

GUIDELINES ON CEDAW
GENERAL RECOMMENDATION NO. 38
on Trafficking in Women and Girls in the Context of Global Migration
(CEDAW/C/G38)

Table of contents

PART I.....	4
1. INTRODUCTION TO THE INTERPRETATIVE GUIDELINES TO CEDAW GENERAL RECOMMENDATION (GR) NO. 38 ON TRAFFICKING IN WOMEN AND GIRLS IN THE CONTEXT OF GLOBAL MIGRATION (CEDAW/C/GC/38).....	4
1.1. The crime of trafficking in women and girls in the context of global migration.....	4
1.2. Setting the Scene: binding and non-binding legal instruments underlying the connection between trafficking, migration and women	5
1.3. Interpretation of the expression ‘traffic in women and exploitation of prostitution of women’ according to the Vienna Convention on the Law of Treaties, including the negotiating process of CEDAW	10
1.4. Trafficking against women and girls and exploitation of prostitution as a violation of human rights and violence against women and girls	15
1.5. The work of CEDAW in countering trafficking and exploitation of prostitution in women and girls 18	
1.6. General Recommendation No. 38.....	19
1.7. Scope and purpose of the guidelines (and legal status)	21
1.8. Definitions.....	21
1.8.1. Asylum seeker.....	22
1.8.2. Gender-based violence against women.....	22
1.8.3. Trafficking in persons	22
1.8.4. Migrant.....	23
1.8.5. Refugee	23
1.8.6. Sex-based discrimination	23
1.8.7. Sexual exploitation.....	24
1.8.8. Violence against women	26
1.9. Methodology	27
1.9.1. Human rights-based approach.....	27
1.9.2 Gender-sensitive approach /gender perspective.....	28
1.9.3. Intersectionality/multiple forms of discrimination	29
Part II.....	31

GUIDELINES TO IMPLEMENT COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN	31
GENERAL RECOMMENDATION No. 38.....	31
1. Premise.....	31
A. Addressing the root causes of trafficking in women and girls and related guidelines	31
2. Context and legal background.....	31
2.1. Trafficking in women and exploitation of prostitution in the context of migration within the 2030 Agenda	33
<i>a) Addressing socio-economic injustice.....</i>	<i>35</i>
POVERTY AS CONTRIBUTING FACTOR TO TRAFFICKING AND EXPLOITATION OF PROSTITUTION	36
VIOLENCE AGAINST WOMEN AND GIRLS AS CONTRIBUTING FACTOR TO TRAFFICKING AND EXPLOITATION OF PROSTITUTION.....	37
<i>b) Addressing trafficking and exploitation of prostitution through promoting a safe migration framework</i>	<i>43</i>
<i>c) Addressing the demand that fosters exploitation and leads to trafficking.....</i>	<i>46</i>
DEMAND OF ORGANS.....	53
<i>d) Addressing trafficking in the context of conflict and humanitarian emergencies</i>	<i>54</i>
<i>e) Addressing the use of digital technology in trafficking</i>	<i>58</i>
<i>f) Awareness-raising.....</i>	<i>63</i>
B. Upholding victims' rights	64
3. Context and legal background.....	64
<i>a) Victim identification.....</i>	<i>64</i>
WOMEN WITH DISABILITY	69
REFERRAL MECHANISMS.....	70
<i>b) Application of other protection framework.....</i>	<i>72</i>
CHILDREN'S RIGHTS	75
REPATRIATION.....	76
<i>c) Non-criminalization and non-conditionality.....</i>	<i>76</i>
NON-CONDITIONALITY	77
PRINCIPLE OF NON-CRIMINALIZATION	78
SUPPORT TO WOMEN AND GIRLS WHO ARE VICTIMS OF TRAFFICKING AND EXPLOITATION OF PROSTITUTION.....	80
<i>d) Right to information about rights and legal assistance</i>	<i>84</i>
<i>e) Right to a remedy</i>	<i>86</i>
C. Gender-sensitive court proceedings.....	88
4. Context and legal background.....	88

AVOIDING STEREOTYPING IN THE JUDICIARY	89
D. Data Collection, legislative, policy and institutional framework	91
NATIONAL ACTION PLANS	92
E. Dissemination and Reporting	94
F. Treaty Ratification	94
Conclusions.....	94

PART I

1. INTRODUCTION TO THE INTERPRETATIVE GUIDELINES TO CEDAW GENERAL RECOMMENDATION (GR) NO. 38 ON TRAFFICKING IN WOMEN AND GIRLS IN THE CONTEXT OF GLOBAL MIGRATION (CEDAW/C/GC/38)

This section is aimed at providing an introduction to the interpretative guidelines to the CEDAW General Recommendation No. 38.

1.1. The crime of trafficking in women and girls in the context of global migration

According to the fifth *Global Report* by the United Nations Office on Drugs and Crime (UNODC),¹ mandated by the General Assembly through the 2010 *Global Plan of Action to Combat Trafficking in Persons* and published in 2021, trafficking in persons particularly affects women and girls. In 2018, for every ten victims detected globally, about five were adult women and two were girls. About one third of the overall detected victims were children, both girls and boys, while 20 per cent were adult men.² The report also stressed how most victims are trafficked for the purpose of sexual exploitation. In 2018, 50 per cent of the victims detected were trafficked for sexual exploitation and 38 per cent were trafficked for forced labour.³ With regard to the phenomenon of trafficking in the context of migration, the report highlighted that migrants constitute a significant share of the detected victims in most global regions: 65 per cent in Western and Southern Europe, 60 per cent in the Middle East, 55 per cent in East Asia and the Pacific, 50 per cent in Central and South-Eastern Europe, and 25 per cent in North America.⁴

1.1.1. (...) and the challenge of the COVID-19 pandemic

The COVID-19 pandemic, which shocked the world in 2020 and 2021, has further exacerbated trafficking. In a study on the effects of COVID-19 pandemic on trafficking in persons released by the UN Office on Drugs and Crimes (UNODC), three aspects are particularly relevant. First, the gendered dimension of the pandemic: it has been reported that women have been trafficked for labour and sexual exploitation after having lost their livelihoods as a result of the pandemic and that women and girls have been recruited, often locally or online, for sexual exploitation. The percentage of women that have been trafficked has not been determined, but the survey and interviews showed how several women were not able to leave the place of exploitation or be rescued as a consequence of the pandemic lockdowns.⁵ Second, the survey and interviews highlighted the negative effects of the pandemic on migrants: in particular, quarantine measures for migrants have potentially placed

¹ UNODC, *Global Report on Trafficking in Persons 2020*, United Nations publication, Sales No. E.20.IV.3, Vienna, January 2021.

² Ibid, p. 31.

³ Ibid, p. 33.

⁴ Ibid, p. 11.

⁵ UNODC, *The Effects of the COVID-19 Pandemic on Trafficking in Persons and Responses to the Challenges. A global study of emerging evidence*, 2021, p. 29.

them at heightened risk of trafficking in persons, and with regard to domestic workers, who might have been trafficked to the country of destination, they have suffered from physical and sexual abuses as a consequence of the confinement measures.⁶ Third, a significant increase in the online recruitment of adults and children has been reported.⁷

The OSCE report of 2020 emphasised how asylum seeking women and girls were at particular risk of violence, trafficking, and exploitation in the weeks following the lockdown, and they became deprived of essential services dedicated to victims of sexual violence and other forms of gender-based violence that were available in refugee camps before the outbreak of the COVID-19 pandemic.⁸ As a consequence of the restrictions imposed by governments to counter the pandemic, in some countries migrants had their residence permits expired and lost their job, facing major risks of contracting the virus and of being exploited by criminal groups.

1.2. Setting the Scene: binding and non-binding legal instruments underlying the connection between trafficking, migration and women

In terms of international binding legal instruments, the connection between trafficking, migration and women has not been clearly established. Soft law acts were however able to fill the gap logically and legally.

In the 1951 United Nations Convention on the status of refugees (1951 Refugee Convention), for example, no explicit reference to trafficking in persons is made. However, the *Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (the 2006 ‘Guidelines on International Protection’) stressed how trafficked people might present the requirements to ask for refugee status⁹. As it is known, Article 1A(2) of the 1951 Refugee Convention reads as follows:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

The 2006 Guidelines on International Protection stressed that, even though the persecutory nature of the acts associated with trafficking must be assessed in the individual case, ‘inherent in the trafficking experience are such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment’ and therefore ‘such acts constitute serious violations of human rights which will generally amount to persecution.’¹⁰

The 2006 Guidelines on International Protection also pointed out that the ‘forcible or deceptive recruitment of

⁶ Ibid, p. 33 and 34.

⁷ Ibid, p. 77.

⁸ OSCE, ODIHR and UN Women, *Guidance: Addressing Emerging Human Trafficking Trends and Consequences of the COVID-19 Pandemic*, 2020.

⁹ UNHCR, *Guidelines on International Protection: the application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked*, HCR/GIP/06/07, 7 April 2006.

¹⁰ Ibid, para. 15.

women and children for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence, which may constitute persecution.’¹¹ The requirement of being ‘outside her or his country of origin and, owing to a well-founded fear of persecution, be unable or unwilling to avail her- or himself of the protection of that country’ should not be read in the sense that the individual must have left on account of a well-founded fear of persecution.¹² Victims of trafficking may not have left the country because of the fear of being persecuted, indeed, but ‘such a fear may arise after leaving their country of origin,’ and in such cases, ‘it is on this basis that the claim to refugee status should be assessed.’¹³

An individual’s well-founded fear of persecution must be related to one or more of the Convention grounds, it must be ‘for reasons of’ race, religion, nationality, membership of a particular social group or political opinion. Sex or gender is not included in the list.¹⁴ The text of the 1951 Refugee Convention was drafted ‘in the male form,’ indeed.¹⁵ Experiences of migration are not gender-neutral, they are determined by gender. The gendered experience of migration characterizes all phases: it starts with the reasons underlying the decision of fleeing a country, it continues during the journey, it persists after the arrival in the country of destination.¹⁶ The use of language that is not gender-neutral in the definition of refugee does not come as a surprise, given the time in which the 1951 Refugee Convention was adopted, but it is clear that the provisions of the Convention were not conceived to deal with cases of gender-based violence against women.¹⁷ One could contend that, in the definition of refugee provided by the 1951 Refugee Convention, there is the ‘catch-all category’ of ‘membership of a particular social group,’¹⁸ in which women victims of violence might be always included. Nonetheless, asylum seekers must demonstrate that they have a ‘well-founded’ fear of persecution *for reasons of* belonging to a particular social group, and this gives rise to a number of difficulties, not least whether ‘women’ can be said to comprise a particular social group.¹⁹ It can be argued that the ground for persecution ‘membership of a particular social group’ alone is not capable of grasping the complexity of women’s experiences: ‘framing all persecution of women as persecution because of gender has reinforced the image of

¹¹ Ibid, para. 19.

¹² Ibid, para. 25.

¹³ Ibid.

¹⁴ During the negotiations for the elaboration of the Convention, the Yugoslav representative proposed to add the words “or sex” after the words “country of origin” to the article on non-discrimination, but he was opposed by the representatives of Austria, Colombia, Italy, Switzerland, Turkey, the UK and the US. *The Refugee Convention 1951. The Travaux préparatoires analysed with a commentary by Dr. Paul Weis*, p. 36, available at: <https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html> [accessed 14.01.2022].

¹⁵ T. Spijkerboer, *Gender and Refugee Status*, Farnham, 1999/2000, p. 1.

¹⁶ See also objective No. 7 of the *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, adopted by the UN General Assembly on 17 December 2018: “(b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, [...] victims of violence, including sexual and gender-based violence”.

¹⁷ According to Kelly, another element should be added to explain the absence of women in international refugee law: it is “a product of the general failure of refugee and asylum law to recognize social and economic rights and its emphasis on individual targeting and specific deprivation of civil and political rights”. Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, in “Cornell International Law Journal”, 1993/26, p. 625 ff., p. 627.

¹⁸ B. Meyersfeld, *Domestic Violence and International Law*, Hart Publishing, London, 2010, p. 280.

¹⁹ Ibid. National jurisprudence has not been clear in the definition of the “particular social group”. See, for example, the controversial US jurisprudence. In 2014 only the Board of Immigration Appeals recognised the particular social group of “married women in Guatemala who are unable to leave their relationship” whose members can qualify for asylum. In *Matter of A-R-C-G 26 I & N Dec. 388* (see the comment in “Harvard Law Review”, available at: <http://harvardlawreview.org/wp-content/uploads/2015/05/Matter-of-ARCG.pdf>). See the position of the Board with regard to FGM as early as the 1990s in *In re Kasinga* of 1996 (21 I & N Dec. 357).

men as the only ‘real’ refugees, and has also marginalised women by implying that only men have political or religious opinions, racial status, etc.’²⁰ It is interesting to also note how the 2006 Guidelines on International Protection addressed the ground of ‘race,’ which has been defined as including ‘all kinds of groups that are referred to races in common usage.’²¹ It has been reported that in situations of armed conflict, where a policy of exploitation of a certain racial or ethnic group is pursued, ‘persecution may manifest itself by the trafficking of members of that group.’²² In times of peace, members of a racial or ethnic group may be vulnerable to trafficking, when the State is unable or unwilling to protect them. In particular, ‘where trafficking serves the sex trade, women and girls may also be especially targeted as a result of market demands for a particular race (or nationality).’²³

The legal distinction between trafficking in persons and crimes related to the phenomenon of migration was made particularly clear in the adoption of two different protocols to the UN Convention against Transnational Organised Crime of 2000: the *Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children* (the Trafficking in Persons Protocol)²⁴ and the *Protocol against the Smuggling of Migrants*.²⁵ The first protocol, ratified by 178 countries,²⁶ defines trafficking in persons as:

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 (Article 3(a)).

The Trafficking in Persons Protocol contains a reference to migration in its relation to the UN 1951 Convention. Article 14 (‘saving clause’) provides that: ‘Nothing in this Protocol shall affect rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein.’ ‘Including’ refers to all international and regional agreements a State might have ratified. In international law, States are only bound by those conventions of which they are parties. When a State is party to both the 1951 Refugee Convention and the Trafficking in Persons Protocol,²⁷ the legal relation between the two is addressed

²⁰ G. Firth and B. Mauthe, *Refugee Law, Gender and the Concept of Personhood*, in *International Journal of Refugee Law*, 2013, p. 470 ff., p. 482. See also A. Macklin, *Refugee Women and the Imperative of Categories*, in *Human Rights Quarterly*, 1995, p. 213 ff.

²¹ UNHCR, *Guidelines on International Protection*, cit., para. 34. See also European Women’s Lobby, *Her Future is Equal*, 2021, p. 26.

²² Ibid.

²³ Ibid.

²⁴ *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the United Nations Convention against Transnational Organized Crime, New York, 15 November 2000, entered into force on 25 December 2003.

²⁵ *Protocol against the Smuggling of Migrants by Land, Sea and Air*, supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000, entered into force on 28 January 2004. Ratifications: 150.

²⁶ As of March 2022.

²⁷ ‘This Protocol is without prejudice to the existing rights, obligations or responsibilities of States Parties under other international instruments, such as those referred to in this paragraph. Rights, obligations and responsibilities under another instrument are determined by the terms of that instrument and whether the State concerned is a party to it, not by the Protocol. Therefore, any State that becomes a party to this Protocol but is not a party to another international instrument referred to in the Protocol would not become subject to

by Article 14 of the latter, which coordinates the provision of the Protocol with the obligations stemming from the 1951 Convention. In other words, the Protocol ‘does not narrow or diminish any rights, obligations, or responsibilities; it only adds to them to the extent that is provided for in the text.’²⁸ In cases where a victim of trafficking in persons is also a refugee, the Convention and Protocol relating to the Status of Refugees apply in addition to the Trafficking in Persons Protocol.²⁹ The principle of *non-refoulement*, enshrined in Article 33 of the 1951 Refugee Convention, provides that no State shall expel or return a refugee in any manner whatsoever to the frontiers of territories where her or his life or freedom would be threatened on account of the person’s race, religion, nationality, membership of a particular social group, or political opinion; it has become, according to legal scholarship, a customary and even *jus cogens* norm.³⁰ It means that this principle prevails irrespective of the ratification by the State of the 1951 Refugee Convention.³¹ The principle of *non-refoulement* could apply if a trafficked victim fears persecution in his or her country of origin, for example in the form of re-trafficking, reprisals from traffickers or criminal networks, ostracism, social exclusion or discrimination to an extent that would amount to persecution, harassment, threats or intimidation.³² A victim of trafficking to whom the refugee status was recognised may fear reprisals, punishment or re-trafficking also in the country of asylum: in that case, as IOM has reported, she or he may need to be considered for resettlement to a third country.³³ The procedure and the criteria for determining refugee status are included in the Handbook prepared by the UNHCR, re-issued in 2019.³⁴

A provision that is similar to Article 14 of the Trafficking in Persons Protocol is included in the Protocol against the Smuggling of Migrants, where the crime addressed by the legal instrument is defined as follows:

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 (Article 3(a).

any right, obligation or responsibility under that instrument.’ UNODC, *Travaux Préparatoires* of the negotiations for the elaboration of the United Nations Convention against Transnational Organized Crime and the Protocols thereto (2006) 421.

²⁸ Legislative Guide for the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, para. 55..

²⁹ *Ibid.*, para. 58.

³⁰ See, among others, H. Lauterpacht and D. Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, in Feller, Turk, and Nicholson (Eds.), “Refugee Protection in International Law, UNHCR’s Global Consultations on International Protection”, UNHCR, 2003; UNHCR, *Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol*, Geneva, 2007; J. Wouters, *International Legal Standards for the Protection from Refoulement*, Intersentia, 2009; A. Zimmermann, *The 1951 Convention Relating to the Status of Refugee and its 1957 Protocol: A Commentary*, Oxford University Press, 2011, pp. 14-15; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection, under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, Geneva, February 2019; J. Allain, *The jus cogens nature of non-refoulement*, in *International Journal of Refugee Law*, 13, 2001, 533-558; G. Goodwin-Gill, J. McAdam (Eds), *The Refugee in International Law*, 4.ed., OUP, 2021.

³¹ The exceptions to the principle of *non-refoulement*, in accordance with 1951 Refugee Convention, are only applicable in the circumstances expressly provided for in Article 33 (2) of the Convention Relating to the Status of Refugees of 1951. See ‘non-refoulement’ in *Inter-American principles on the human rights of all migrants, refugees, stateless persons and victims of human trafficking*, Resolution 04/19 approved by the Commission on 7 December 2019, principle 6 (Inter-American Principles).

³² IOM, *The IOM Handbook Direct Assistance for Victims of Trafficking*, 2007, p. 71; UNODC, *Toolkit to Combat Trafficking in Persons*, pp. 362-363..

³³ IOM, *The IOM Handbook*, cit., p. 72.

³⁴ Handbook on procedures and criteria for determining refugee status and guidelines on international protection under the 1951 Convention and the 1967 Protocol relating to the status of refugees. The Handbook was first published in 1979 and re-issued in 1992 and in 2019.

