.

*Proposed Council Directive on the residence status of trafficked and smuggled persons*

In February 2002, the Commission proposed a directive which addresses some of the shortcomings of the Framework Decision. The proposal introduces a short term residence permit for third-country nationals who are victims of smuggling or trafficking and who cooperate in the prosecution of the offenders. Victims are first granted a 30 days reflection period to decide if they want to cooperate with the authorities (Art. 1) During this period, they must not be deported and shall have access to suitable accommodation, emergency medical and psychological care and social welfare benefits if they do not have sufficient resources (Art. 8 para. 2, Art. 9). After these 30 days, a renewable short-term residence permit shall be issued for 6 months, provided that the victims' presence is "useful", the victim has shown a "clear intention to cooperate" and has severed all relations with the offenders. Further, there must be "no objections on the grounds of the protection of public order and national security" (Art. 10). Holders of short-term residence permits have access to the labour market, vocational training and education and primary medical care (Art. 12, 13). If a member state decides to apply the directive to minor victims (see Art. 3 para. 2), it shall take due account of the best interests of the child (which may lead to an extension of the 30 days reflection period), ensure procedures that are appropriate to the age and maturity of the child, and locate the family members of unaccompanied minors (Art. 14). Art. 15 enables member states to make the residence permit dependent upon the victim's participation in integration and vocational training programmes in the host country, or their assisted return to the country of origin or another country willing to accept them. The residence permit shall not be renewed if the proceedings are terminated by a judicial decision or the victim does not participate in a programme under Art. 15. It may be withdrawn at any time if the victim has renewed contacts with the suspect, if the court believes the victim's cooperation or complaint is fraudulent or wrongful, or for reasons of public order and national security (Art. 16, 17).

The draft Directive is the first legally binding instrument at the European level to explicitly deal with the residence status of trafficked persons in a destination country. It creates a minimum standard which goes beyond the legislation currently in force in most EU member states and applicant countries by providing for an initial reflection delay, a right to a renewable 6 months residence status, access to assistance services and to the labour market.

However, the draft Directive is not designed to primarily protect the human rights of trafficked persons, but is an instrument to combat illegal migration, as the Commission has explicitly stated in the explanatory memorandum to the proposal.<sup>19</sup> This approach can also be concluded from the equation of trafficking and smuggling throughout the document and the linkage between cooperation and benefits.

The proposed directive has a number of serious shortcomings regarding the protection of the rights of trafficked persons, including the following examples:

- It blurs the distinction between trafficking and smuggling, as recognised by the UN Protocol, and thereby fails to recognise that trafficked persons are victims of human rights violations, whereas smuggled persons are usually not. Trafficking violates the victim's human rights, while smuggling violates the integrity of a state's borders.

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<sup>19</sup> According to the Commission's proposal, "[t]he aim of the present proposal for a directive is to strengthen the instruments for combating illegal immigration. (...) [T]he proposed Directive may appear to serve to protect victims. This is not, however, the case: (...) [witness or victim protection] is neither its aim nor its legal basis." COM(2002) 71 final, pp 6f.

- The proposal grants residence permits only to victims who cooperate with the authorities. It does not protect persons who are unwilling or unable to testify, because they do not have any information useful for the prosecution or because they were threatened by the traffickers with retaliation.
- The limitation of the residence permit for the duration of criminal proceedings and the option to make the issue of residence permits dependent on the victim's return to the country of origin fails to recognise that even after termination of proceedings it might be unsafe for a trafficked person to return home.
- States may refrain from issuing residence permits or withdraw permits "for reasons relating to the protection of public order and national security". Such clauses are problematic, because they may be interpreted to allow states to refuse residence permits to victims who have committed offences related to their status as victim of trafficking, such as violations of laws related to prostitution or immigration.

#### **4. Conclusions**

Since the beginning of the 21<sup>st</sup> century, the UN and the EU have started to explicitly address the problem of trafficking in human beings in legally binding instruments. These instruments provide the basis for legal harmonisation and bilateral, regional and international cooperation, which are necessary elements in the fight against trafficking. However, because of weakly drafted provisions that leave wide discretion to states, narrow scopes of application – the UN Protocol applies only to transnational trafficking committed by organised criminal groups; the draft Council Directive encompasses only those victims who are willing to testify – and because of the strong focus on law enforcement and crime control, these documents fall short to provide effective protection to the rights of trafficked persons.

This is exactly where the challenges for a Council of Europe Convention on trafficking comes in. Such a European Convention should adopt a sufficiently broad definition of trafficking, and should provide for mandatory provisions obliging states to provide assistance and protection to all trafficked persons, irrespective of their willingness to testify. It should cover procedural rights of victims, including information, translation, legal assistance and access to compensation, further grant effective protection from retaliation, establish a residence status and ensure that victims have access to assistance facilities. For more detailed recommendations on the Convention, I would like to refer you to the draft congress resolution that Marjan Wijers and I have prepared and that will be presented later on.