The Committee on the Elimination of Discrimination against Women (CEDAW)

**Statement on CEDAW General Recommendation on Trafficking in Women and Girls in the Context of Global Migration**

# The Finnish Non-Discrimination Ombudsman acting as a National Rapporteur on Trafficking in Human Beings expresses her gratitude to CEDAW for allowing the Ombudsman to give her independent statement on the forthcoming CEDAW General Recommendation on Trafficking in Women and Girls in the Context of Global Migration.

# Under the Act on the Non-Discrimination Ombudsman, the Ombudsman serves as a National Rapporteur on Trafficking in Human Beings in Finland. **Under the law, the Non-Discrimination Ombudsman is an independent and autonomous public authority.** As a National Rapporteur, the Non-Discrimination Ombudsman follows action against human trafficking in Finland, human trafficking at large, compliance with international obligations and the effectiveness of national legislation. The Ombudsman issues suggestions, recommendations, statements and advice and follows the implementation of the rights of trafficking victims. **The Ombudsman has served as a National Rapporteur since 2009.**

# The Ombudsman would like to comment on the definition on human trafficking and its connection and relevance to the protection of victims’ rights. Under international law, trafficking victims have a special status and a right to special assistance and protection measures provided by the State, but the implementation of these rights is largely dependent on the application and the interpretation of the definition of human trafficking, which in many countries has been prescribed by the criminal code.

The UN Trafficking Protocol contains the first international consensus definition of trafficking in persons according to which states parties are required to criminalize and punish this activity. The UN definition has provided a basis for the criminalization of trafficking in many countries, and more or less same definition has been accepted, for example, by the European Union and the Council of Europe.

The definition of trafficking in human beings consists of three elements, which all have to become fulfilled: criminal acts, the means used to commit those acts, and purposes of various forms of exploitation. Thus, any act that combines any of the listed action and means and is carried out for any of the listed purposes must be criminalized as trafficking in human beings. According to the Article 3 of the Protocol, “’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."

The definition of human trafficking represents a compromise between different views on (migration to) prostitution. With regard to the adult trafficking victims, definition of trafficking accepts the view that the consent of the person to exploitation is irrelevant only when any of the means set forth in the definition have been used. The UN Trafficking Protocol attempts to draw the line between trafficking and (migration to) prostitution, but it is important to note that it expands the scope of criminalized activities by broadening the list of coercive means that weaken the weight of given consent.

The Protocol, thus, recognizes that human trafficking may occur without use of any physical force, active physical resistance, kidnapping or deception, for example. By including the more subtle means to the definition of human trafficking, such as the abuse of victim’s vulnerable position, the scope of protected people becomes broader than often anticipated (see more, e.g., Roth, Venla: Defining Human Trafficking, Identifying Its Victims, 2012).

The Ombudsman acting as a National Rapporteur in Finland has emphasized that in applying the criminal law definition, based on the international definition, the attention should not only be paid to the forceful recruitment or transportation methods used by perpetrators during the movement phase of the trafficking process. The legal practitioners should focus, instead, on the actual outcomes which may turn out to be exploitative and coercive in the country of destination. The Ombudsman has contested the deep-rooted understanding of the criminal justice system not to protect those women who have initially consented to come to Finland to sell sex and thereafter ended up in exploitative circumstances. Historically, they have been considered as procured prostitutes, solely objects of a victimless crime without right to compensation and assistance (Ombudsman’s report 2010. See also, Ombudsman’s report 2014).

Under the Finnish Penal Code, the elements of trafficking can nowadays be met in a situation where the perpetrator has taken control over the victim, and it has been especially emphasized in the preparatory works that it can occur at any given time of the trafficking process. To meet the recommendation of the Ombudsman, the meaning and purpose of the more subtle means of trafficking were elaborated in the preparatory works in a more detailed manner, allowing the practitioners to apply the law in accordance with the international legal definition. This means that the requisites of human trafficking can be fulfilled also when the victim has consented to travel to Finland with a knowledge that she is supposed to sell sex after arrival but the circumstances turn out to be exploitative and coercive after having entered Finland.

Several studies also from other countries demonstrate that many trafficking victims have sold sex in their countries of origin and that they have migrated to another country without physical violence or even deception. Moreover, these studies argue that much of the abuse exerted on the trafficking victims is psychological rather that physical in nature after arrival to another country. It is much more common that the perpetrators resort to psychological pressure and control rather than physical violence against the trafficking victims in order to submit them into coercive and exploitative conditions or prevent them from escaping the situation.

The studies show that the perpetrators take advantage of the dependency of the victims caused by debt to the traffickers/smugglers or their vulnerable position arising from an insecure or illegal status, fear of deportation, distrust of authorities or other foreign-specific vulnerabilities. Moreover, the perpetrators know that many trafficking victims are unable to quit due to their desperate economic situation or the lack of other possibilities for illiterate and uneducated women to earn a living to themselves and to their families. Many migrant women have not actively chosen prostitution but ended up selling sex as a consequence of being trapped by debt, family obligations, dependence on the perpetrator (who can also be a family member), an insecure or illegal residence status, or a lack of other opportunities.

The UN Trafficking Protocol attempts to draw a distinction between trafficking and (migration to) prostitution, but it expands the scope of criminalized activities and protected people by including the abuse of victim’s vulnerable position and the abuse of power in the list of prohibited means. As these subtle means are rather poorly elaborated in the preparatory works of the UN Trafficking Protocol, it remains to the States Parties to decide who are protected as victims of human trafficking in their jurisdiction.

The Finnish jurisprudence has evolved into the direction where focus is more on the degree of “unfreedom” and the forms of domination and control rather than the coercive recruitment or transportation element of human trafficking. Attention has been paid more and more to the conditions under which the trafficking victims live and work rather than their possible prior consent to travel to Finland. This development of jurisprudence has been even more visible in the field of labour trafficking, and can partly explain the increased number of conviction compared to many other European or Nordic countries.

The Ombudsman considers that this kind of understanding is in line with the international case law on other form of violence against women, i.e. sexual violence/rape. As the European Court of Human Rights has noted in its famous case-law *M.C. v. Bulgaria* (2004), the lack of consent, not force, is perceived as the constituent element of the offence of rape in case-law in most European countries. The case demonstrates that a legally valid consent is dependent on the circumstances and the context where it has been given. The Court concluded that physical force is not a constituent element of rape, rather the lack of consent or the issue of non-consent that can be constituted by assessing the surrounding circumstances that could have inferred the lack of consent.

The discussion on rape law and the constituent element of non-consent in the criminal law is currently under a discussion also in Finland, as it is in many other European countries. Many feminist criminologists and activists see the element on non-consent as a possibility to transfer the burden of proof from the victim to the perpetrator of suspected rape offence.

As a final remark, the definition of human trafficking and its application and interpretation have great practical significance for those affected. Only victims of human trafficking are entitled to the special assistance and protection measures prescribed in the international legal instruments, such as Council of Europe Trafficking Convention and EU Anti-Trafficking Directive. The anti-trafficking laws provide extensive assistance and protection for those who have suffered from serious forms of exploitation in migration, regardless of their residence status. Moreover, the countries are under legal obligation to take legal and other measures to discourage the demand that is considered to foster trafficking in human beings for the purpose of sexual exploitation.

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