The differences between the two crimes,³⁵ despite the provisions of the two protocols, are increasingly blurred in migration, as emphasised by the *Special Rapporteur on trafficking in persons, especially women and children*. She highlighted in her report of 2018 the interconnections between trafficking, gender and migration: trafficking is ‘interlinked with mixed migration movements, encompassing various categories of persons on the move, including refugees, asylum seekers and migrants travelling, mostly in an irregular manner, along similar routes, using similar means of travel, and for various and often interrelated reasons.’³⁶ People are not necessarily trafficked from the very beginning of their migration journey, they might become victims of trafficking during their journey or when they reach a transit or destination country. Migration movements can start independently or using a smuggler, but they can be intercepted by traffickers at a later stage.³⁷

The connection between trafficking and migration was also stressed in another soft law instrument, the *Global Compact for Migration*, whose recommendation No. 10 reads as follows: ‘Prevent, combat and eradicate trafficking in persons in the context of international migration.’³⁸ Under Objective 9, ‘Strengthen the transnational response to smuggling of migrants,’ contains a series of actions to be undertaken in order to realise the commitment of preventing and countering the smuggling of migrants, among which ‘to design, review or amend relevant policies and procedures to distinguish between the crimes of smuggling of migrants and trafficking in persons by using the correct definitions and applying distinct responses to these separate crimes, while recognizing that smuggled migrants might also become victims of trafficking in persons, therefore requiring appropriate protection and assistance.’³⁹

With regard to women and girls, as linked to trafficking and migration, it should be stressed how the gendered aspect of trafficking has been highlighted in the Trafficking in Persons Protocol, by acknowledging among the purposes of the normative text, ‘to prevent and combat trafficking in persons, *paying particular attention to women and children*’ (Article 2(a)).⁴⁰ Furthermore, Article 6(4) of the Trafficking in Persons Protocol requires that States parties take into account the age, gender and special needs of victims of trafficking, in particular the special needs of children, in providing appropriate housing, counselling and information, medical, psychological and material assistance, employment, education and training. The Protocol against the Smuggling of Migrants does not embrace a gendered dimension. Nonetheless, the gendered dimension should be considered. Even though adult men represent the largest group of smuggled migrants on the global scale, ‘women report a much higher exposure to sexual violence while migrating and report not having access to

³⁵ On trafficking, see in detail A. Gallagher, *The International Law of Human Trafficking*, Cambridge, Cambridge University Press, 2011. On smuggling, A. Gallagher and F. David, *The International Law of Migrant Smuggling*, Cambridge, Cambridge University Press, 2014. See also the relevant chapters in C. Costello, M. Foster, J. McAdam (eds), *The Oxford Handbook of International Refugee Law*, Oxford, OUP, 2021.

³⁶ UNGA - HRC, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, A/HRC/38/45, 14 May 2018, para. 7 – available online at: <https://digitallibrary.un.org/record/1637426> [accessed on 14.01.2022].

³⁷ *Ibid.*

³⁸ Resolution adopted by the General Assembly on 19 December 2018, *Global Compact for Safe, Orderly and Regular Migration*, A/RES/73/195, 11 January 2019, p. 6 – available online at: https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_73_195.pdf [accessed on 14.01.2022].

³⁹ *Ibid.*

⁴⁰ Emphasis added.

sufficient health care as a significant obstacle, showing an increased need for such services likely linked to the impact of sexual violence experienced as part of their journey.’⁴¹

As for soft law instruments, the United Nations Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 19 contained three relevant paragraphs on the relationship between gender, migration and trafficking:

14. Poverty and unemployment increase opportunities for trafficking in women. In addition to established forms of trafficking there are new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries, and organized marriages between women from developing countries and foreign nationals. These practices are incompatible with the equal enjoyment of rights by women and with respect for their rights and dignity. They put women at special risk of violence and abuse. 15. Poverty and unemployment force many women, including young girls, into prostitution. Prostitutes are especially vulnerable to violence because their status, which may be unlawful, tends to marginalize them. They need the equal protection of laws against rape and other forms of violence. 16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.⁴²

The breakthrough is represented by CEDAW General Recommendation No. 38, adopted in November 2020, which interprets Article 6 of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Article 6 CEDAW states that ‘States Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ CEDAW is binding for ratifying States (189⁴³), meaning States have legal obligations they must abide by.⁴⁴ General Recommendation No. 38 is a non-binding legal instrument; however, when it reproduces obligations enshrined in other normative texts, it confirms already existing obligations for States that ratified the relevant conventions.

1.3. Interpretation of the expression ‘traffic in women and exploitation of prostitution of women’ according to the Vienna Convention on the Law of Treaties, including the negotiating process of CEDAW

Article 6 refers to the expression ‘traffic in women and exploitation of prostitution of women’ without explaining its meaning. In order to interpret provisions of an international treaty, the 1969 Vienna Convention on the Law of the Treaties (VCLT) remains the fundamental legal instrument to refer to. According to Article 31(1) VCLT: ‘A treaty shall be interpreted in good faith in accordance with the *ordinary meaning* to be given to the terms of the treaty in their *context* and in the light of *its object and purpose*’.⁴⁵ International judicial

⁴¹ UNODC, *Abused and Neglected, A Gender Perspective on Aggravated Migrant Smuggling Offences and Response*, 2021 - available online at: https://www.unodc.org/documents/human-trafficking/2021/Aggravated_SOM_and_Gender.pdf [accessed on 14.01.2022].

⁴² General Recommendation No. 19, eleventh session, 1992 violence against women. Also, even though it clearly excluded cases of trafficking, General Recommendation No. 26 on women migrant workers contains many elements that are also relevant in situations where women migrants have been victims of trafficking.

⁴³ As of March 2022.

⁴⁴ To view the status of the Convention please consult the UN Treaty Body Database at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en [accessed on 14.01.2022].

⁴⁵ Emphasis added.

bodies quite often turn to dictionaries, general or more specialized ones, to grasp the ordinary meaning of the words included in a treaty.⁴⁶ In the case of the expression ‘traffic in women and exploitation of prostitution of women,’ the literal wording is not much helpful because the ordinary meaning of the words does not solve its inherent ambiguity. Hence, in the Oxford English Dictionary, traffic is defined as ‘the activity or business of acquiring, transporting, and selling something which, for legal or moral reasons, should not be treated as a mere commodity; trade of an illegal, immoral, or otherwise objectionable nature; cf. Trafficking.’ Exploitation is defined in the same dictionary as ‘[t]he action or fact of taking advantage of something or someone in an unfair or unethical manner; utilization of something for one's own ends.’ In the Stanford Encyclopedia exploitation is defined as follows: ‘To exploit someone is to take unfair advantage of them. It is to use another person’s vulnerability for one’s own benefit.’⁴⁷ Much more complex is when one searches for ‘exploitation of prostitution’ or ‘sexual exploitation’ in general databases of dictionaries: several entries appear, including sexual slavery, commercial sexual exploitation of children, and exploitation of labor, but not the one that is present in Article 6 CEDAW.⁴⁸ According to Article 31(1) VCLT the expression in Article 6 CEDAW must be interpreted in light of the object and purpose of the treaty. It is clear that the purpose of the treaty is to eliminate discrimination against women. Again, by looking at the object and purpose of the treaty, it is difficult to add something more to the expression enshrined in Article 6 CEDAW, because trafficking in persons and exploitation of prostitution represent forms of discrimination on the basis of sex, which have a disproportionate impact on women and girls.

To understand what ‘context’ is, one should turn to Article 31(2) VCLT, where it is written that it includes the preamble and the annexes, plus ‘(a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty; (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.’ As context, one should look at the punctuation and syntax. For example, in the *Aegean Sea Continental Shelf* case, the International Court of Justice had to deal with the French phrase ‘et, notamment,’ and explicitly pointed to the commas used.⁴⁹ What does the word ‘and’ in Article 6 CEDAW tell us? The grammatical conjunction ‘and’ introduces ‘a word, phrase, clause, or sentence, which is to be taken side by side with, along with, or in addition to, that which precedes it.’⁵⁰ In English ‘and’ is cumulative. In any event, as the International Court of Justice has stressed, ‘the Court cannot base itself on a purely grammatical interpretation of the text.’⁵¹ In the contextual interpretation, it is also useful, as stressed by legal scholarship, to compare ‘the term in question with the analogous wording of a related treaty.’⁵² In the case under analysis here, there was an analogous wording, indeed, the one of the 1949 Convention for the Suppression of the Traffic in Persons

⁴⁶ O. Dörr, *Article 31*, in O. Dörr and K. Schmalenbach (eds), *Vienna Convention on the law of the treaties, a Commentary*, 2nd ed., Springer, 2018, p. 581.

⁴⁷ Definition of “Exploitation” in *Stanford Encyclopedia of Philosophy*, available online at: <https://plato.stanford.edu/entries/exploitation/> [accessed 14.01.2022].

⁴⁸ Research conducted using Yewno Discover in December 2021.

⁴⁹ *Aegean Sea Continental Shelf (Greece v. Turkey)*, judgment of 19 December 1978, paras. 50 ff. Dörr, p. 582.

⁵⁰ *Oxford English Dictionary*, entry ‘and’.

⁵¹ *Aegean Sea Continental Shelf*, cit., para. 55.

⁵² Dörr, cit., p. 584.

and of the Exploitation of the Prostitution of Others⁵³ with the only change of the words ‘persons’ and ‘others’ with women. As it was argued, ‘when the Convention was drafted, these issues were already addressed in international treaties, specifically the 1949 Convention on the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others;’ and ‘due to the existing coverage under international law, the Convention drafters believed that trafficking needed only brief mention.’⁵⁴

In addition to the aforementioned means of interpretation, Article 31(3) VCLT states that: ‘There shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules of international law applicable in the relations between the parties.’ As it was argued, Article 31(3)

‘requires taking account of subsequent developments, agreements between the parties and practice in applying the treaty, and thus seems to focus on the current consensus of the parties in understanding the treaty. That consensus, which exists at the time of interpretation, may in some cases even override the original understanding of the text of the treaty, which prior to the subsequent developments may have appeared perfectly clear.’⁵⁵

Let us start with Article 31(3)c, because the legal definition of trafficking has evolved thanks to the 2000 Trafficking in Persons Protocol, to encompass trafficking for the purpose of a wide range of exploitative labor practices beyond exploitation of prostitution. Hence, there was an evolution of the first part of the expression in Article 6 CEDAW as linked to exploitation of prostitution. However, it was contented that there is not a common interpretation of trafficking in persons across national jurisdictions, and that some countries have interpreted the crime widely, for example by viewing any involvement in voluntary prostitution as human trafficking.⁵⁶ Hence, according to these scholars, the definition of trafficking is still obscure. With regard to letter b), subsequent practice can include the practice of the organization concerned. In the case of CEDAW, one could argue that the point of reference is the practice of the UN Member States. However, this practice is extremely varied. One could also consider the work of the CEDAW Committee, even though the Committee can only issue guidance and interpretation of the Convention as a monitoring mechanism.. With regard to the concluding observations by the CEDAW Committee, the practice shows that the Committee has provided ‘at times inconsistent, interpretations of Article 6 vis-à-vis the issue of prostitution.’⁵⁷ The Committee members have had divergent views on whether States parties should seek abolition of all forms of prostitution or just the exploitation of it, whatever the meaning of the latter. For example, in the 2020 concluding observations on Pakistan, the Committee confirmed its broad view of trafficking – not only for sexual exploitation but also for

⁵³ The Convention was considered to have fallen into *desuetude*. A. Gallagher, *The International Law on Human Trafficking* cit.,p. 62. The Convention was criticised by scholars and also by the Special Rapporteur on Violence against Women back to 2000 (R. Coomaraswamy, UN Doc. E/CN.4/2000/68, at para. 22): ‘The 1949 Convention has proved ineffective in protecting the rights of trafficked women and combating trafficking. The Convention does not take a human rights approach. It does not regard women as independent actors endowed with rights and reason; rather, the Convention views them as vulnerable beings in need of protection from the “evils of prostitution”.’

⁵⁴ M.A. Freeman, C. Chinkin, B. Rudolf, *Article 6*, in M.A. Freeman, C. Chinkin, and B. Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination Against Women. A Commentary*, OUP, 2012.

⁵⁵ Dörr, cit., p. 561.

⁵⁶ For the ambiguity of the definition of human trafficking, see J. Allain, *The Law and Slavery*, Brill, 2015, p. 265 ff. V. Stoyanova, *Human Trafficking and Slavery Reconsidered*, CUP, 2017.

⁵⁷ *Ibid.*

forced labor and forced marriage,⁵⁸ while making no reference to prostitution. In the concluding observations on Moldova, there is a comment on State laws on prostitution, recommending the State decriminalize women in prostitution and eliminate stigma and discrimination against women and girls in prostitution.⁵⁹ In the concluding observations on Russian Federation, the Committee recommended that the State party ‘(e) Provide exit programmes and alternative income-generating opportunities for women who wish to leave prostitution; (f) Adopt measures to reduce the demand for prostitution, including by carrying out educational and awareness-raising measures targeting the general public, in particular men and boys, with a focus on combating all forms of subordination and objectification of women.’⁶⁰ In many recommendations for States Parties, or in the constructive dialogues phase, the Committee has included a request for the adoption of measures to discourage and/or reduce the demand for prostitution.⁶¹

When the meaning of an expression included in the treaty is obscure, as it is in the case of Article 6 CEDAW, the interpreter should turn to the preparatory works, which have a supportive role in treaty interpretation. In other words, only once the application of the whole Article 31 fails to provide clarity, the interpreter can use the *travaux préparatoires*. It can be surprising at first sight that to Article 6 CEDAW (former Article 7 in one of the first versions of the draft convention) has not had much debate during the negotiations. It was placed in Part I (former general provisions) of the Convention and phrased as it is today from the very beginning. Reading hundreds of pages of *travaux préparatoires* is always a good exercise to know the negotiating history of an international convention. On Article 6 (former Article 7 in the *travaux préparatoires*), there was not the extensive and time-consuming debate that one can imagine. In the 1974 Draft report of the Commission of the status of women at its twenty-fifth session, the rapporteur, Mrs. Ruda Mohammed, reported on the topic ‘exploitation of labor through illicit and clandestine trafficking.’⁶² The topic was related to migration and labor, hence the activity of the International Labor Organization was widely mentioned. Nonetheless, there was a paragraph which clearly situates the debate in the international legal framework at that time: ‘The importance of full implementation of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others adopted by the General Assembly on 2 December 1949 was also stressed and it

⁵⁸ Concluding observations on the fifth periodic report of Pakistan, adopted by the Committee at its seventy-fifth session (10-28 February 2020), para. 33.

⁵⁹ Concluding observations on the sixth periodic report of the Republic of Moldova, adopted by the Committee at its seventy-fifth session (10-28 February 2020), para. 25.

⁶⁰ Concluding observations on the ninth periodic report of the Russian Federation, adopted by the Committee at its eightieth session (18 October to 12 November 2021), para. 29.

⁶¹ See, for example, Concluding observations on the sixth periodic report of Lebanon, adopted by the Committee at its eighty-first session (7–25 February 2022), CEDAW/C/LBN/CO/6, 1 March 2022, para. 28; Concluding observations on the combined eighth and ninth periodic reports of Uganda, adopted by the Committee at its eighty-first session (7–25 February 2022), CEDAW/C/UGA/CO/8-9, 1 March 2022, para. 28; Concluding observations on the sixth periodic report of Uzbekistan, adopted by the Committee at its eighty-first session (7–25 February 2022), CEDAW/C/UZB/CO/6, 1 March 2022, para. 23; Concluding observations on the fifth periodic report of Kyrgyzstan, adopted by the Committee at its eightieth session (18 October to 12 November 2021), CEDAW/C/KGZ/CO/5, 29 November 2021, para. 23.

⁶² E/CN.6/L.660/Add. 10, 31 January 1974.

was emphasized that the reporting system relating to that Convention should be maintained.’⁶³ The Secretary-General reported on the Draft Convention on the Elimination of Discrimination against Women in September 1977, outlining that Austria ‘drew attention on a certain parallelism’ of the rule under the then Article 7 (later 6) ‘with the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.’⁶⁴ Among the few amendments proposed to the draft article, Belgium at the 638. meeting suggested that ‘and attacks on the physical integrity of women’ should be added at the end of the sentence,⁶⁵ and Denmark recommended the proposal include the adjective ‘illicit’ before traffic.⁶⁶ Both proposals had been withdrawn. In the 1977 report of the working group of the whole on the drafting of the Convention on the elimination of discrimination against women, the discussion on former Article 7 (what is now Article 6) was communicated. Two amendments had been submitted. Argentina wanted to replace ‘each State party agrees to take all appropriate measures’ by ‘state parties undertake to adopt all appropriate measures.’⁶⁷ The Netherlands suggested that ‘exploitation of prostitution of women’ should have been replaced by ‘exploitation of women, in particular through prostitution,’ which was later withdrew. The representative of Romania highlighted the importance of considering other forms of exploitation, such as exploitation by the media. The final version adopted by consensus was the one proposed by Argentina, ‘the State Parties shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’ At the 9. meeting of the working group, the legal officer gave explanation of the relationship between Article 7 of the draft and the relevant articles of the Convention for the Suppression of the Traffic in Persons and of the Exploitation of Prostitution of the Others.⁶⁸

The rules on interpretation in international law lead to the following conclusions:

- Trafficking in persons has developed as a concept thanks to the 2000 Trafficking in Persons Protocol, which encompasses, among the purposes of the crime, not only exploitation of prostitution, but several forms exploitation, including forced marriages, forced domestic labor, etc. This is confirmed by the work of the CEDAW Committee in its concluding observations.

- Exploitation of prostitution is one of the *purposes* of the crime of trafficking, as it emerges from the Trafficking in Persons Protocol.⁶⁹

⁶³ Ibid, para. 6. At that time, the Commission also requested Mrs Warzazi to pay particular attention to ‘young women victims of clandestine traffic and to the plight of young girls and women who are lured into lives of prostitution by false promises of overseas jobs’ (para. 10).

⁶⁴ A/32/218, 21 September 1977, Report of the Secretary-General, para. 50.

⁶⁵ E/CN.6/591/Add.1. In the report of the 1975 World Conference of the International Women’s Year, States were encouraged to take special measures to combat prostitution and the illicit traffic of women (E/CONF.66/34, paras 159).

⁶⁶ E/CN.6/591.

⁶⁷ A/C.3/32/L.59, 6 December 1977, Report of the working group as a whole on the drafting of the Convention on the elimination of discrimination against women, paras. 111 ff.

⁶⁸ Ibid. Reference was also made in the part on the historical developments of the Convention (A/C.3/33/WG.1/CRP.1, 2 October 1978, para. 2).

⁶⁹ According to an author, ‘the definition of human trafficking captures deceptive or coercive processes, not the actual exploitation,’ and ‘if the contrary were to be correct, the clarification about prostitution would hardly make any sense’; in other words, ‘if States are free to adopt their own approaches to prostitution, including perceiving all prostitution as inherently abusive [,,] then the coercive conditions in the destination country must be irrelevant.’ V. Stoyanova, *Human Trafficking*, cit., p. 60. In practice, however, as the author argues (p. 61), it is much more complex, because of the indeterminacy as to the levels of coercion and deception involved, and because of the fact that ‘for the purpose of exploitation’ is an indispensable element

- As Article 6 was originally conceived in the negotiating process, it combines trafficking of women *and* exploitation of prostitution as an inseparable sentence. Given the obscure meaning of the provision as it is phrased – ‘traffic’ and ‘exploitation’ – in the CEDAW, and the practice of the CEDAW Committee, it was necessary to go back to the *travaux préparatoires*, where the connection between the two elements is undeniable.

The topic that has been addressed in these pages is extremely sensitive. Whether ‘trafficking’ encompasses ‘non-coerced prostitution’ ‘remains actively debated’ indeed.⁷⁰ States have endorsed very different approaches on prostitution: a) criminalization; b) decriminalization; c) legalization/regulation of prostitution, d) addressing the demand side and taking measures to reduce the demand side.⁷¹ Feminist scholarship is also divided.⁷²

1.4. Trafficking against women and girls and exploitation of prostitution as a violation of human rights and violence against women and girls

Trafficking in women and girls and exploitation of prostitution are transnational crimes,⁷³ and as such they must be addressed through the adoption of a series of preventive, protective and repressive measures.

Transnational crimes are violations of law that involve more than one country in their planning, execution, or impact. These offenses are distinguished from other crimes in their multinational nature, which poses unique problems in understanding their causes, developing prevention strategies, and in mounting effective adjudication procedures. Transnational crimes can be grouped into three broad categories involving provision of illicit goods (drug trafficking, trafficking in stolen property, weapons trafficking, and counterfeiting), illicit services (commercial sex and human trafficking), and infiltration of business and government (fraud, racketeering, money laundering, and corruption) affecting multiple countries.⁷⁴

of the definition of human trafficking but without understanding as to the meaning of exploitation. The author highlights the indeterminacy of the crime of human trafficking and that there are clear standards against which abuses can be qualified slavery, servitude or forced labour.

⁷⁰ Freeman and others, cit.

⁷¹ Ibid. See also the report European Parliament, *Sexual exploitation and prostitution and its impact on gender equality*, 2014, [https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET\(2014\)493040_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/etudes/join/2014/493040/IPOL-FEMM_ET(2014)493040_EN.pdf). As the European Court of Human Rights has stated, there is no consensus at European level on prostitution: see *V.T. v. France, judgment of 11 September 2007*.

⁷² The sexual domination/radical position (supported by scholars such as Kathleen Barry, Katherine McKinnon, Carole Pateman) from the sex work/liberal position (scholars such as Laura Agustín). See also the debate during the drafting of the Trafficking in Persons Protocol in V. Stoyanova, *Human Trafficking*, cit., p. 62 ff.

⁷³ According to Article 4 of the 2000 Trafficking in Persons Protocol: ‘This Protocol shall apply, except as otherwise stated herein, to the prevention, investigation and prosecution of the offences established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organized criminal group, as well as to the protection of victims of such offences.’ In the *Model Law against Trafficking in Persons* prepared by UNODC, although Article 4 limits its applicability to offences that are transnational in nature and involve an organized criminal group, these requirements are not part of the definition of the offence and therefore national laws should establish trafficking in persons as a criminal offence, independently of the transnational nature or the involvement of an organized criminal group. The scope of the Council of Europe Anti-Trafficking Convention is clearly meant to include ‘all forms of trafficking in human beings, whether national or transnational, whether or not connected with organized crime’ (Article 2).

⁷⁴ J. S. Albanese, *Transnational Crime*, Sitter Publications, 2005, <https://www.oxfordbibliographies.com/view/document/obo-9780195396607/obo-9780195396607-0024.xml> [accessed 14.01.2022].

Trafficking in women and girls and exploitation of prostitution constitutes a violation of human rights, as stressed in the preambles of the Council of Europe Convention on Action against Trafficking in Human Beings,⁷⁵ of the ASEAN Convention against Trafficking in Persons, especially Women and Children,⁷⁶ and in the Recommended Principles and Guidelines on Human Rights and Human Trafficking ('Recommended Principles and Guidelines').⁷⁷ Trafficking violates numerous rights and freedoms, including, among others, the prohibition of discrimination on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status, the right to life, the right to liberty and security, freedom from slavery, servitude, forced labour or bonded labour, the right not to be subjected to torture and/or cruel, inhuman, degrading treatment or punishment, freedom from violence; the right to freedom of movement, the right to the highest attainable standard of physical and mental health and reproductive rights, the right to just and favourable conditions of work, the right to an adequate standard of living, the right to social security. Trafficking in women and girls and exploitation of prostitution constitute forms of violence against women and girls, as stressed by CEDAW Recommendation No. 38.⁷⁸ According to the Istanbul Convention, endorsing a well consolidated definition of violence against women at the international level, violence against women is:

a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life (Article 3(a)).

Trafficking and exploitation of prostitution disproportionately affect women and girls, they result in physical, sexual, psychological or economic harm or suffering to women, including deprivation of liberty. Trafficking for the purposes of sexual exploitation has been identified as a form of 'gender-related violence' and a form of persecution also in the *Guidelines on Gender-Related Persecution within the context for Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (Gender Guidelines):⁷⁹

Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination.⁸⁰

⁷⁵ *Council of Europe Convention on Trafficking in Human Beings*, Warsaw, 16 May 2005, CETS No. 197.

⁷⁶ *ASEAN Convention against Trafficking in Persons, especially Women and Children*.

⁷⁷ The Recommended Principles and Guidelines on Human Rights and Human Trafficking are included as an addendum to a report to the Economic and Social Council (E/2002/68/Add.1).

⁷⁸ GR No. 38, para. 10.

⁷⁹ UNHCR, *Guidelines on Gender-Related Persecution within the context for Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002.

⁸⁰ *Ibid.*, para. 18.

In these interpretative guidelines to the GR No. 38, it is also argued that trafficking and exploitation of prostitution in women and girls is a form of violence against women's health.⁸¹ It is, in other words, an issue of reproductive justice. Evidence on the effects of trafficking on health and human rights is limited, and it is focused on the impact of sexual exploitation almost exclusively. However, as the WHO highlighted, 'at each stage, women, men and children may encounter psychological, physical and/or sexual abuse; forced or coerced use of drugs or alcohol; social restrictions and emotional manipulation.'⁸² Their health is affected both on the psychological level (including self-harm, lack of self-esteem, shame, guilt, helplessness, memory loss, post-traumatic stress disorder, sleep disturbances, depression, isolation, alcohol abuse or abuse of other drugs, and many more), and on a physical and sexual level (for example, chronic pain, fatigue, deterioration of pre-existing conditions, reproductive or sexual health complications, among others).⁸³ In a 2016 study by the European Commission, the analysis showed that many of the harms arising from trafficking for sexual exploitation are gender-specific, including vaginal injuries, increased risk of sexually transmitted diseases and HIV and unwanted pregnancies.⁸⁴

At the same time, however, violence against women and girls might also create conditions of vulnerability that can be exploited by traffickers. When a woman tries to escape gender-based violence in her country of origin, she finds herself in a position of vulnerability that can be exploited by criminal organisations on her way to a country of destination.

BINDING LEGAL INSTRUMENTS ON VIOLENCE AGAINST WOMEN

1979 Convention on the Elimination of All Forms of Discrimination against Women (the CEDAW Convention) as interpreted by General Recommendations No. 19 and No. 35

1994 Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)

2003 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)

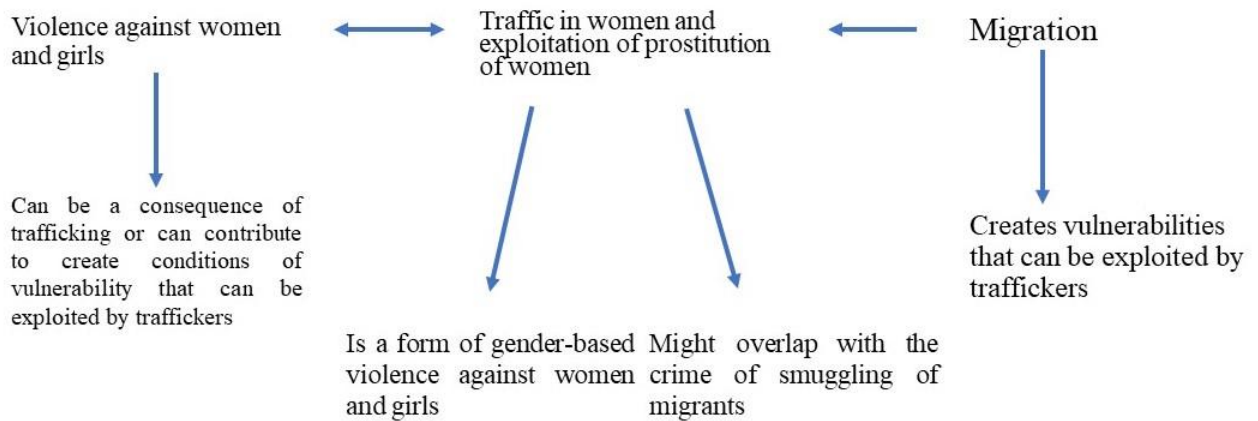
2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

⁸¹ S. De Vido, *Violence against Women's Health in International Law*, Manchester University Press, June 2020.

⁸² WHO and Pan American Health Organization, *Understanding and Addressing Violence against Women*, 2012, p. 2.

⁸³ EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 14, quoting Zimmerman, C., Hossain, M. and Watts, C. (2011), *Human trafficking and health: A conceptual model to inform policy, intervention and research*, in "Social Science and Medicine", 73(2), p. 327-335.

⁸⁴ European Commission (2016), *Study on the Gender Dimension of Trafficking in Human Beings*, Luxembourg, p. 35.



1.5. The work of CEDAW in countering trafficking and exploitation of prostitution in women and girls

The Committee on the Elimination of Discrimination against Women (CEDAW) is a United Nations human rights treaty body established by Article 17 of Convention on the Elimination of All Forms of Discrimination against Women.

Human rights treaty bodies are treaty-based and composed of independent experts. They assess the progress made by State parties in the implementation of treaty obligations. Each treaty body is invested with various tools to assist State parties in the compliance with the convention of which the body is guardian, including consideration of State reports, issuance of general comments, conduct of inquiries, and individual communication procedures (against states that have specifically accepted the competence of the treaty body in that respect).⁸⁵

The CEDAW Committee is composed of 23 experts on women’s rights nominated by their governments and elected by the State parties as individuals ‘of high moral standing and competence in the field covered by the Convention.’ Under Article 18 CEDAW:

States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect: (a) Within one year after the entry into force for the State concerned; (b) Thereafter at least every four years and further whenever the Committee so requests.

Reports are aimed at identifying factors and difficulties in the implementation of the Convention. The Committee presents its concluding observations, which highlight positive steps to be taken and gaps to be filled in the compliance with the convention, and they include recommendations to states. Trafficking is a chapter of the concluding observations. Just to make an example, in concluding observations adopted in 2020, the Committee noted that ‘new forms of trafficking in persons within and from the State party are on the rise,

⁸⁵ D. Moeckli, S. Shah, S. Sivakumaran, D. Harris (Eds.), *International Human Rights Law*, Third Edition, Oxford University Press, December 2017, p. 387 ss.

such as trafficking in women and girls by using the status of asylum seekers.’ It also stressed the lack of rehabilitation services for victims of trafficking for purposes of sexual exploitation and forced labour, and the lack of early identification and referral of victims of trafficking to appropriate services.⁸⁶

The Committee also elaborates general recommendations,⁸⁷ which contribute to the interpretation of the treaty provisions. General recommendations address issues that are not expressly covered by the Convention – landmarks were GR No. 19 and 35 which defined violence against women and brought it under the terms of the treaty⁸⁸ – and they also interpret treaty provisions. They are useful to specify obligations States must abide by and to detect state practice.

Under the Optional Protocol to the Convention, the Committee can also receive individual communications and initiate inquiries into situations of grave or systematic violations of women’s rights against States that ratified the Protocol. The procedures are optional, meaning that they are available only where the State concerned accepted them.⁸⁹

1.6. General Recommendation No. 38

On 6. November 2020 the UN Committee on the Elimination of All Forms of Discrimination against Women (CEDAW Committee) adopted the General Recommendation n. 38 on trafficking in women and girls in the context of global migration. The Recommendation is not legally binding, and its purpose is to interpret Article 6 CEDAW.

The Recommendation was preceded, following the usual procedure, by a call for comments to which numerous States, UN bodies and members of civil society have answered. The number of answers to the call (more than 150, including 21 States), demonstrates the high level of interest for this issue. The Recommendation is divided into two parts: the first part contains the objectives of the document, the legal framework of reference, the causes of trafficking in women and girls, the assistance and protection for women and girls victims of trafficking, their access to justice; the second part, very articulated, contains a list of recommendations. In the first part of the Recommendation, trafficking in the context of migration is contextualised: migrant women and girls are particularly vulnerable and exposed to being intercepted by criminals for the purpose of exploitation. Furthermore, the restrictive conditions imposed by States on migration and asylum determine migrants to turn to irregular channels.⁹⁰ The CEDAW Committee acknowledges that trafficking and exploitation of prostitution represents a ‘form of gender-based violence,’ stemming from structural discrimination against women and ‘often exacerbated in the contexts of displacement, migration, the increased globalization of economic

⁸⁶ *Concluding observations on the sixth periodic report of the Republic of Moldova*, CEDAW/C/MDA/6, Adopted by the Committee at its seventy-fifth session, 10–28 February 2020, para. 24.

⁸⁷ Other human rights treaty-based bodies call them ‘general comments’.

⁸⁸ CEDAW, *General Recommendation No. 19: Violence against women*, Eleventh session, 1992, contained in document A/47/38 and *General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19*, CEDAW/C/GC/35, 26 July 2017.

⁸⁹ Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women, 6th October 1999 (2131 UNTS 83), OXIO 22. Oxford Public International Law (<http://opil.ouplaw.com>).

⁹⁰ GR No. 38, para. 5.

activities, including global supply chains, the extractive and offshore industry, militarization, foreign occupation, armed conflict, violent extremism and terrorism.⁹¹ In a key passage, the CEDAW Committee recognises the role of ICT, social media and ‘apps’ in ‘the recruitment of women and girls and their exploitation’ and underlines that trafficking must be understood not only as physical violence or deprivation of liberty, but also as the abuse of a position of vulnerability or abuse of power, considering that the victims are often subject to different forms of exploitation.⁹²

In terms of responses to trafficking, criminalisation, although fundamental, is not able alone to contrast the phenomenon, unless accompanied by measures aiming at identifying, facing and eliminating the root causes of trafficking, including systemic gender-based discrimination, situations of conflict and humanitarian emergencies, discrimination patterns in migration and asylum regimes, the demand that fosters exploitation and leads to trafficking in human beings.⁹³ Particularly relevant is the way in which the risks of trafficking in human beings amplify exponentially in the context of migration – both in transit, and in the reception and the accommodation facilities, at borders and in destination countries.⁹⁴ The risk is especially high for unaccompanied minors, or children separated from their families for whatever reason. In addition, the CEDAW Committee notes how the problem of trafficking in human beings manifests also in the absence of a gender dimension of migration - in other words, in the absence of considerations on how structural discrimination based on gender has an impact on the conditions of migrant women and girls:⁹⁵ Gender neutral norms concerning migration, far from being an expression of equality, have instead a disproportionate impact on women, who often obtain a visa only because they are legally dependent on their employer or husband, or are unable to obtain it because they lack the mandatory minimum income, a situation determined by discrimination regarding labour and occupation in the country of origin.⁹⁶

Also, the persisting stereotypes on male domination, the patriarchal conception of gender-related roles, coercion and control, the perception of women as inferior and weak must be considered causes of trafficking in human beings.⁹⁷

With regard to modern technologies, the phenomenon has intensified during the COVID-19 pandemic, which determined the increase of ‘cyber’ means in recruiting women and girls for online sexual exploitation and a rising demand of pornographic materials showing the sexual exploitation of minors.⁹⁸ As pointed out by the CEDAW Committee, ‘realities of trafficking in women and girls now extend well beyond the offline world, pointing to recent trends of trafficking in cyberspace. The development of social media and chat apps to gain

⁹¹ Ibid, para. 10.

⁹² Ibid, para. 12.

⁹³ Ibid, paras. 18 and 19.

⁹⁴ Ibid, paras. 22-24.

⁹⁵ On the vulnerability of migrant women see F. Ippolito, *Understanding Vulnerability in International Human Rights Law*, Napoli, Editoriale Scientifica, p. 383.

⁹⁶ GR No. 38, paras. 26-27.

⁹⁷ Ibid, paras. 29-30.

⁹⁸ Ibid, para. 37.

easy access to potential victims when traffickers cannot use more traditional ways to recruit women and girls for sexual exploitation during COVID-19 lockdowns was alarming.’⁹⁹

The recommendations that conclude the document are divided into: management of the root causes of traffic in women and girls; the protection of victims’ rights; gender-sensitive judicial proceedings; data gathering and legal, political and institutional framework; dissemination and reporting activities; treaty ratification.

GR No. 38 calls upon States:

- To improve victim identification, support and protection services
- To investigate, prosecute and convict all perpetrators involved in the crime
- To bring perpetrators to justice and secure adequate financial remedies for victims
- To acknowledge that trafficking and exploitation of prostitution constitute gender-based violence
- To address the demand side that leads to trafficking in women and girls.¹⁰⁰

1.7. Scope and purpose of the guidelines (and legal status)

The scope of these guidelines is to complement the text of the General Recommendation No. 38, providing some guidance on its application by both States and non-State actors. It will be based on existing practice and will further elaborate the recommendations already included in GR No. 38.

As for their legal nature, these guidelines are not encapsulated in an international or regional treaty and therefore they do not create legal obligations for States and non-State actors. Nonetheless, the guidelines are not devoid of legal significance. As it will be more specifically emphasised, the guidelines: a) can be based on established customary rules¹⁰¹ which are binding for all States, including those related to the protection of human rights and fundamental freedoms; b) can be based on provisions of agreements in force. In as much as these guidelines reproduce existing legal obligations for States, they are themselves a source of legal obligations for States. These guidelines also establish a framework for State practice that might contribute to the development of customary law.

1.8. Definitions

The definitions of the main concepts, which are provided in alphabetical order, are based on the IOM glossary for migration,¹⁰² the CEDAW Convention, the Trafficking in Persons Protocol, the Istanbul Convention and

⁹⁹ UN Committee calls for crackdown on trafficking of women and girls in digital age, 11 November 2020, available at <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26491&LangID=E> [last accessed on 1. February 2022]. See also below, part II, A. 2, letter c) ‘addressing the use of digital technology in trafficking.’

¹⁰⁰ Dalia Leinarte, presentation at the side event during the 21st Global Alliance Conference on *Trafficking of Women and Girls in the Context of Global Migration: General Recommendation 38 of the UN Committee on the Elimination of Discrimination against Women (CEDAW)*. The side event was organized by the Office of the High Commissioner for Human Rights and the OSCE Secretariat Gender Issues Programme, in partnership with the Office of the OSCE Special Representative and Co-ordinator for Combating Trafficking in Human Beings.

¹⁰¹ Article 38 of the *Statute of the International Court of Justice*.

¹⁰² IOM – UN Migration, *Glossary on Migration*. International Migration Law, available online at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf [accessed on 14.01.2022].

the UN General Assembly Declaration on Violence Against Women,¹⁰³ the Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking elaborated by the Office of the United Nations High Commissioner for Human Rights.¹⁰⁴

1.8.1. Asylum seeker

An individual who is seeking international protection. In countries with individualised procedures, an asylum seeker is someone whose claim has not yet been finally decided on by the country in which he or she has submitted it. Not every asylum seeker will ultimately be recognized as a refugee, but every recognized refugee is initially an asylum seeker.¹⁰⁵ The Recommended Principles and Guidelines, Commentary, highlighted that ‘asylum claims should be considered on their substantive merits and not on the basis of the applicant’s means of entry. In practical terms this means that all persons, including both smuggled migrants and trafficked persons, should be given full opportunity (including through the provision of adequate information) to make a claim for asylum or to present any other justification for remaining in the country of destination on that basis.’¹⁰⁶

1.8.2. Gender-based violence against women

In the Council of Europe Istanbul Convention, gender-based violence against women is defined in Article 3 (d):¹⁰⁷ ‘gender-based violence against women shall mean violence that is directed against a woman because she is a woman or that affects women disproportionately.’ Gender-based violence against women is also the expression used in CEDAW General Recommendation No. 35.

Trafficking and exploitation of prostitution is a form of violence against women and a violation of the norm prohibiting discrimination on the basis of sex, as acknowledged by the Recommended Principles and Guidelines, Commentary.¹⁰⁸

1.8.3. Trafficking in persons

Under the Protocol (Article 3(a)): ‘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

¹⁰³ Declaration on the Elimination of Violence against Women, proclaimed by General Assembly resolution 48/104 of 20 December 1993.

¹⁰⁴ UN, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Commentary, 2010.

¹⁰⁵ United Nations High Commissioner for Refugees, *Master Glossary of Terms*, 2006.

¹⁰⁶ Recommended Principles and Guidelines, Commentary, p. 88.

¹⁰⁷ See also below, violence against women.

¹⁰⁸ Recommended Principles and Guidelines, Commentary, p. 39.

forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁰⁹ The definition was also endorsed by the Council of Europe Convention on Action against Trafficking in Human Beings¹¹⁰ and the ASEAN one.¹¹¹

1.8.4. Migrant

According to the IOM glossary, migrant is ‘an umbrella term, not defined under international law, reflecting the common lay understanding of a person who moves away from his or her place of usual residence, whether within a country or across an international border, temporarily or permanently, and for a variety of reasons. The term includes a number of well-defined legal categories of people, such as migrant workers; persons whose particular types of movements are legally defined, such as smuggled migrants; as well as those whose status or means of movement are not specifically defined under international law, such as international students.’ No universal definition for migrants exists that was accepted at the international level. IOM endorses the broad definition.

1.8.5. Refugee

According to the 1951 Convention (Article 1(A)2):

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

A claim for international protection in the case of trafficking can arise for example: (i) Where the victim has been trafficked to a country other than her/his own and seeks the protection of the host State; or (ii) Where the victim, fearing trafficking or having already been trafficked within her or his own country, manages to escape and flee to another country in search of protection.¹¹²

1.8.6. Sex-based discrimination

¹⁰⁹ See the definitions in Recommended Principles and Guidelines, Commentary, pp. 33-36.

¹¹⁰ *Council of Europe Convention on Action against Trafficking in Human Beings*, Art. 4: ‘Trafficking in human beings’ 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.’

¹¹¹ *ASEAN Convention against Trafficking in Persons, Especially Women and Children*, Art. 2.a: ‘“Trafficking in persons” shall mean the recruitment, transportation, transfer, harbouring or reception 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;’

¹¹² Recommended Principles and Guidelines, Commentary, p. 69.

CEDAW defines discrimination against women as ‘any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.’ (Article 1).

In General Recommendation No. 28, CEDAW highlighted how states must guarantee that there is neither direct nor indirect discrimination against women.

Direct discrimination against women constitutes different treatment explicitly based on grounds of sex and gender differences. Indirect discrimination against women occurs when a law, policy, programme or practice appears to be neutral in so far as it relates to men and women, but has a discriminatory effect in practice on women because pre-existing inequalities are not addressed by the apparently neutral measure. Moreover, indirect discrimination can exacerbate existing inequalities owing to a failure to recognize structural and historical patterns of discrimination and unequal power relationships between women and men.¹¹³

Trafficking constitutes a violation of international law because it is contrary to the international prohibition on sex-based discrimination.¹¹⁴

1.8.7. Sexual exploitation

Sexual exploitation has no consolidated definition at the international level. As highlighted in the specific UNODC report on the topic, ‘the concept of exploitation as it relates to trafficking appears to be broadly consistent with its general meaning of one person taking unfair advantage of another person, their vulnerability or their situation.’¹¹⁵ The report also adds that ‘the core essence¹¹⁵ of trafficking-related exploitation is accepted to apply to both sexual exploitation and exploitation of another person’s labour. However, there is much less certainty at the edges, particularly in relation to the parameters of the concept; the scope and substance of individual practices deemed ‘exploitative’; and the criteria for determining other practices that could or should be included.’¹¹⁶

Exploitation can have a positive, neutral or pejorative meaning. The word entered the English language during the epoch which Eric Hobsbawm has dubbed the ‘age of capital’.¹¹⁷ It is traditionally connected to Karl Marx’s idea of exploitation as a ‘feature of all modes of production based around a social division of classes.’¹¹⁸ As it was reported, in international legal instruments ‘exploitation is always understood as a matter of pursuing gain at another’s unfair expense. While greater emphasis is placed in some contexts than in others on taking wrongful advantage of another person’s vulnerability, the core idea of treating someone as the instrument of one’s own ends is invariably there.’¹¹⁹

¹¹³ *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, para. 16.

¹¹⁴ *Recommended Principles and Guidelines, Commentary*, p. 39.

¹¹⁵ UNODC, *The Concept of ‘exploitation’ in the trafficking in persons protocol*, 2015, p. 39.

¹¹⁶ *Ibid.*

¹¹⁷ See the evolution of the word in an international context in S. Marks, *Exploitation as an International Legal Concept*, in S. Marks ed., “International Law on the Left”, Cambridge, Cambridge University Press, 2008, p. 284.

¹¹⁸ *Ibid.*, p. 286.

¹¹⁹ *Ibid.*, p. 300.

It has also highlighted the important point that these inequalities affect not only the extent, but also the forms of exploitation. Most obviously, women and girls are disproportionately exposed to exploitation for sex and domestic work. But which women and girls are disproportionately exposed? While the question of the ‘root causes’ of human trafficking is part of the debate, it cannot dispose of the much larger question of the socio-economic conditions in which this activity becomes possible and develops – not just as a category of transnational crime, but also, of course, as a branch of business.¹²⁰

An author used the word exploitation ‘to identify the root cause of the oppressive man-woman relationship;’¹²¹ ‘exploitation is a historical - and not a biological or psychological - category which lies at the basis of the man-woman relation. It was historically created by patriarchal tribes and societies.’¹²² What is important to note is that women’s exploitation meant as oppression is part of our societies and can take different forms: from sexual exploitation to economic exploitation (gender pay gap, for example).

During the negotiations for the Trafficking in Persons Protocol, the following definition was proposed: ‘Sexual exploitation’ shall mean: (i) of an adult [forced] prostitution, sexual servitude or participation in the production of pornographic materials for which the person does not offer himself or herself with free and informed consent; (ii) of a child, prostitution, sexual servitude or use of a child in pornography’.¹²³ The intention of the drafters was not to extend the definition of trafficking to prostitution or pornography *per se*.¹²⁴ The Interpretative Note to the Convention explained that the Protocol ‘is [...] without prejudice to how States parties address prostitution in their respective domestic laws.’¹²⁵ Compared to the Trafficking in Persons Protocol, General Recommendation No. 38 also addresses trafficking and exploitation of prostitution in the digital world, embracing the new forms of trafficking that have developed over the last years. It also stresses that ‘sexual exploitation persists due to States parties’ failure to effectively discourage the demand that fosters exploitation and leads to trafficking.’¹²⁶

The UN Secretary General introduced an operative definition of sexual exploitation in 2003, aimed at reducing violence committed by UN officials: ‘any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.’¹²⁷

In the Model law prepared by the UNODC, even though it is mentioned that the concept of sexual exploitation has been voluntarily left undefined in the UN Protocol, the following definition of sexual exploitation has been provided: ‘sexual exploitation shall mean the obtaining of financial or other benefits through the involvement

¹²⁰ Ibid., p. 301.

¹²¹ M. Mies, *Patriarchy and Accumulation on a World Scale: Women in the International Division of Labour*, London, Zed Books Ltd., 2014.

¹²² Ibid.

¹²³ Sixth Draft of the Trafficking Protocol, UN Doc. A/AC.254/4/Add.3/Rev.6, Apr. 4, 2000, at Art. 2(bis), Option 1.

¹²⁴ Gallagher, p. 38.

¹²⁵ *Travaux Préparatoires for the Organized Crime Convention and Protocols*, p. 347 (or Interpretative Notes A/55/383/Add.1, para. 64). Similar for the European Trafficking Convention Explanatory Report, para. 88: ‘[t]he terms “exploitation of the prostitution of others” and “other forms of sexual exploitation” are not defined in the Convention, which is therefore without prejudice to how States Parties deal with prostitution in domestic law.’

¹²⁶ GR No. 38, para. 30.

¹²⁷ Secretary-General’s Bulletin: Special Measures for Protection from Sexual Exploitation and Sexual Abuse, UN Doc. ST/SGB/2003/13, 9 October 2003.

of another person in prostitution, sexual servitude or other kinds of sexual services, including pornographic acts or the production of pornographic materials.’¹²⁸

In legal scholarship, Anne Gallagher stressed that ‘since the Protocol was concluded, several different definitions of “sexual exploitation” have emerged, confirming that many of the earlier controversies documented above are alive and well.’¹²⁹

The Recommended Principles and Guidelines, Commentary, added to established forms of trafficking, new forms of sexual exploitation, such as sex tourism, the recruitment of domestic labour from developing countries to work in developed countries and organized marriages between women from developing countries and foreign nationals.¹³⁰

1.8.8. Violence against women

In the Declaration on the Elimination of Violence against Women, proclaimed by General Assembly resolution 48/104 of 20 December 1993, violence against women was defined as follows:

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life. (Article 1)

Acts falling under the umbrella notion ‘violence against women’ are the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

The following year, General Recommendation No. 19 brought within the scope of CEDAW violence against women as a form of discrimination:

The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.¹³¹

General recommendation No. 35, updating general recommendation No. 19, endorses the concept of ‘gender-based violence against women’ as ‘a more precise term that makes explicit the gendered causes and impacts of the violence,’ and considers that ‘gender-based violence against women is one of the fundamental social,

¹²⁸ UNODC, *Model Law Against Trafficking in Persons*, available online at: https://www.unodc.org/documents/human-trafficking/UNODC_Model_Law_on_Trafficking_in_Persons.pdf [accessed 14.01.2022].

¹²⁹ Gallagher, p. 39. Stoyanova, cit., p. 57 ff.

¹³⁰ Recommended Principles and Guidelines, Commentary, p. 41.

¹³¹ GR No. 19, para. 6.

political and economic means by which the subordinate position of women with respect to men and their stereotyped roles are perpetuated.’¹³²

At regional level, the 1994 Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para) defines violence against women at its Article 2:

violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere.

The 2003 Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Women in Africa conceives ‘violence against women’ as all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during situations of armed conflicts or of war (Article 1, letter j).

According to Article 4(a) of the Council of Europe Istanbul Convention:

violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

1.9. Methodology

1.9.1. Human rights-based approach

These guidelines will be guided by a human rights-based approach.

The phenomenon of trafficking in women and exploitation of prostitution of women must be addressed both as a crime and as a human rights violation. A human rights-based approach, which was also endorsed by the 2002 *Recommended Principles and Guidelines on Human Rights and Human Trafficking elaborated by the Office of the United Nations High Commissioner for Human Rights*,¹³³ and its 2010 Commentary (‘Recommended Principles and Guidelines, Commentary’),¹³⁴ is a conceptual framework ‘that is normatively based on international human rights standards and operationally directed to promote and protect human rights.’¹³⁵ It means to integrate human rights into all aspects of the work. As showed in the 2010 Recommended Principles and Guidelines, Commentary, ‘international human rights law is also relevant in terms of directing or determining appropriate responses by States.’¹³⁶ A human rights-based approach means that every aspect of the national, regional and international responses to trafficking and exploitation of prostitution is founded on

¹³² GR No. 35, paras. 9-10.

¹³³ Text presented to the Economic and Social Council as an addendum to the report of the United Nations High Commissioner for Human Rights (E/2002/68/Add. 1).

¹³⁴ UN, *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, Commentary, 2010.

¹³⁵ UNODC, *Toolkit for Mainstreaming Human Rights and Gender Equality* 2021. See also OHCHR, *Human Rights and Human Trafficking*, 2014, Factsheet no. 36, p. 7.

¹³⁶ *Ibid.*, p. 38.

the rights and obligations established by international human rights law.¹³⁷ In particular, in terms of policies and programmes, the main objective should be to promote and protect rights, so that human rights are mainstreamed. A human rights-based approach also identifies rights holders (e.g. the victims of trafficking and exploitation of prostitution) and duty bearers (States, but also, whether relevant, non-State actors) and address the capacities of rights holders to secure their rights and duty bearers to meet their obligations. A human rights-based approach has guided GR No. 38 as well: ‘States parties’ primary obligation is to address trafficking in a way that respects, protects and fulfils the human rights of persons, particularly of marginalized groups.’¹³⁸

1.9.2 Gender-sensitive approach /gender perspective

These guidelines will also embrace a gender perspective.

A gender-sensitive approach takes into account the disproportionate impact of trafficking on women and girls. This approach does not underestimate the impact of trafficking on other genders, but it rather points out the dynamics of gender relations and acknowledge the subordinate role to which women have been relegated in history and societies.

The term ‘gender’ is not unknown in international legal instruments on trafficking. It appears, for example, in the Trafficking in Persons Protocol, at Articles 6 and 10.

Article 6 - Assistance to and protection of victims of trafficking in persons:

Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons, (...).

Article 10 - Information exchange and training:

States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. (...) The training should also take into account the need to consider human rights and child- and gender-sensitive issues (...).

Also, in the Council of Europe Convention on Action against Trafficking in Human Beings, Article 5 provides that:

Each Party shall promote a human rights-based approach and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2.

Article 17 – Gender equality:

Each Party shall, in applying measures referred to in this chapter, aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures.

EIGE explained what a gender perspective entails in the identification of trafficking victims and application and interpretation of criminal law:

Understanding the dynamics of violence against women, including the elements of power and control, the gradual impairment of the violent situation and the complexity of the aspects causing vulnerability to exploitation and

¹³⁷ Factsheet no. 36, op. cit., p.7.

¹³⁸ GR No. 38, para. 9.

violence, may assist the criminal justice practitioners to apply and interpret the definition of human trafficking and achieve convictions. [...] The analytical examination of the policies, legislation and measures against trafficking in human beings from the perspective of violence against women will also help to comprehend and manage the gap between the numbers of estimated and identified trafficking victims and the low number of investigations, prosecutions and convictions. Assessing the implementation of anti-trafficking legislation and its impact from a gender perspective also enhances the tailoring of future policy and legislative measures against trafficking in human beings.¹³⁹

A gender perspective was also endorsed by the *IACHR Principles on the human rights of all migrants, refugees, stateless persons and victims of human trafficking*. Under ‘Principle 8: Gender perspective and differentiated approach:’ ‘Migration laws and policies implemented by States must incorporate a gender perspective considering the specific risks’ persons face in the context of human mobility.¹⁴⁰

A gender perspective should inform all aspects of the response to trafficking in human beings, in order to appreciate the dynamics underlying the phenomenon, and providing effective responses.

1.9.3. Intersectionality/multiple forms of discrimination

The term ‘intersectionality’ was first introduced by Kimberlé Crenshaw in late 1980s, to stress the specific conditions of Black women in the US society. It is not a concept that only applies to marginalized groups, it is rather ‘an aspect of social organization that shapes our lives,’ and that ‘groups may be advantaged or disadvantaged by structures of oppression.’¹⁴¹ Nonetheless, it is commonly applied in situations of discrimination, and in particular with regard to women. Defined as an ‘analytical tool,’¹⁴² it has not always entered the legal reasoning of courts. Legal scholarship considered intersectionality as ‘a tool for interpreting human rights in general, and for violence against women in particular, consisting of an explicit interdisciplinary approach to the study of race, gender, class and other social categories of distinction.’¹⁴³ This concept, she argued, captures the ‘socio-structural nature of inequality.’¹⁴⁴ From a legal point of view, intersectionality can be used as ‘interpretative methodology’ for exploring international legal norms on violence against women,¹⁴⁵ and for ‘empowering these norms.’¹⁴⁶

The Inter-American Commission and Court of Human Rights referred to ‘multiple forms of discrimination’ in *I.V. v. Bolivia*.¹⁴⁷ In a case of forced sterilization of a Peruvian refugee, the Inter-American Commission

¹³⁹ EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 16.

¹⁴⁰ Resolution 04/19 approved by the Inter-American Commission on Human Rights on 7 December 2019.

¹⁴¹ L. Weldon, *Intersectionality*, in G. Goertz, A. Mazur (Eds), *Politics, Gender, and Concepts*, Cambridge University Press, Cambridge, 2008, p.193, 195.

¹⁴² J.C. Nash, *Re-thinking Intersectionality*, in *Feminist Review* 89 (2008) 1, available online at: <https://philpapers.org/archive/NASRI.pdf> [14.01.2022].

¹⁴³ L. Sosa, *Intersectionality in the Human Rights Legal Framework on Violence Against Women*, Cambridge University Press, Cambridge, 2017, p. 15.

¹⁴⁴ *Ibid.*, p. 16.

¹⁴⁵ See the analysis of legal instruments by Sosa, *Intersectionality*, op cit.

¹⁴⁶ L. Sosa, *Intersectionality*, op. cit., p. 33, referring to the work by Satterthwaite, *Women Migrants’ Rights under International Human Rights Law*, in “Feminist Review Labour Migrations: Women on the Move”, 77 (2004), p.167, 170.

¹⁴⁷ Inter-American Court of Human Rights, *I.V. v. Bolivia*, judgment of 30 November 2016, Preliminary objections, merits, reparations and costs.

acknowledged that certain groups of women suffer discrimination ‘based on one or more factors in addition to their sex, which increases their exposure to acts of violence and other violations of their human rights.’¹⁴⁸ The Commission referred to ‘multiple forms of discrimination that intersect to hinder the enjoyment and exercise of human rights by certain groups of women on the basis of their sex, immigrant status, and economic situation.’¹⁴⁹ The Court, to which the case was referred, recognized that ‘identifiable subgroups of women suffer from discrimination throughout their lives based on more than one factor combined with their sex, which increases their risk of suffering acts of violence and other human rights violations.’¹⁵⁰ With regard to access to justice, ‘multiple factors of discrimination in access to justice converged intersectionally, associated with her condition as a woman, her socio-economic situation, and her condition as a refugee.’¹⁵¹

¹⁴⁸ Inter-American Commission of Human Rights, *I.V. v. Bolivia*, report No. 72/14 of 15 August 2014, case 12.655, merits, para. 160.

¹⁴⁹ *Ibid.*, para. 161.

¹⁵⁰ *I.V. v. Bolivia*, judgment of 2016, para. 247.

¹⁵¹ *Ibid.*, para. 318. However, in the specific case, the Court did not find that the sterilisation was based on her nationality of origin, her situation as a refugee, or her socio-economic status. Nevertheless, the Court considers that ‘these aspects had an impact on the magnitude of the harm suffered by I.V. in the sphere of her personal integrity.’ (*ibid.*, para. 248).

Part II
GUIDELINES TO IMPLEMENT COMMITTEE ON THE ELIMINATION OF
DISCRIMINATION AGAINST WOMEN
GENERAL RECOMMENDATION No. 38

1. Premise

This second part will follow the recommendations elaborated in GR No. 38, and will be divided into:

- A. Addressing the root causes of trafficking in women and girls
- B. Upholding victims' rights
- C. Gender-sensitive court proceedings
- D. Data collection and legislative, policy and institutional framework
- E. Dissemination and reporting
- F. Treaty ratification and accession

The guidelines will follow a human rights-based approach and will endorse a gender perspective, as outlined in the introduction. Trafficking in women and girls and exploitation of prostitution in the context of migration should be considered as a continuum of gender-based violence against women in the country of origin and/or in transit and in the country of destination. These guidelines are aimed at the protection of women and girls victims of trafficking and exploitation of prostitution, irrespective of the way in which prostitution is regulated or not regulated at national level. These guidelines are not aimed at dealing with the issue of consent in prostitution, either, but must be read as a tool to enhance the protection of women and girls victims of trafficking and exploitation of prostitution in the context of global migration. Trafficked women and girls suffer from multiple violations of their fundamental human rights.

A. Addressing the root causes of trafficking in women and girls and related guidelines

2. Context and legal background

General Recommendation No. 38 contains a series of recommendations to States to address the root causes of trafficking in women and girls, which are divided into:¹⁵²

- a) Addressing socio-economic injustice
- b) Addressing trafficking through promoting a safe migration framework
- c) Addressing the demand that fosters exploitation and leads to trafficking
- d) Addressing trafficking in the context of conflict and humanitarian emergencies
- e) Addressing the use of technology in trafficking
- f) Awareness-raising

¹⁵² GR No. 38, paras. 47 ff.

In the first ‘umbrella’ recommendation (GR No. 38, para. 47), the Committee on the elimination of discrimination against women called upon States parties to address the root causes of trafficking in women and girls by mobilizing public resources and strengthen public services areas that support the achievement of gender equality, by promoting women’s and girls’ human rights and their sustainable development in order to reduce the risk of factors leading to trafficking.¹⁵³

From a legal point of view, Article 9(4) of the Trafficking in Persons Protocol states that:

States Parties shall take or strengthen measures, including through bilateral or multilateral cooperation, to alleviate the factors that make persons, especially women and children, vulnerable to trafficking, such as poverty, underdevelopment and lack of equal opportunity (para. 4).

It is first worth differentiating between root causes and contributing factors. According to the *Root Cause Analysis*, ‘root cause is that most basic reason for an undesirable condition or problem which, if eliminated or corrected, would have prevented it from existing or occurring.’¹⁵⁴ It is the main reason for the occurrence of the phenomenon. A contributing factor is commonly considered as a secondary cause, whose elimination leads to the reduction of the likelihood of the phenomenon. The root cause of trafficking is inequality and discrimination on the basis of sex/gender, which is aggravated by contributing factors that, by making persons, especially women and children more vulnerable, lead to trafficking and exploitation of prostitution.

The expression ‘such as’ in Article 9(4) of the Trafficking in Persons Protocol means that the list of factors is an open one. Factors that contribute to the vulnerability to trafficking are several, including a demand for cheap labor and sexual services, shortage of organ transplants, lack of adequate labor and migration laws, limited mobility, restrictive migration laws and policies, war and conflict, natural disasters, gender and sex discrimination and inequality, gender-based violence, child abuse, and failures to protect fundamental human rights and civil liberties. This means that States parties to the Trafficking in Persons Protocol have legal obligations to address the factors that determine conditions of vulnerability to trafficking ‘with a great degree of flexibility as to how the obligations are to be implemented.’¹⁵⁵

Vulnerability is a concept that is difficult to grasp from a legal point of view. It can be argued that human beings are *per se* vulnerable, as sociopolitical beings, to exploitation, manipulation, oppression, political violence, and rights abuses (*inherent vulnerability*, as it was defined).¹⁵⁶ Vulnerability can also be caused or exacerbated by the personal, social, political, economic, or environmental situations in which individuals or social groups find themselves. In that sense, this kind of vulnerability may be short term, intermittent or long term (*situational vulnerability*). Vulnerability can also be *pathogenic*, and generated by a variety of sources, ‘including morally dysfunctional or abusive interpersonal and social relationships and sociopolitical oppression or injustice.’¹⁵⁷

¹⁵³ GR No. 38, cit., para. 47.

¹⁵⁴ P.F. Wilson, L.D. Dell, G. Anderson, Gaylord F., *Root Cause Analysis*, ASQ Quality Press, 1993, p. 9.

¹⁵⁵ Legislative Guide, cit., para. 285.

¹⁵⁶ C. Mackenzie, W. Rogers, S. Dodds, *Introduction*, in C. Mackenzie, W. Rogers, S. Dodds (eds), *Vulnerability: New Essays in Ethics and Feminist Philosophy*, OUP, 2013, p. 1. See also F. Ippolito, *Understanding Vulnerability in International Human Rights Law*, Editoriale Scientifica, 2020, p. 6 ff.

¹⁵⁷ C. Mackenzie and others, cit., p. 9.

[V]ulnerability speaks to our universal capacity for suffering, in two ways. First, I am vulnerable because I depend upon the co-operation of others (including, importantly, the State) . . . Second, I am vulnerable because I am penetrable; I am permanently open and exposed to hurts and harms of various kinds.¹⁵⁸

Several factors increase vulnerability to trafficking in women and girls in the context of global migration. For example, a lack of information about safe migration options and the dangers associated with trafficking is a short-term, specific vulnerability.¹⁵⁹ Reducing vulnerability requires both legislative and non-legislative measures:

Efforts such as research into the nature and extent of the problem, the conducting of media or other public information campaigns, enhancing cross-border mobility, access to labour markets, and the alleviation of harsh social or economic conditions may not require legislation. Experience has shown that the more serious these matters are taken, the more effective they can be. Without a legal mandate, these initiatives may not be treated with the seriousness or permanence that is required, which can undermine their effectiveness over time. Well-crafted legislation — particularly migration and labour legislation — can play an important role in preventing trafficking in persons.¹⁶⁰

2.1. Trafficking in women and exploitation of prostitution in the context of migration within the 2030 Agenda

GR No. 38 para. 47 specifically refers to the Sustainable Development Goals in the 2030 Agenda:

States parties must work towards mobilization of public resources and strengthening of public services in areas that support achievement of gender equality, promotion of women's and girls' human rights and their sustainable development in order to reduce the risk of factors leading to trafficking. Full achievement of the Sustainable Development Goals (SDGs) is essential to address the factors that heighten the risks of trafficking, in particular: achieving gender equality and empowering women and girls; promoting peace, justice and strong institutions; reducing inequalities; end poverty in all its forms; ensuring inclusive and equitable quality education and promoting lifelong learning opportunities for women and girls; ensuring healthy lives and promoting the well-being of women and girls of all ages; ensuring decent work and economic participation for women and girls; and promoting climate change measures in gender equality policies.

The reference to the 2030 Agenda was also present in Resolution 72/1 (2017): the UN General Assembly adopted the political declaration on the implementation of the United Nations Global Plan of Action to Combat Trafficking in Persons, according to which States Members of the UN recalled and reaffirmed the 'commitments to the 2030 Agenda for Sustainable Development, recognizing its integrated and indivisible nature and acknowledging that the 2030 Agenda includes commitments that relate to combating all forms of trafficking in persons.'¹⁶¹

¹⁵⁸ M. Neal, "Not Gods but Animals": *Human Dignity and Vulnerable Subjecthood*, 33 *Liverpool L. Rev.* 177, 186–187 (2012). See also, with regard to the European Convention on Human Rights, L. Peroni and A. Timmer, *Vulnerable groups: The promise of an emerging concept in European Human Rights Convention law*, in *I•CON* (2013), Vol. 11 No. 4, 1056–1085.

¹⁵⁹ GA Res. 63/156 cit. See also OHCHR, *Recommended Principles and Guidelines, Commentary*, cit., p. 105.

¹⁶⁰ Legislative Guide, cit., para. 287.

¹⁶¹ Resolution adopted by the General Assembly on 27 September 2017, A/RES/72/1, para. 2.

The 2030 Agenda for sustainable development, adopted by all UN Member States in 2015, is composed of 17 Sustainable Development Goals (SDGs), which consist in urgent calls for action by all countries. The Agenda 2030 is not binding and therefore it does not create legal obligations States must abide by. Some of the goals might include targets that mirror provisions in international treaties, and, because of that, are binding for ratifying States. For the purpose of these guidelines, relevant is Sustainable Development Goal No. 5, ‘gender equality,’ containing Target 5.2, which reads: ‘Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation.’ GR No. 38 appreciates the interconnections between the different goals of the 2030 Agenda including goals that do not explicitly endorse a gender perspective. This is a pivotal aspect of the GR No. 38, because it locates the target on countering trafficking in persons in the context of global migration within the framework of the 2030 Agenda, considering it as a cross-cutting issue. Hence, for example, the Committee on the Elimination of Discrimination against Women mentioned in GR No. 38 the promotion of peace, justice and strong institutions (No. 16), and the promotion of climate change measures in gender equality policies (No. 13). Both goals of the Agenda 2030 do not explicitly refer to women and girls’ rights, but the Committee on the Elimination of Discrimination against Women considered them as necessary to address trafficking in women and girls. Goal No. 16 is relevant to grant women’s access to justice. Access to justice consists, in its broader sense, in the right of an individual not only to enter a court, but also to have a case investigated, heard and adjudicated in a fair manner. Article 2, letter c) of the CEDAW requires States ‘to establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.’ The Committee on the Elimination of Discrimination against Women explained that States Parties must ‘ensure that remedies are adequate, effective, promptly attributed, holistic and proportional to the gravity of the harm suffered. Remedies should include, as appropriate, restitution (reinstatement), compensation (whether provided in the form of money, goods or services) and rehabilitation (medical and psychological care and other social services).’¹⁶² Turning to climate change measures, it is fundamental to realize that climate change induced migration represents a further source of vulnerability to trafficking in persons. The connection has not been thoroughly explored in literature. As acknowledged by IOM:

Climate change increases the risk of natural disasters and places a strain on livelihoods; it exacerbates poverty and can potentially cause situations of conflict and instability. These conditions, when combined with a mismatch between demand for labour and supply and the proliferation of unscrupulous recruitment agencies, increase high-risk behaviours and other negative coping strategies among affected populations. This may include resorting to migrant smugglers, which in turn makes them vulnerable to trafficking in persons (TiP) and associated forms of exploitation and abuse.¹⁶³

¹⁶² General Recommendation No. 33, para. 19(b).

¹⁶³ IOM, *The Climate Change-Human Trafficking Nexus*, 2016, p. 3. J. Decker Sparks, D.S. Boyd, B. Jackson, C. Ives and K. Bales, *Growing evidence of the interconnectedness between modern slavery, environmental degradation, and climate change*, Volume 4, Issue 2, 2021, One Earth, 2021, pp. 181-191.

The nexus between climate change and trafficking in persons has been confirmed in the Asia-Pacific region, which faces vulnerability to climate change and an increase rate of human trafficking cases as related to natural disasters.¹⁶⁴

Despite the 2030 Agenda being a soft law instrument, States are obliged to address the root causes to trafficking as showed by Article 9(4) of the Trafficking in Persons Protocol mentioned above. In particular, being the list of factors that make persons, in particular women and children, vulnerable to trafficking an open one, some other factors can be taken into account. States should therefore realize the interconnections between SDGs in the Agenda 2030 which impact on human trafficking: for example, they should adopt policies to address climate change induced migration, which heighten the risks of trafficking. With regard to sustainable development goal No. 5, States parties to the CEDAW must fund policies aimed at supporting the achievement of gender equality, the promotion of women's and girls' human rights and their sustainable development. Article 2 CEDAW requires States parties to pursue a policy of eliminating discrimination against women. For that purpose, 'the policy must be action- and results-oriented in the sense that it should establish indicators, benchmarks and timelines, ensure adequate resourcing for all relevant actors and otherwise enable those actors to play their part in achieving the agreed benchmarks and goals. To this end, the policy must be linked to mainstream governmental budgetary processes in order to ensure that all aspects of the policy are adequately funded.'¹⁶⁵

a) Addressing socio-economic injustice

In addressing the root causes of trafficking, GR No. 38 refers to the fact that trafficking and exploitation of prostitution is rooted in sex and gender-based discrimination, gender-based structural inequality and the feminization of poverty.¹⁶⁶ This acknowledgment is crucial to grasp the complexity of trafficking. Trafficking in women and girls and exploitation of prostitution is a violation of human rights and must be addressed using a human rights-based approach. A human rights-based approach to trafficking requires States and non-States actors to mainstream human rights in all actions aimed at countering the crime, putting at the center the human rights of women and girls. The Committee on the Elimination of Discrimination against Women also recommended States adopt a 'gender-transformative approach' which is useful 'to dismantle the structural and systemic conditions that deprive women and girls of their fundamental rights, the consequence of which places them in situations of vulnerability to all forms of trafficking and sexual exploitation' (GR No. 38, para. 49). A gender-transformative approach addresses the causes of gender-based inequalities and works to transform

¹⁶⁴ Ibidem.

¹⁶⁵ General recommendation No. 28 on the core obligations of States parties under article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 16 December 2010, para. 28.

¹⁶⁶ GR No. 38, para. 20. According to Mullally, the Committee has been concerned to avoid 'the pitfalls of earlier anti-trafficking instruments that assume a common vulnerability of women:' cfr. S. Mullally, 'Article 17 – Gender Equality' in J. Planitzer, H. Sax, and L. Boltzmann (eds), *A Commentary on the Council of Europe Convention on Action against Trafficking in Human Beings*, Elgar, 2020, p. 254.

harmful gender roles, norms and power relations.¹⁶⁷ The effectiveness of these approaches depends on a strong gender analysis and an understanding of local contexts.¹⁶⁸

In GR No. 38, the Committee recommended States reduce the risk of trafficking by eradicating pervasive and persistent gender inequality through ‘economic and public policies that prevent a lack of sustainable livelihood options and basic living standards’ (para. 50), and ‘eliminate social structures which limit women’s autonomy and access to key resources.’ Social structures that limit women’s autonomy are numerous: for example, ‘lower access to education and vocational training opportunities, asset and land ownership, access to credit, women’s low participation in decision-making, unequal pay, child/early and forced marriage, pervasiveness of patriarchal gender roles, the concentration of women in insecure and vulnerable work and their lack of decent work opportunities’ (para. 51). The GR No. 38 also highlighted how domestic abuses, family laws and other socio-cultural practices might increase the risk for women and girls to be trafficked (para. 52). In particular, the Committee recommended States adopt measures to prevent families ‘from agreeing to the indefinite or temporary “marriage” of their daughter in exchange for financial gains’ (para 53). It also stressed the importance of implementing the labour rights framework (para. 54 ff.).

POVERTY AS CONTRIBUTING FACTOR TO TRAFFICKING AND EXPLOITATION OF PROSTITUTION

Addressing inequality and poverty contributes to the reduction of vulnerabilities to trafficking and exploitation of prostitution. According to the UN OHCHR 2004 report *Human Rights and Poverty Reduction*, ‘a human rights approach to poverty is about the empowerment of the poor.’¹⁶⁹ It is adamant that it is very difficult to identify a strict causal correlation between the *individual* situation of poverty and the *individual* fact of being trafficked. However, poverty creates the conditions of vulnerability where the crime of trafficking and exploitation of prostitution might flourish. In terms of legal obligations:

While the human rights approach imposes an obligation on duty-holders to work towards poverty reduction, it does not make the unreasonable demand that all human rights must be realized immediately. The international code of human rights recognizes that many human rights will be realized progressively and are subject to the availability of resources. Accordingly, the precise obligations arising from some human rights vary over time in relation to the same State (progressive realization) and from one State to another (because of differing resource availability).¹⁷⁰

Addressing poverty and socio-economic inequality must be a key aspect of States policies through the development of poverty reduction strategies, namely national cross-sectoral development framework, designed and implemented by the national Government, specifically to tackle the causes and impact of poverty in a

¹⁶⁷ UNFPA, UNICEF, UN Women, *Technical Notes on Gender-transformative Approaches in the Global Programme to End Child Marriage Phase II: A summary for practitioners*, available online at <https://www.unicef.org/media/58196/file> [accessed 12.10.2022].

¹⁶⁸ *Ibid.*

¹⁶⁹ OHCHR, *Human Rights and Poverty Reduction A Conceptual Framework*, HR/PUB/04/1, p. 13.

¹⁷⁰ *Ibid.*, p. 22.

country.¹⁷¹ This is a long-term goal that goes beyond addressing trafficking in persons *per se*, but it deals with the conditions underlying the crime of trafficking in women and girls.¹⁷²

With regard to children, the *Guiding Principles on Extreme Poverty and Human Rights* of 2012 showed that poverty renders children, in particular girls, vulnerable to exploitation, neglect and abuse,¹⁷³ and that States must promote the rights of children by strengthening and allocating the necessary resources to child protection strategies and programmes. Civil society can play a pivotal role in raising awareness of the problem of trafficking in women and girls that live in a condition of extreme poverty.

Practice

Apne Aap – Women Worldwide and *BeAwareNow* (Italian association) – raising awareness among very poor girls in India of the risks of trafficking.¹⁷⁴ The project of participatory art consisted in dolls without arms full of synthetic hair. The artist, Janine Von Thüngen, created these dolls so that the participants to the performance could take some hair out of these dolls and keep them in a tiny bag to be put in their bags or wallets. The powerful message is to remind everyone of the fact that girls, especially those living in very poor areas, are powerless to exploitation and of the huge violations of human rights they are suffering. The performance was held in New Delhi and in the village of Najafgarh in 2015, thanks to the collaboration with Ruchira Gupta, journalist and activist in human rights, founder of the international movement *Apne Aap – Women Worldwide*. The performance was held in many schools in Italy as well.

VIOLENCE AGAINST WOMEN AND GIRLS AS CONTRIBUTING FACTOR TO TRAFFICKING AND EXPLOITATION OF PROSTITUTION

Violence against women and girls is a form of discrimination against women and a violation of human rights. Even though trafficking in women and girls is *per se* a form of violence against women, violence against women and girls is also a factor that increases vulnerability to trafficking and exploitation of prostitution.¹⁷⁵ States have legal obligations to address violence against women, stemming from the CEDAW – being violence against women a form of discrimination addressed by the CEDAW¹⁷⁶ – and from relevant treaties that States ratified, such as the Council of Europe Istanbul Convention. For example, concerning the Council of Europe Istanbul Convention, States parties are obliged to criminalize forced marriages and to ensure that, in criminal

¹⁷¹ WHO and OHCHR, *Human Rights, Health and Poverty Reduction Strategies*, 2008, p. 11.

¹⁷² *Recommended Principles and Guidelines, Commentary*, op. cit., p. 109. For poor and the most vulnerable people, the key element is that the circumstance contributing to their poverty are not addressed: sometimes, as it was suggested, it is not a matter of ‘not knowing’ what trafficking is, but rather ‘how the alternatives available to them are depicted’: P. Olayiwola, “*Killing the Tree by Cutting the Foliage Instead of Uprooting It?*” *Rethinking awareness campaigns as a response to trafficking in South-West Nigeria*, in *Anti-Trafficking Review*, 13, 2019, pp. 50-65.

¹⁷³ OHCHR, *Guiding Principles on Extreme Poverty and Human Rights*, 2012, para. 34.

¹⁷⁴ For further information see the official website: <https://beawarenow.eu/project/india-art-fair-2015/> [accessed 12.10.2021].

¹⁷⁵ *Recommended Principles and Guidelines, Commentary*, op. cit., p. 111.

¹⁷⁶ In that respect, GR No. 19 and No. 35.

proceedings initiated following the commission of any of the acts of violence covered by the scope of this Convention, culture, custom, religion, tradition or so-called ‘honour’ shall not be regarded as justification for such acts. As it was noted, cases in which young women living outside their home countries or regions are sent home under a deceptive pretext and with the intent of forcing them into marriage should be regarded as trafficking in women and girls.¹⁷⁷ For example, Syrian refugee women and girls are trafficked for sexual exploitation through the practice of ‘temporary’ or child and/or forced marriages. Girls and women are often forcibly married by their parents, who consider these arrangements as a way to protect their daughters and ensure to the family livelihood. However, once married, the wives are likely to end up in a situation of sexual and domestic exploitation by a spouse whom they have followed abroad.¹⁷⁸ It was also reported the practice of trafficking for sexual exploitation through marriages with foreign men who then force their ‘brides’ into prostitution in another country.¹⁷⁹ A 2016 report concerning Estonia, Ireland, Latvia, Lithuania and the Slovak Republic found connections between the phenomenon of ‘sham marriages’ – the report defining them ‘exploitative sham marriages’ (sexual exploitation, forced labour or domestic servitude) – and trafficking in persons.¹⁸⁰ Trafficking in women and girls may intersect with domestic violence in two ways: on the one hand, when a woman or a girl is trafficked by a member of the family, and, on the other hand, when domestic violence becomes a ‘push factor’ that creates conditions of vulnerability.¹⁸¹ A case law analysis published in the Global Report on Trafficking in Persons 2020 highlighted the intersection between human trafficking and domestic and intimate partner violence. In at least 25 per cent of the cases examined, victims/defendants were subject to multiple forms of gender-based violence prior to and while being trafficked, including from early childhood. Despite the critical nature of the victims/defendants’ relationship to the trafficker in the case law examined, very few courts addressed these dimensions. Furthermore, an examination of victims’ roles in offending also revealed a different set of motives from those typically ascribed to traffickers, including seeking alleviation from their own exploitation, securing the trafficker’s affection and having no alternative but to obey the trafficker’s orders, among others.¹⁸²

With regard to minors, there are individual, relational, community and societal risk factors for sexual exploitation and sex trafficking of minors. For example, if homeless, ‘young people are at significant risk of commercial sexual exploitation and sex trafficking for reasons ranging from a lack of resources for basic needs,

¹⁷⁷ *Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences, Yakin Erturk: intersections between culture and violence against women*, A/HRC/4/34, 17 January 2007, para. 56.

¹⁷⁸ *Report of the Special Rapporteur trafficking in persons, especially women and children, on her mission to Jordan*, A/HRC/32/41/Add.1, 8 June 2016, available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G16/115/46/PDF/G1611546.pdf?OpenElement> [accessed 12.10.2021].

¹⁷⁹ OHCHR, *Report of the Special Rapporteur on trafficking in persons, especially women and children*, SR A/73/171, 2018, para. 23.

¹⁸⁰ M. Viuhko, A. Lietonen, A. Jokinen and M. Joutsen (eds.), *Exploitative sham marriages: exploring the links between human trafficking and sham marriages in Estonia, Ireland, Latvia, Lithuania and Slovakia*, European Institute for Crime Prevention and Control, Helsinki, 2016.

¹⁸¹ H. Cody, *Domestic Violence and Human Trafficking*, UNICEF US, 2017, available online at: <https://www.unicefusa.org/stories/domestic-violence-and-human-trafficking/33601> [accessed 14.01.2022].

¹⁸² UNODC, *Global Report on Human Trafficking 2020*, p. 54.

such as food and shelter, to the need for social connection when separated from the family unit and other social supports.’¹⁸³

Preventive measures must be based on the understanding of the consequences of trafficking on women and girls, including their effects on health and reproductive health. Long lasting effects and lifelong trauma must be taken into account in the elaboration of policies aimed at raising awareness of human trafficking.¹⁸⁴

INEQUALITY AND LABOUR AS CONTRIBUTING FACTOR TO TRAFFICKING AND EXPLOITATION OF PROSTITUTION

Slavery, servitude and forced labor are often connected to trafficking in persons. According to Target 8.7 of the 2030 Agenda, States committed to eradicate forced labor and end modern slavery and trafficking in persons. Attention should be paid, for example, to paid domestic work, which is a highly feminized sector: there are 70 million domestic workers employed by households worldwide, of which 49.2 million are women (70 per cent) and 11.5 million are migrant women.¹⁸⁵ Despite focusing on voluntary migration for domestic work, the 2018 report by the Special Rapporteur on contemporary forms of slavery, including its causes and consequence, highlighted that domestic workers face some of the poorest working conditions across the care economy and are particularly vulnerable to exploitation.¹⁸⁶ In particular, marginalized women might see domestic work as a way of escaping violence, including domestic violence and forced marriage.¹⁸⁷

Restrictions on women’s migration for domestic work as a way to prevent trafficking and exploitation of prostitution have been introduced in some States.¹⁸⁸ However, it was reported that this practice has unintentionally pushed women to use irregular migration channels with the consequence of risking sexual and gender-based violence, exploitation and abuse.¹⁸⁹ The cooperation with NGOs working with migrants is fundamental to identify the best policy to prevent trafficking and exploitation. Restrictions on women’s migration for domestic work, for example, if in place, should be combined with information and campaigns to raise awareness of the risks connected to certain forms of recruitment.

¹⁸³ Wright Clayton, Krugman, and Simon (Eds), *Confronting Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States*, Committee on the Commercial Sexual Exploitation and Sex Trafficking of Minors in the United States; Board on Children, Youth, and Families; Committee on Law and Justice; Institute of Medicine; National Research Council, 2013, p. 86, available online at: <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/243838.pdf> [accessed 14.01.2022].

¹⁸⁴ According to a study commissioned by the European Commission, in the EU, the lost economic output - when the victim is not participating in the legal economy while in trafficking and in services, and when the victim has reduced participation post-trafficking as a consequence of long-term harms to health – is estimated EUR 59 795 in EU-27 per victim. The losses in the quality of life, being the victims/survivors of human trafficking and exploitation of prostitution subject to physical, sexual and mental injuries, amount to EUR 135 751 in EU-27. It is relevant to notice that the study found that there are higher costs for victims of sexual exploitation, in particular because of the impact on women and girls’ reproductive health. European Commission, *Study on the economic, social and human costs of trafficking in human beings within the EU*, 2020.

¹⁸⁵ See ILO, *Care Work and Care Jobs for the Future of Decent Work*, Geneva, 2018. See also *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, A/HRC/39/52, 2018, paras. 24 ff. See also S. Marchetti, D. Cherubini, G. Garofalo Geymonat (eds), *Global Domestic Workers. Intersectional Inequalities and Struggles for Rights*, Bristol University Press, 2021.

¹⁸⁶ *Ibid.*, para. 41.

¹⁸⁷ *Ibid.*, para. 29.

¹⁸⁸ *Ibid.*, para. 30.

¹⁸⁹ UN GA HRC, *Report of the Special Rapporteur on human rights of migrants*, A/HRC/38/41/Add.1, 4 May 2018, paras. 77–78, available online at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18/125/17/PDF/G1812517.pdf?OpenElement> [accessed 12.10.2021].

Another phenomenon is the deployment of health personnel abroad. In November 2019, two Special Rapporteurs, the one on contemporary forms of slavery, including its causes and consequences, and the one on trafficking in persons, especially in women and children, requested the Cuban government to provide information on the working conditions of Cuban medical missions. The rapporteurs argued that, on the basis of the information regarding working conditions reported to them, the deployment of health personnel abroad, subject to restrictions of rights and freedoms, ‘could amount to forced labour.’¹⁹⁰ During the pandemic, the gendered dimension of the phenomenon was particularly strong, with female health personnel highly supporting the fight against COVID-19.

States and non-States actors can play a pivotal role in reducing the risk of trafficking in women and girls and exploitation of prostitution. In General Comment No. 23 (2016), the Committee on Economic, Social and Cultural Rights stressed that States parties should cooperate in order to ‘protect the rights of their nationals working in other States parties, including through bilateral agreements with host countries and the sharing of recruitment practices.’¹⁹¹ States parties should also seek cooperate to protect the rights of migrant workers who are employed by enterprises registered in other States parties so as to enable such workers to enjoy just and favourable conditions of work.¹⁹² States have positive obligations of due diligence to prevent third parties from violating human rights. In the preamble of the third draft of the UN Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises (Draft Human Rights and Business),¹⁹³ it is recognized

the distinctive and disproportionate impact of business-related human rights abuses on women and girls, children, indigenous peoples, persons with disabilities, people of African descent, older persons, migrants and refugees, and other persons in vulnerable situation, as well as the need for a business and human rights perspective that takes into account specific circumstances and vulnerabilities of different rights-holders and the structural obstacles for obtaining remedies for these persons.

Article 6 (4) of the Draft Human Rights and Business on prevention requires States Parties to ensure that human rights due diligence measures undertaken by business enterprises shall include:

- a. Undertaking and publishing regular human rights, labour rights, environmental and climate change impact assessments throughout their operations;
- b. Integrating a gender perspective, in consultation with potentially impacted women and women’s organizations, in all stages of human rights due diligence processes to identify and address the differentiated risks and impacts experienced by women and girls;
- c. Conducting meaningful

¹⁹⁰ Mandatos de la Relatora Especial sobre las formas contemporáneas de la esclavitud, incluidas sus causas y consecuencias; y de la Relatora Especial sobre la trata de personas, especialmente mujeres y niños, 8 November 2019, <https://spcommreports.ohchr.org/TMResultsBase/DownloadPublicCommunicationFile?gId=24868> : ‘Las condiciones de trabajo reportadas podrían elevarse a trabajo forzoso, según los indicadores de trabajo forzoso establecidos por la Organización Internacional de Trabajo. El trabajo forzoso constituye una forma contemporánea de esclavitud’ (p. 3). A case is pending in front of US Courts, *Ramona Matos Rodriguez et al v. Pan-American Health Organisation*, Civil Action No. 20-928. Plaintiffs charge that PAHO provided, or knowingly benefited from others having provided, their forced labor, and they seek damages under the Trafficking Victims Protection Act and the Racketeer Influenced and Corrupt Organizations Act.

¹⁹¹ General comment No. 23 (2016) on the right to just and favourable conditions of work (article 7 of the International Covenant on Economic, Social and Cultural Rights) E/C.12/GC/23 (2016), para. 73. See also below on recruitment.

¹⁹² Ibid.

¹⁹³ The open-ended intergovernmental working group (OEIGWG) has had six sessions so far. Ahead of the seventh session, the Permanent Mission of Ecuador, on behalf of the Chairmanship of the OEIGWG, released a third revised draft legally binding instrument to regulate the activities of transnational corporations and other business enterprises. <https://www.ohchr.org/en/hrbodies/hrc/wgtranscorp/pages/igwgotnc.aspx> [accessed 14.01.2022].

consultations with individuals or communities whose human rights can potentially be affected by business activities, and with other relevant stakeholders, including trade unions, while giving special attention to those facing heightened risks of business-related human rights abuses, such as women, children, persons with disabilities, indigenous peoples, people of African descent, older persons, migrants, refugees, internally displaced persons and protected populations under occupation or conflict areas.

Under Article 7, dedicated to access to remedies, (1) ‘States Parties shall provide their courts and State-based non-judicial mechanisms, with the necessary competence in accordance with this (Legally Binding Instrument) to enable victims’ access to adequate, timely and effective remedy and access to justice, and to overcome the specific obstacles which women, vulnerable and marginalized people and groups face in accessing such mechanisms and remedies.’ This aspect was already emphasized in GR No. 23: ‘in situations in which a business enterprise has caused or contributed to adverse impacts, the enterprise should remedy the damage or cooperate in its remediation through legitimate processes that meet recognized standards of due process.’¹⁹⁴ As GR No. 38 stressed, businesses should be encouraged to establish safe and anonymous gender-sensitive grievance mechanisms for all workers, to ensure the respect for labor rights, and should be trained and assisted to ensure compliance with human rights and labor standards.¹⁹⁵

The Special Rapporteur on Trafficking in Persons, Especially Women and Children, analyzed the issue of access to remedies in the context of business in great detail in the 2019 report to the UN General Assembly.¹⁹⁶ It is adamant that the protection of labor rights and decent working conditions are pivotal in reducing vulnerability to trafficking in persons. For example, labor inspectorates¹⁹⁷ should have a broad mandate to enforce labor laws and officers must be trained to detect cases of trafficking in women and girls and exploitation of prostitution. As highlighted in a report on the topic, labor inspectors have a potential role to play in the prevention of forced labor and protection of victims; as such, they are an important partner of government agencies, employers’ and workers’ organizations, and NGOs that deal with issues of forced labor and trafficking.¹⁹⁸

Cultural mediators might bridge the gap between the authorities and the workers. Campaigns to raise awareness of the issue must be addressed to officials, trade unions, and the general public.

Practice

¹⁹⁴ GR No. 23, para. 75.

¹⁹⁵ GR No. 38, para. 54, d) and e).

¹⁹⁶ Report of the Special Rapporteur on trafficking in persons, especially women and children, A/74/189, 18 July 2019.

¹⁹⁷ The functions of labour inspection are defined as follows: a) To secure the enforcement of the legal provisions relating to conditions of work and the protection of workers while engaged in their work, such as provisions relating to hours, wages, safety, health and welfare, the employment of children and young persons, and other connected matters, in so far as such provisions are enforceable by labour inspectors; b) To supply technical information and advice to employers and workers concerning the most effective means of complying with the legal provisions; c) To bring to the notice of the competent authority defects or abuses not specifically covered by existing legal provisions. Art. 3, 81 Labour Inspection (in Industry and Commerce) Convention, No. 81, 1947.

¹⁹⁸ A. Beate, *Forced labour and human trafficking: a handbook for labour inspectors*, International Labour Office, Geneva, ILO, 2008.

In the EU,¹⁹⁹ under Article 9 of the Employers Sanctions Directive,²⁰⁰ EU Member States must ensure that the infringement of the prohibition of employment of illegally staying third-country nationals is a criminal offence, when committed intentionally, and in each of the listed circumstances, including when the infringement is committed by an employer who uses work or services exacted from an illegally staying third-country national with the knowledge that he or she is a victim of trafficking in human beings.²⁰¹ The Directive also requires Member States to have in place an effective mechanism for lodging complaints against exploitative employers (Article 13). To improve the effectiveness of the complaint mechanisms, NGOs, trade unions and victim support organizations must support workers who are victims of trafficking in persons in seeking redress.

Despite being an important instrument to address the offence, the directive is rarely well implemented, as a recent report from the Fundamental Rights Agency of the EU shows.²⁰²

Some best practices were described in the report. In Austria, for example, the NGO Association for Unionized Assistance for Undocumented Workers (*Anlaufstelle zur gewerkschaftlichen Unterstützung UNDOkumentiert Arbeitende, UNDOk*) is the main contact point for trade union support for undocumented workers. It provides information and counselling, and takes on complaints on behalf of workers, sometimes in cooperation with NGOs specialized in helping victims of trafficking in human beings, such as the Intervention Center for Trafficked Women (*Interventionsstelle für Betroffene von Frauenhandel, LEFÖ-IBF*) and Men VIA. According to their latest annual report, UNDOk writes to employers on behalf of migrant workers in an irregular situation, claiming back pay. If the employer does not react, UNDOk refers the person to the relevant trade union or the chamber of labour, which assists the worker in filing a complaint to the labour law court. The law provides the legal basis for representation (in particular by trade unions) at labour courts.²⁰³

The European Commission issued a Communication on the application of the Directive in 2021,²⁰⁴ stressing that ‘to facilitate the identification of situations of exploitation and of victims of trafficking during inspections and support Member States in implementing the obligations from the Directive, the Commission will promote, in a structured way, the exchange of practices, for instance on joint inspections of labour authorities and specialised labour exploitation units, in cooperation with the Fundamental Rights Agency and seeking the expertise of the European Platform tackling undeclared work.’

In the implementation of the labour rights framework, a key role should be played by women and girls as agents of change. States should support the organization of business activities that involve former victims of

¹⁹⁹ Where EU is taken as an example, it should be stressed that it is not party to the CEDAW. Nonetheless the practice of this organization must be considered.

²⁰⁰ Directive 2009/52/EC of the European Parliament and of the Council of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third-country nationals, OJ L 168, 30 June 2009, p. 24–32.

²⁰¹ Article 9, letter d).

²⁰² FRA, *Protecting Migrants in an Irregular Situation from Labour Exploitation. Role of the employers sanctions directive*, Luxembourg – Publication Office of the EU, 2021, available online at: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2021-employers-sanctions-directive-report_en.pdf [accessed 14.01.2022].

²⁰³ UNDOk, *Arbeit ohne Papiere, aber nicht ohne Rechte* (Work without papers, but not without rights), Vienna, 2020, p. 17.

²⁰⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the regions, on the application of Directive 2009/52/EC of 18 June 2009 providing for minimum standards on sanctions and measures against employers of illegally staying third country nationals, COM(2021) 592 final, p. 17.

trafficking. Businesses can explore opportunities to provide ‘ready and qualified survivors with access to safe and well-paying jobs at your business, or with a key business partner (e.g. a trusted supplier).’²⁰⁵

Practice

The Interactive Map for Business of Anti-Human Trafficking Organisations identifies Immediate Needs Providers, Vocational Training Organizations, social enterprises, and other victim and survivor support organizations around the world that businesses can partner with to combat human trafficking, forced labour, child labour and modern slavery.²⁰⁶

Practice

In UK, in April 2017 the Bright Future programme was launched by one of the world’s largest consumer co-operatives, owned by millions of members. The programme was aimed at offering the opportunity of a paid work placement and a job in the food business to those who have been rescued from modern slavery.²⁰⁷

b) Addressing trafficking and exploitation of prostitution through promoting a safe migration framework

As said by the Special Rapporteur on the human rights of migrants, ‘migration is never a gender-neutral phenomenon.’²⁰⁸ He encouraged the analysis of the specific needs and challenges of all migrants from a gender perspective, in particular the gender inequalities prevalent in countries of origin, transit and destination, considering intersecting factors of discrimination, such as age, migratory status, ethnicity, religion and race.²⁰⁹ States have specific legal obligations with regard to migrants, stemming from international human rights law and from relevant international and regional conventions. In planning the response to trafficking in women and girls it is also pivotal to stress the commitments contained in soft law instruments, such as the Global Compact for Safe, Orderly and Regular Migration (GCM), as well as in the Global Plan of Action against Trafficking in Persons.

GR No. 38 recommends States establish a safe migration framework to protect women and girl migrants, including those with an irregular migrant status, from violations of their human rights at every stage of migration (para. 56). In particular, States are called upon to support access to pathways for safe and regular migration, in order to avoid exploitation, including sexual exploitation, considering the specific needs of

²⁰⁵ Global Business Coalition against Human Trafficking, *Empowerment and Employment of Survivors of Human Trafficking. A Business Guide*, available online at: https://www.bsr.org/reports/GBCAT_Business_Guide_on_Survivor_Empowerment_and_Employment.pdf [accessed 14.01.2022].

²⁰⁶ See the interactive map for business of anti-human trafficking organisations at: <https://www.modernslaverymap.org/> [accessed 14.01.2022].

²⁰⁷ See the independent review of the activity, conducted by the University of Liverpool in 2019, here: https://assets.ctfassets.net/5ywmq66472jr/36Svz3uAt17j9i7LE8c5vr/d25d5184773e8e77effae94f2034c5cb/COP21157_Bright_Future_Report_6_2_-_FINAL_2_July_2019.pdf [accessed 14.01.2022].

²⁰⁸ *Report of the Special Rapporteur on the human rights of migrants: good practices and initiatives on gender-responsive migration legislation and policies*, A/74/191, 18 July 2019, para. 14.

²⁰⁹ Ibid.

women and children, and to ensure the rights of migrants within these pathways to protected formal employment opportunities, legal pathways to education and vocational training. The General Recommendation also invokes the Global Compact for Migration, which expressly indicates, among the objectives for safe, orderly and regular migration, to ‘prevent, combat and eradicate trafficking in persons in the context of international migration.’²¹⁰ The Global Compact for Migration presents several actions to be adopted to achieve the abovementioned objective.²¹¹ In particular, GR No. 38 endorses four actions within this framework, namely the conclusion of bilateral agreements with destination countries for employment to ensure coordination between States Parties to strengthen cooperation on the regulation of working conditions which ensures the protection and promotion of the rights of women migrant workers; the participation of workers in the development of those agreements; the establishment of mechanisms of compliance in the country of destination to deal with the violation of women migrants’ rights; the training of officials in the diplomatic missions, labor and economic attachés and consular officials.²¹² Furthermore, GR No. 38 requires States to ensure that visa schemes do not discriminate against women,²¹³ that labour recruiters, intermediaries and employment agencies are regulated and monitored,²¹⁴ and that risks of dependency and vulnerability of migrant women workers in relation to their employers are mitigated.²¹⁵ Risks of vulnerability can be reduced thanks to practical information given before migrating. Information might include: the importance of having written contracts to reduce vulnerabilities to deceptive work conditions, and the importance of listening to first-hand experience of women who had migrated. As demonstrated,²¹⁶ practical information alone is not enough to exclude exploitation without effective compliance mechanisms in the country of destination.

Practice

Sweden became the first country to formulate and pursue a feminist foreign policy. In its Handbook on Sweden’s feminist foreign policy, Sweden indicated that it ‘has also prioritized the issue of safe workforce migration with decent conditions, particularly for women.’²¹⁷

Practice

ILO Work in Freedom, Phase II - Fair recruitment and decent work for women migrant workers in South Asia and the Middle East

²¹⁰ Global Compact for Safe, Orderly and Regular Migration, 13 July 2018, p. 5.

²¹¹ In detail, *ibid.* p. 17 ff.

²¹² GR No. 38, para. 57.

²¹³ *Ibid.*, para. 58.

²¹⁴ *Ibid.*, para. 59.

²¹⁵ *Ibid.*, para. 60.

²¹⁶ L. Kiss, J. Mak and B. Sijapati. et. al., *South Asia Work in Freedom Three-Country evaluation: A theory-based intervention evaluation to promote safer migration of women and girls in Nepal, India and Bangladesh*, in *SWiFT Research report*, London School of Hygiene & Tropical Medicine, London, 2019, p. 22.

²¹⁷ Ministry of Foreign Affairs, *Handbook: Sweden’s feminist foreign policy*, 2014, quoted in A/74/191, para. 29 and available online at: https://www.government.se/reports/2018/08/handbook-swedens-feminist-foreign-policy/?TSPD_101_R0=082953afa5ab2000117741cc384e2d2ecf6231f7e6581b59afb5f117fda8ca47702eae7e1543cebf085d0d826a14300050c040e816483bda928386d5622ecb400627a9395493bce7bac7f7d19043e888f50299f7a3c9baf30afeb319ad1db2a [accessed 14.01.2022].

The Work in Freedom is an integrated programme to support mobility by choice among women and girls from countries of origin (India, Bangladesh and Nepal) to decent jobs with safety and dignity of workers in destination countries (India, Lebanon and Jordan) through fair recruitment processes.²¹⁸

States must acknowledge that there is a close connection between the achievement of safe, orderly and responsible migration and the prevention of trafficking in women and girls and exploitation of prostitution. In a report of the International Organization for Migration, the following four recommendations have been adopted: 1. increase protections for victims and vulnerable migrants, including access to legitimate sources of work and/or finance along migration pathways and in destination countries, eliminate gaps in labour protection for workers in informal sectors, and to ensure that local child protection systems are strengthened and supported to provide protection to migrant children; 2. reduce capacity and opportunity for potential offenders, for example by prohibiting recruitment fees, prohibiting restrictions on mobility and withholding of identity documents, and promoting labour rights, inspections and protections; 3. increase capacity and focus of guardians and first responders, through criminalization of behaviours such as forced marriages, trafficking in persons and exploitation of prostitution; 4. focus research efforts on filling critical gaps in knowledge, focusing on the availability of relevant and reliable data.²¹⁹

The involvement of businesses is pivotal in reducing risks of trafficking in the recruitment process.²²⁰ Ethical recruitment agencies can play a very helpful role in the recruitment process, since in some cases recruitment agencies have proved to engage in abusive and fraudulent recruitment practices and excessive or illegal fee charging.²²¹ Fraudulent and abusive recruitment practices can either create vulnerabilities to trafficking or be directly involved in trafficking criminal networks that aim to exploit workers.²²² Codes of conduct for recruiters should be elaborated and should be endorsed by corporations on a voluntary basis. In Africa, the Association of Private Recruitment Agencies of Kenya adopted in 2019 a code of conduct for members, which addresses issues of smuggling, trafficking, child and forced labour.²²³ An express reference to trafficking in women and exploitation of prostitution and recruitment procedures should be taken into consideration by the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights in the elaboration of an international treaty on business and human rights.²²⁴

²¹⁸ ILO, *Work in Freedom, Phase II – fair recruitment and decent work for women migrant workers in South Asia and the Middle East*, project code RAS/17/11GBR, 1 April 2018 – 31 March 2023, available online at: https://www.ilo.org/newdelhi/whatwedo/projects/WCMS_651634/lang--en/index.htm [accessed 14.01.2022].

²¹⁹ IOM, *Migrants and their vulnerability to human trafficking, modern slavery and forced labour*, 2019, p. 12.

²²⁰ See also the guidelines by ILO, *General principles and operational guidelines for fair recruitment & Definition of recruitment fees and related costs*. International Labour Office - Fundamental Principles and Rights at Work Branch, Labour Migration Branch – Geneva: ILO, 2019, p. 15, where the recommendation is directed to governments: Governments should consider setting out a clear policy expressing the expectation that all enterprises domiciled or operating in their territory or jurisdiction respect human rights, including workers' rights, and the law on recruitment throughout their operations, including in supply chains.

²²¹ Working Group on Trafficking in Persons, *Role of recruitment agencies and recruitment fees in trafficking in persons*, CTCOP/COP/WG.4/2015/2 (2015), para. 15.

²²² *Ibid.*, para. 13.

²²³ IOM, *ASMAK Members Adopted Code of Conduct for Ethical Recruitment of Kenyan Migrant Workers*, 28 May 2019, available online at: <https://www.iom.int/news/asmak-members-adopted-code-conduct-ethical-recruitment-kenyan-migrant-workers> [accessed 14.01.2022].

²²⁴ Third draft available here: <https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session6/LBI3rdDRAFT.pdf> [accessed 14.01.2022].

With regard to visa schemes, the Special Rapporteur on Migration acknowledged that ‘granting permission for victims of trafficking for sexual exploitation or other grave crimes to remain in the country, even if the criminal proceedings have been completed, helps the victims to access compensation or to participate in additional criminal investigations against perpetrators, if they wish to do so.’²²⁵

Practice

In Italy, victims of trafficking or exploitation can benefit from assisted voluntary return to their home country or a special residence permit for social protection (Article 18 Legislative Decree No 286 of 1998).

The UN Network on Migration on the World Day against Trafficking in Persons recommended States enhance international, regional and local cooperation to monitor migration routes to prevent trafficking, collaborate in cross-border investigation and prosecution of perpetrators, and to provide protection and assistance to those vulnerable to or victimized by trafficking in persons at any stage of their migration journey; and to enhance the availability of pathways for regular migration, including regularization of migrants who are in an irregular situation: ‘Pathways should be based on international human and labour rights standards and give due consideration to the specific needs of women and children – to lower the risk of exploitation and human trafficking and ensure that affected migrants are able to access justice and services without fear of arrest, detention and deportation.’²²⁶

c) Addressing the demand that fosters exploitation and leads to trafficking

Article 9(5) of the Trafficking in Persons Protocol addresses the demand that fosters exploitation and leads to trafficking: ‘States Parties shall adopt or strengthen legislative or other measures, such as educational, social or cultural measures, including through bilateral and multilateral cooperation, to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking.’ Demand, a concept which might be commonly associated with the economic sector, can be defined as the desire ‘for labour that is exploitative or services which breach the human rights of the person delivering those services.’²²⁷ However, in a number of State parties where prostitution is neither regulated nor legal under national laws the demand for sexual purposes cannot be defined as ‘economic sector’, services or/and entertainment business. Generally, the demand that leads to trafficking includes demand for sexual exploitation; for cheap labour and domestic workers; for organ removal and sale; for illicit adoption and forced marriages; for criminal activities or begging or for exploitation within the army.²²⁸ The then Special Rapporteur on Trafficking in Women and Children mentioned the difference between direct and derived demands in her 2013 report. The former is the demand for a service that is specifically provided by a person subject to one of the forms of exploitation under

²²⁵ UN GA, *Human rights of migrants: good practices and initiatives on gender-responsive migrant legislation and policies*, A/74/191, 18 July 2019, para. 51.

²²⁶ UNODC, *Statement by the UN Network on Migration the World Day against Trafficking in Persons “Victims’ Voices Lead the Way”*, 30 July 2021, available online at: <https://www.unodc.org/unodc/press/releases/2021/July/statement-by-the-united-nations-network-on-migration-on-the-world-day-against-trafficking-in-persons.html> [accessed 14.01.2022].

²²⁷ UNODC, *Toolkit to Combat Trafficking in Persons*, 2008, p. 457.

²²⁸ UNODC and UNGIFT, *Human Trafficking: an overview*, 2008, p. 13.

the Trafficking in Persons Protocol.²²⁹ The derived demand is not ‘directly for the services of a trafficked or exploited person or for a commodity which they have helped produce, but for something else, usually for products or services that are particularly cheap’ (for example an employer demand for cheap and docile workers).²³⁰ GRETA, in its 3rd General Report (2013), stressed how ‘... the demand side of trafficking is often neglected by prevention programmes. GRETA’s evaluation reports reveal that there is a scarcity of measures to discourage demand and in many countries, officials met by GRETA have referred to difficulties to conceive such measures.’²³¹ States influence the demand as a consequence of legal structures on a range of matters, including immigration.²³²

International experts have addressed the issue of the demand in different ways. For example, in the 2006 report of the then Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, demand was defined in a very broad way as ‘any act that fosters any form of exploitation that, in turn, leads to trafficking.’²³³ Talking about the demand for sex trafficking, she considered the specificity of this demand compared to other forms of exploitation, saying that ‘unlike the purchaser of consumer goods produced through trafficked labour, the prostitute-user is simultaneously both the demand-creator and (by virtue of his receipt of the trafficked person) part of the trafficking chain.’²³⁴ Similarly, GR No. 38 clearly addresses the issue of the demand that ‘fosters exploitation and leads to trafficking’, highlighting the connection between the two elements.

It is important to acknowledge that the issue of the demand that fosters exploitation and leads to trafficking must be addressed using a human rights-based approach and endorsing a gender perspective. Hence, the measures aimed at addressing the demand must be located within the human rights framework, in full respect of international human rights law obligations. Principle 2 of the Recommended Principles on human rights and human trafficking provides that States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons. States have legal obligations to prevent trafficking in women and girls, including by addressing the demand, especially for sexual services. A human rights-based approach entails the commitment to consulting those who will be or would have been affected by potential measures.²³⁵ The important contribution that survivors of trafficking can, on a voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact is recognized in the OHCHR Recommended Principles and Guidelines.²³⁶ Also, in its resolution 72/1, the UN General Assembly recognized the role of victims and survivors as agents of change in

²²⁹ UN GA HRC, *Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo*, A/HRC/23/48, 18 May 2013, para. 14.

²³⁰ *Ibid.*

²³¹ Third General Report on GRETA’s activities (2013), para. 90.

²³² Gallagher, *The International*, cit., p. 439.

²³³ *Integration of the Human Rights of Women and a Gender Perspective. Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons especially women and children, Sigma Huda*, E/CN.4/2006/62, 20 February 2006, para. 52].

²³⁴ Report of the Special Rapporteur on the human rights aspects of the victims of trafficking in persons, especially women and children, Sigma Huda, E/CN.4/2006/62

20 February 2006, para. 63.

²³⁵ A/HRC/23/48, op. cit., para. 76.

²³⁶ UN Economic and Social Council, *Recommended Principles and Guidelines on Human Rights and Human Trafficking. Report of the UN High Commissioner for Human Rights to the Economic and Social Council*, E/2002/68/Add.1, 20 May 2002, para. 6.

the global fight against trafficking in persons and encouraged further consideration of incorporating their perspective and experience in all efforts to prevent and combat trafficking in persons.²³⁷ As reported by the Inter-Agency Coordination Group against Trafficking in Persons (ICAT), on the occasion of the World Day against Trafficking in Persons in 2021, ‘victims and survivors are key actors in the fight against trafficking in persons and lead the way by sharing their experiences and knowledge about this crime and its consequences. The inclusion of their voices and perspectives is crucial in informing prevention strategies, fostering prosecution of criminals profiting from exploitation, enhancing identification and rescue of victims, as well as their recovery and social inclusion.’²³⁸

Practice

The launch of the International Survivors of Trafficking Advisory Council (ISTAC) by the OSCE Office for Democratic Institutions and Human Rights has been – and will be – pivotal to ensure that the voices of victims and survivors are heard and will contribute to the elaboration of policies in fighting human trafficking: prevention strategies, fostering prosecution of criminals profiting from exploitation, enhancing identification and rescue of victims, as well as their recovery and social inclusion.²³⁹ The involvement of victims and survivors of trafficking and exploitation of prostitution must respect their human rights and avoid any risk of re-victimisation. This will be possible through the elimination of barriers and stigmas, and by fully implementing the principle of non-punishment of victims for unlawful activities that they committed as a direct consequence of being trafficked.²⁴⁰

Linked to this aspect is the criminalization of the use of services of trafficked women. With regard to legislative (including criminal law) measures, the Recommended Principles and Guidelines, Commentary, argued that ‘criminalizing the use of the services of a trafficking victim – where the user knew or recklessly disregarded the fact that the individual involved was a victim of trafficking – is well within the spirit of the Recommended Principles and Guidelines;’ it represents a ‘key aspect of a comprehensive strategy to reduce the demand for the goods and services produced through the exploitation of trafficked persons.’²⁴¹ The knowledge element mentioned here is not unknown to criminal law conventions such as, for example, the UN Convention for the suppression of the financing of terrorism, at its Article 2.²⁴² It should be underlined, however, that there are

²³⁷ UN GA, *Draft resolution referred to the high-level meeting of the GA on the appraisal of the UN Global Plan of Action to Combat Trafficking in Persons by GA at its seventy-first session. Political declaration on the implementation of the UN Global Plan of Action to Combat Trafficking in Persons*, A/72/L.1, 18 September 2017, para. 57.

²³⁸ ICAT calls on stakeholders to include victims and survivors’ perspectives in all anti-trafficking actions Statement by the Inter-Agency Coordination Group Against Trafficking in Persons (ICAT) on the occasion of the World Day against Trafficking in Persons, 30 July 2021, available online at: https://trello.com/1/cards/6103ac66ed161416779e56ae/attachments/6103ac66ed161416779e56b3/download/WDAT_statement__final.pdf [accessed 14.01.2022].

²³⁹ Ibid.

²⁴⁰ Ibid.

²⁴¹ *Recommended Principles and Guidelines, Commentary*, cit., p. 103.

²⁴² ‘1. Any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and wilfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) An act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) Any other act intended to cause death or serious bodily injury to a civilian, or to any other person not

significant differences between legal systems – between common and civil law systems most significantly - and that the ‘knowing use’ standard can be extremely difficult to use in practice.²⁴³ The fact that the knowledge requirement is difficult to use in practice has not been an obstacle with regard to other crimes, such as terrorist financing. Addressing the criminalization of the use of services, including sexual services, with the knowledge that the individual involved was a victim of trafficking does not mean to take position on the criminalization, decriminalization and legalization of prostitution. Denying the importance of criminalizing this aspect would mean that, paradoxically, trafficking in persons is a crime, but using the services of victims of trafficking is not. To continue the comparison with terrorist financing, the criminalization of the behaviour is fundamental to address the root causes of terrorism, otherwise it would mean that terrorism is a crime but providing resources and money to terrorists or terrorist groups is not. The complexity of the application of the unlawful intention or knowledge requirements, combined with the debate on the definition of international terrorism, has not prevented an action in that sense. The complexity of the unlawful intention or knowledge requirements, combined with the debate on the prostitution, should not prevent a criminal law action that targets the perpetrators of the crime consisting in the use of sexual services provided by victims of trafficking and exploitation of prostitution. The European Commission, in its 2021 Strategy on Combatting Trafficking in Human Beings 2021- 2025, committed to thoroughly analyze the criminalization of the knowing use of exploited services and products from victims, given the fact that the invitation included in the Anti-Trafficking Directive to EU Member States to consider criminalizing the knowing use of services exploited from trafficked persons led to a diverse legal landscape in Europe: ‘As part of the evaluation of the Anti-trafficking Directive, the Commission will therefore carry out an assessment on the possibility having minimum EU rules that criminalise the use of exploited services of trafficking victims.’²⁴⁴ The Commission launched a study for the evaluation of the Anti-Trafficking Directive, and, based on this study, it might consider to review the Directive. The debate on criminalization, decriminalization, legalization/regulation of prostitution²⁴⁵ is often linked to the debate concerning the demand. The point is however to counter the demand side that fuels a crime

taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act. 2. (a) On depositing its instrument of ratification, acceptance, approval or accession, a State Party which is not a party to a treaty listed in the annex may declare that, in the application of this Convention to the State Party, the treaty shall be deemed not to be included in the annex referred to in paragraph 1, subparagraph (a). The declaration shall cease to have effect as soon as the treaty enters into force for the State Party, which shall notify the depositary of this fact; (b) When a State Party ceases to be a party to a treaty listed in the annex, it may make a declaration as provided for in this article, with respect to that treaty. 3. For an act to constitute an offence set forth in paragraph 1, it shall not be necessary that the funds were actually used to carry out an offence referred to in paragraph 1, subparagraphs (a) or (b). 4. Any person also commits an offence if that person attempts to commit an offence as set forth in paragraph 1 of this article. 5. Any person also commits an offence if that person: (a) Participates as an accomplice in an offence as set forth in paragraph 1 or 4 of this article; (b) Organizes or directs others to commit an offence as set forth in paragraph 1 or 4 of this article; (c) Contributes to the commission of one or more offences as set forth in paragraphs 1 or 4 of this article by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either: -4- (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of an offence as set forth in paragraph 1 of this article; or (ii) Be made in the knowledge of the intention of the group to commit an offence as set forth in paragraph 1 of this article.’ Article 2 of the UN Convention for the Suppression of the Financing of Terrorism of 1999.

²⁴³ OSCE, *Discouraging the demand that fosters trafficking for the purpose of sexual exploitation*, 2021, p. 37.

²⁴⁴ Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the EU Strategy on Combatting Trafficking in Human Beings 2021- 2025, COM/2021/171 final, para. 3.

²⁴⁵ See, among others, K. Peterson-Iyer, *A Feminist Ethical Analysis*, in *Journal of Feminist Studies in Religion*, 1998, Vol. 14, No. 2, pp. 19-44; V. Roth, *Defining Human Trafficking and Identifying its Victims*, Leiden-Boston, Brill, 2012, p. 30.

which is a form of violence against women and girls and a form of discrimination against women. Sweden, for example, developed the Equality model, which includes the prohibition of the purchase of a sexual act and the criminalization of all forms of coercive control and exploitation, including pimping and trafficking. The aim has been declared to curtail the demand for sexual services that fosters exploitation and leads to trafficking.²⁴⁶ In the Netherlands, which lifted the general ban on brothels and pimping in the criminal code, and distinguishes between forced prostitution and voluntary prostitution, has discussed a proposal to amend the criminal code by establishing criminal liability for a person who uses sexual services with the knowledge or strong suspicion that a victim of trafficking is involved. GRETA, already in its first report, invited the Dutch authorities to consider making clearer the criminalization of the use of services of a victim of trafficking with the knowledge that the person is a victim of trafficking.²⁴⁷

‘Legislative or other measures, such as educational, social or cultural measures’ included in Article 9(5) of the Trafficking in Persons Protocol should be understood ‘as encompassing a broad range of initiatives that go beyond criminal justice responses.’²⁴⁸ Criminal law measures are not sufficient to address the demand.²⁴⁹ For example, the Working Group on Trafficking in Persons referred to the importance of collecting relevant data, including on the socio-economic factors increasing the demand and on the consumers of goods and services provided by victims of trafficking.²⁵⁰ The UN Global Plan of Action to Combat Trafficking in Persons recommended actions that must be taken to discourage the demand, including ‘specific measures at national level to combat trafficking for labour exploitation and strive to educate consumers on those measures.’²⁵¹

United Nations agencies summarized the measures that are needed to discourage demand:

Examples of measures to address the demand side are measures to broaden awareness; attention and gender-sensitive research into all forms of exploitation and forced labour and the factors that underpin its demand; to raise public awareness on products and services that are produced by exploitative and forced labour; to regulate, license and monitor private recruitment agencies; to sensitize employers not to engage victims of trafficking or forced labour in their supply chain, whether through subcontracting or directly in their production; to enforce labour standards through labour inspections and other relevant means; to support the organisation of workers; to increase the protection of the rights of migrant workers; and/or to criminalize the use of services of victims of trafficking or forced labour.²⁵²

In the 2020 edition of the Legislative Guide, a list of measures has been identified:

(a) Measures addressing the root causes of and factors contributing to trafficking, including poverty, lack of education, and social norms that enable exploitative practices, such as norms permitting

²⁴⁶ Law prohibiting the purchase of sexual services of 1999, replaced in 2005 by a criminal provision on the purchase of sexual services in chapter 6 of the criminal code. See D. Borg Jansson, *Modern Slavery*, Leiden-Boston, 2015, p. 96 ff.

²⁴⁷ Report concerning the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by the Netherlands, GRETA (2018)19, paras. 195-196.

²⁴⁸ *Legislative Guide*, 2020, para. 315.

²⁴⁹ OSCE, *Discouraging the demand*, cit.

²⁵⁰ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, Report on the Meeting of the Working Group on Trafficking in Persons held in Vienna from 27 to 29 January 2010, UN Doc. CTOC/COP/WG.4/2010/6, 17 February 2010, 7 [45].

²⁵¹ UN Global Plan of Action to Combat Trafficking in Persons, Article 22. See also UN GA Resolution 66/141.

²⁵² OHCHR, Office of the United Nations High Commissioner for Refugees (UNHCR), UNICEF, UNODC, UN-Women and ILO, *Prevent, Combat, Protect – Human Trafficking: Joint UN Commentary on the EU Directive – A Human Rights-Based Approach*, 2011, p. 97.

- discrimination against women and other traditionally disadvantaged groups, with a view to reducing vulnerability to trafficking;
- (b) Measures increasing opportunities for legal, gainful and non-exploitative labour migration and other legal and safe pathways for movement and promoting access to information about such opportunities;
 - (c) Measures sanctioning those who use the goods or services exacted from victims of trafficking;
 - (d) Measures and mechanisms to improve labour conditions in sectors vulnerable to labour exploitation through strengthening and enforcing labour standards and regulations through labour inspections and other means;
 - (e) Measures against exploitation associated with the migration process, including through improved regulation of private recruitment agencies, strengthening protections and rights of migrant and refugee workers, and support for the organization of workers;
 - (f) Measures increasing access to protection and asylum systems;
 - (g) Measures increasing access to education and employment for refugees, internally displaced persons, and stateless persons;
 - (h) Measures raising awareness and attention about the risks associated with trafficking and research into all forms of exploitation and the factors that foster demand;
 - (i) Private sector and State initiatives to address exploitative labour practices;
 - (j) Measures addressed at disrupting supply chains that involved exploitative labour practices;
 - (k) Provide, by law, a civil cause of action in both the country of operation and the country of corporation, for workers in global supply chains who suffer harm due to non-fulfilment of mandatory due diligence laws;
 - (l) Consumer-based action against products made from trafficked labour; and
 - (m) In the case of trafficking for the purpose of organ removal, promoting organ donation²⁵³

Public awareness campaigns are key elements to discourage the demand.²⁵⁴ These campaigns can be promoted by State organs and/or by civil society. They can use TV and radio ads, billboards, the internet including social media. They can be addressed to the general public or to specific groups that according to the data contribute the most to the creation of the demand. The latter target was found to be particularly important by the Special Rapporteur on Trafficking in Persons, in her report of 2013, where she concluded that ‘for information to be effective in discouraging demand, it needs to be provided to specific audiences which have been identified as constituting a demand factor or being able to influence demand, with the content of the information being tailored to have the intended influence.’²⁵⁵ People who have been trafficked should be periodically consulted in the design, monitoring and evaluation of the campaigns. Education is also pivotal. At OSCE level, education targeted three different audiences: young people, current buyers and users, and employees who might come

²⁵³ Legislative Guide, cit., para. 316. The ILO has addressed trafficking from a labour market perspective, seeking to eliminate its root causes, such as poverty, lack of employment and inefficient labour migration systems. In a study conducted in Thailand, ILO recommended the government amend legislative provisions which excluded certain categories of workers from protection, such as domestic workers, and recognise the right for such workers to be treated equally. ILO, *The Mekong Challenge. Human Trafficking: Redefining Demand Destination factors in the trafficking of children and young women in the Mekong sub-region*, by Elaine Pearson, 2005.

²⁵⁴ See also in the OSCE Region, Report of 2021, p. 51, where there are some examples of campaigns adopted at national level.

²⁵⁵ Report of the Special Rapporteur on trafficking in persons, especially women and children, Joy Ngozi Ezeilo, A/HRC/23/48 of the 18 March 2013, para. 42.

into contact with buyers and users.²⁵⁶ Appropriate training of police forces and the judiciary, following a human rights-based approach, endorsing a gender perspective in a multi-stakeholder environment, is a key aspect in addressing trafficking in persons and exploitation of prostitution

Practice

Sri Lanka's National Strategic Action Plan to Monitor and Combat Human Trafficking

As part of the new campaign, IOM helps the Ministry of Justice to produce TV and radio ads to alert people to sexual and labour exploitation.²⁵⁷

Practice

In 2017, Mexico and UNODC launched the campaign Blue Heart Mexico: #AquiEstoy contra la trata de personas (#HereIAM against trafficking in persons, in English) in Mexico City. #AquiEstoy shows people's outrage against human trafficking and it encourages the public to think about their responsibility as consumers of goods and services. The campaign illustrates some forms of human trafficking and shows the groups most vulnerable to this crime.²⁵⁸

As it was argued, framing trafficking as 'demand-driven' can lead to share the State's responsibility of addressing trafficking with other actors, such as companies. For example, legislation that obliges corporations to report on their efforts to reduce trafficking and enhance transparency in the supply chain can add to preventing trafficking.²⁵⁹ Codes of Conduct that prohibit practices that are related to trafficking in women and girls and exploitation of prostitution should become a key element of any business activity. Codes of conduct can be voluntarily adopted by private companies. Some common guidelines, which take into consideration the differences between sectors of activity, should be elaborated at the international or regional level. Both consumers and investors play an important role in putting pressure on businesses to take appropriate action against trafficking in persons: 'evidence suggests that when businesses work together to stop human trafficking, they can have a significant impact.'²⁶⁰

The action to discourage the demand for trafficking in women and girls must involve multiple actors – public-private and civil society – and must be a cross-cutting issue in several sectors – criminal-education-public health-business sectors.²⁶¹

²⁵⁶ OSCE, *Discouraging the demand that fosters trafficking for the purpose of sexual exploitation*, p. 56 ff.

²⁵⁷ IOM, *IOM Launches Campaign to Combat Human Trafficking in Sri Lanka*, 18 February 2020, available online at: <https://www.iom.int/news/iom-launches-media-campaign-combat-human-trafficking-sri-lanka> accessed [14.01.2022].

²⁵⁸ UNODC, *#AquiEstoy: Campaign against human trafficking launched in Mexico*, 1 August 2017, available online at: https://www.unodc.org/unodc/en/frontpage/2017/August/aquiestoy_-_campaign-against-human-trafficking-launched-in-mexico.html [accessed 14.01.2022].

²⁵⁹ J. Planitzer, 'Article 6 – Measures to discourage the demand', in J. Planitzer and others, *A Commentary*, p. 113.

²⁶⁰ A/HRC/23/48, op. cit., paras. 48-49.

²⁶¹ The OSCE report (*Discouraging the demand*, cit., p. 65) refers to the model Ending Exploitation Collaborative (EEC) in Washington State, United States of America, which includes actions in education, technology, business, health, government, criminal justice, general public and media. In OSCE countries (report, p. 67), of the 28 awareness campaigns identified by this paper, 24 took place in States that criminalize some aspect of demand. In only two States, Italy and Spain, campaigns identified where there are no laws

DEMAND OF ORGANS

‘Trafficking in organs’ covers illicit activities that commercialize human organs and tissues needed for therapeutic transplantation. According to the report on organ donation prepared by the Global Observatory on Donation and Transplantation, the number of transplants in 2020 has been estimated to be around 130,000 – with a 17.6 per cent decrease vs 2019 – which covers less than 10 per cent of the global needs.²⁶² The global shortage in organs builds the demand that leads to trafficking in persons for organ removal. According to a 2021 report by Interpol, the problem of trafficking is of particular concern in North and West Africa, with connections to the medical sector in countries from Africa and beyond, notably in Asia and the Middle East.²⁶³ It is reported that organized criminal groups profit from the desperation of the unemployed, migrants, asylum seekers and refugees to coerce them into selling an organ. Victims of human trafficking for sexual and labor purposes face additional risk.²⁶⁴ Indeed, the UN Special Rapporteur on trafficking in persons, especially women and children had already expressed concern in 2019 that ‘trafficking for sexual exploitation may, in some cases, deteriorate into some of the worst forms of exploitation, including trafficking for the purpose of organ removal, although the magnitude of the phenomenon is unknown at present.’²⁶⁵

In legal terms, trafficking for the purpose of organ removal – a form of exploitation – is criminalized in the Trafficking in Persons Protocol (Articles 3(a) and 5). In 2015, the Council of Europe adopted a Convention against Trafficking in Human Organs, which criminalizes the illicit removal of human organs from living or deceased donors. Article 4(1), letters a – c, obliges Parties to the Convention to establish as a criminal offence the removal of human organs from living or deceased donors in the following cases: lack of a free, informed and specific consent by the donor or of authorisation by the domestic law of the Party in question (letter a); a financial gain or comparable advantage has been offered or received in exchange for the removal of organs from a living donor (letter b), or a deceased donor (letter c). As reported in the Explanatory report, ‘though the illicit removal of human organs may in practice involve elements of all the acts described in letters a – c, it is enough that one of the three conditions are fulfilled to establish that the crime described in Article 4, paragraph 1, has been committed.’²⁶⁶ The commercialization of organs is never acceptable if there is a financial gain or comparable advantage. Among soft law acts, WHO guiding principles on human cell, tissue and organ transplantation, endorsed in 2010 by the sixty-third World Health Assembly in its resolution 63.22., stipulate

criminalizing users of services from trafficking victims. Overall, the OSR/CTHB found no criminal justice or prevention initiatives in 19 participating States.

²⁶² GODT, *2020 International Activities Report*, available online at: <http://www.transplant-observatory.org/2020-international-activities-report/> [accessed 11.01.2022].

²⁶³ Interpol, *Trafficking of Human Beings for the purpose of Organ Removal in North and West Africa*, July 2021, p. 9. See also the detailed report in the EU: European Parliament, *Trafficking in human organs*, 2015.

²⁶⁴ Interpol, *Trafficking*, cit.

²⁶⁵ *Visit to Nigeria*, Report of the Special Rapporteur on trafficking in persons, especially women and children, A/HRC/41/46/Add.1. Also, in the joint report in the joint report Council of Europe, United Nations, *Trafficking in organs, tissues and cells and trafficking in human beings for the purpose of the removal of organs*, 2009, p. 12: ‘There is a growing concern and a body of evidence that trafficking in human beings has been affecting women and girls disproportionately, as one of the root causes is poverty and discrimination, including sexual discrimination, and women and girls make up the majority of the poor and of victims of sexual violence.’

²⁶⁶ Explanatory report, para. 31.

that the human body and its parts are not to be the subject of commercial transactions and, in guiding principle 5, that ‘purchasing, or offering to purchase, cells, tissues or organs for transplantation, or their sale by living persons or by the next of kin for deceased persons, should be banned.’

In the 2013 report, the Special Rapporteur on Trafficking in Persons stressed the importance of linking trafficking in persons for the removal of organs to trafficking in persons, despite some objections in that respect.²⁶⁷ The difficulty in detecting the phenomenon comes from the fact that ‘victims may not perceive themselves as such, in particular if they have broken laws by engaging in an agreement to sell an organ. They often fear stigmatization and will hide the fact of their surgery, even from close family members. A further challenge to identification lies in the fact that, unlike other forms of trafficking, trafficking in persons for the removal of organs is essentially a one-off event that can often be completed within a very brief period, reducing the opportunity for detection.’²⁶⁸

With regard to the topic of General Recommendation No. 38, it should be noted that women and girls that are victims of trafficking and exploitation of prostitution are more vulnerable to trafficking for organs removal. Law enforcement authorities must be aware of the danger of trafficking in persons for the removal of organs, and be able to identify victims and perpetrators, even when the victim has already been identified as victim of trafficking for sexual exploitation. There might be a combination of forms of exploitation that it is difficult to detect and that requires legislative and non-legislative measures in response.

d) Addressing trafficking in the context of conflict and humanitarian emergencies

In 2016, the United Nations Security Council condemned in the strongest terms ‘reported instances of trafficking in persons in areas affected by armed conflict.’²⁶⁹ Resolution 2388 (2017) highlighted the specific vulnerabilities of women and children to exploitation during conflict and post-conflict situations. The resolution stated that trafficking undermines the rule of law and contributes to other forms of transnational organized crime that could exacerbate conflict and foster insecurity and instability, therefore undermining development. The topic has been explored in further resolutions and reports.²⁷⁰

The fight against trafficking in women and girls should be integrated into conflict and disaster-risk reduction, preparedness and response plans,²⁷¹ and should be placed within the UN SC Women, Peace and Security Agenda (WPS).²⁷² Several actions can be envisaged: addressing economic insecurity, improve access to education and legal identity documentation for displaced families; prevention of trafficking and sexual

²⁶⁷ Report of the Special Rapporteur on trafficking in persons, especially women and children, A/68/256, 2 August 2013.

²⁶⁸ Ibid., para. 52. See also J. Allain, *Slavery in international law*, Leiden-Boston, Brill, 2013, p. 326 ff.

²⁶⁹ United Nations Security Council, *Security Council Presidential Statement Says Human Trafficking Might Constitute War Crimes, as Members Consider Issue for First Time*, SC/12165, 16 December 2016, available online at: <https://www.un.org/press/en/2015/sc12165.doc.htm> [accessed 12.10.2021].

²⁷⁰ IOM, *Addressing human trafficking and exploitation in times of crisis*, Geneva, 2015, available online at: <https://publications.iom.int/books/addressing-human-trafficking-and-exploitation-times-crisis-evidence-and-recommendations-0> [accessed 19.09.2021]; UNODC, *Trafficking in Persons in the context of armed conflict*, Vienna, 2018, available online at: https://www.unodc.org/documents/data-and-analysis/glotip/2018/GloTIP2018_BOOKLET_2_Conflict.pdf [accessed 12.10.2021].

²⁷¹ GR No. 38, para. 65.

²⁷² GR No. 38, para. 48.

exploitation in accommodation facilities for displaced women and girls, including by appropriately training staff; adopting a zero-tolerance policy on trafficking and sexual exploitation, forced labour, slavery, slavery-like practices²⁷³

Practice

UN

The zero-tolerance policy of the UN²⁷⁴ regards all UN staff and employees, including peacekeepers and personnel engaged in missions abroad. It severely prohibits any sexual activity with beneficiaries of UN assistance, owing to the existing uneven power-relations, and with children, intended as persons under the age of 18, regardless of the local age of consent. The idea is to maintain a safe environment that prevents sexual exploitation. Reporting mechanisms were established so that any inappropriate behavior among UN staff can be easily denounced and immediate disciplinary action taken. Also, upon consultation with the Office of Legal Affairs, allegations of sexual abuse or exploitation may be referred to national authorities for criminal prosecution.

EU

The Daphne Funding Programmes, activated from 2000 to 2013, were specific EU initiatives to combat violence against women and children, including trafficking in persons. They included both ex-ante preventive action and ex-post support and protection for victims / survivors, through cooperation with NGOs and multidisciplinary networks. Awareness raising, transnational knowledge exchange and dissemination of information and good practices were among the main pillars of the programmes.²⁷⁵

The EU Anti-Trafficking Directive of 2011²⁷⁶ put the accent on cooperation among Member States' law enforcement and justice authorities to offer effective remedy to victims and prosecute criminals in compliance with national legislation. However, the EEP Group of the European Parliament underlined how national rules have not always been effective in Member States and recommended that the European Commission proposed changes to the laws that should include hotlines for victims, free legal assistance and medical support, for victims / survivors, also psychological support.²⁷⁷

NATO

The NATO Policy on Combating Trafficking in Human Beings was adopted in 2004 and includes applying a zero-tolerance approach for its personnel, training, reviews of national legislation and a push towards the

²⁷³ GR No. 38, paras 65 ff.

²⁷⁴ *Secretary-General's Bulletin Special measures for protection from sexual exploitation and sexual abuse*, ST/SGB/2003/13, 2003.

²⁷⁵ Further information available at: https://ec.europa.eu/justice/grants1/programmes-2007-2013/daphne/index_en.htm [accessed 14.01.2022].

²⁷⁶ Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, *OJ L 101, 15.4.2011, p. 1–11*.

²⁷⁷ EEP Group in the EP, *Zero Tolerance Regarding Violence against Women*, 16 April 2019, available online at <https://www.eppgroup.eu/what-we-stand-for/campaigns/eu-elections-2019/achievements/achievement/zero-tolerance-regarding-violence-against-women> [accessed 14.01.2022].

ratification of the UN Convention against Organised Crime and the Palermo Protocol.²⁷⁸ Also, NATO schools and Partnership for Peace training institutions teach modules including human trafficking issues, which may also be delivered online so as to raise awareness and provide training so as to weaken and disrupt human trafficking.²⁷⁹

USA²⁸⁰

In the USA, the Trafficking Victims Protection Act, P.L. 106-386 and its reauthorization are two pieces of legislation that combat human trafficking into the USA and abroad. They were followed by the Trafficking victims Protection Reauthorization Act of 2005, H.R. 972, which became Public Law No: 109-164 in 2006.²⁸¹ The new bill was deemed necessary in light of the aftermath of the war in the Balkans and the UN Mission in Congo, so as to “develop trafficking prevention strategies for post-conflict and humanitarian emergency situations”.²⁸² One of the most important aspects of this bill regards the accountability of US Government personnel, including Armed Forces, and contractors during their missions abroad, which was one of the loopholes of previous legislation.. Also, a director of anti-trafficking policies was designated to implement the new zero-tolerance policies. The bill improved the assistance to victims and facilitated their access to federally funded programs and services and established a guardian ad litem program for child victims of trafficking. The bill contributed to a shift in paradigm that distinguishes the victims of human trafficking from the perpetrators of the crime, granting the much-needed protection of human rights to the former and assuring accountability for the latter.

In addition, in the USA, the Military Code prohibits personnel from engaging in activities with sex workers and provides for immediate disciplinary measures, both for domestic violations and for those that might occur in missions abroad, for instance in South Korea.²⁸³

The Women, Peace and Security (WPS) agenda of the UN Security Council has its roots in UNSCR 1325 (2000), which recognized the ‘impact of armed conflict on women and girls,’ and stressed how ‘effective institutional arrangements to guarantee their protection and full participation in the peace process can significantly contribute to the maintenance and promotion of international peace and security.’²⁸⁴ However, the first seven WPS resolutions after 1325 are ‘surprisingly silent about trafficking in women and girls, including in armed conflict.’²⁸⁵ It is only with Resolution No. 2331 (2016),²⁸⁶ and the following year with

²⁷⁸ For further information see <https://www.nato.int/docu/comm/2004/06-istanbul/docu-traffic.htm> [accessed 14.01.2022].

²⁷⁹ K.J. Allred, *Combating Human Trafficking*, in *NATO Review*, 1 June 2006, available online at: <https://www.nato.int/docu/review/articles/2006/06/01/combating-human-trafficking/index.html> [14.01.2022].

²⁸⁰ The US is not party to the CEDAW, however its policies must be taken into consideration as example of State practice.

²⁸¹ The full text of the bill here: <https://www.congress.gov/bill/109th-congress/house-bill/972> [accessed 12.10.2021].

²⁸² L. Smith, *Combating Human Trafficking: Achieving Zero Tolerance*, Commission on Security and Cooperation in Europe, on occasion of the 109th Congress, House of Representatives, First Session, 9 March 2005.

²⁸³ Allred, *Combating*, cit.

²⁸⁴ UN SC Resolution 1325 adopted on 31 October 2000, available online at: <http://peacewomen.org/SCR-1325> [accessed 12.10.2021].

²⁸⁵ S. Basu, P. Kirby, L. J. Shepherd (Eds.), *New Directions in Women, Peace and Security*, Bristol University Press, Bristol UK, 2020.1].

²⁸⁶ S/RES/2331 (2016), 20 December 2016.

Resolution No. UNSCR 2388 (2017), which however do not belong to the WPS agenda resolutions, that the UN SC addressed trafficking in persons and acknowledged the links between conflict-related trafficking and the maintenance of international peace and security.²⁸⁷ In particular, Resolution No. 2331 (2016) stressed that trafficking in persons in areas affected by armed conflict and post-conflict situations ‘can be for the purpose of various forms of exploitation, including exploitation of the prostitution of others or other forms of sexual exploitation, forced labour, slavery or practices similar to slavery, servitude or the removal of organs,’ that it can be associated with sexual violence in conflict, and that ‘children in situations of armed conflict and persons displaced by armed conflict, including refugees, can be especially vulnerable to trafficking in persons in armed conflict and to these forms of exploitation.’²⁸⁸ The Resolution calls upon States, *inter alia*, to ‘investigate, disrupt and dismantle networks involved in trafficking in persons in the context of armed conflict, in accordance with national legislation, including anti-money-laundering, anti-corruption and anti-bribery laws and, where appropriate, counter-terrorism laws.’²⁸⁹ However, the Resolution falls short of recognizing trafficking as a violation of women’s human rights,²⁹⁰ and of recommending the involvement of victims/survivors of trafficking in the elaboration of policies. As Chinkin highlighted, ‘the incidence of human trafficking (as a form of gender-based violence) in armed conflict means that it comes naturally under the auspices of the WPS agenda. The Security Council’s silence in this regard constitutes of itself a form of violence that weakens the potential of the WPS agenda to bring structural transformation in post-conflict contexts.’²⁹¹

As suggested by the Special Rapporteur on Trafficking in Persons, especially women and children at the Arria formula meeting of the UN Security Council in 2019 ‘a full integration of the anti-trafficking and WPS agenda – which are both part of the Security Council agenda - is a powerful means to show the centrality of women's agency and participation,’²⁹² and encouraged ‘a systematic and joint interpretation of the Palermo Protocol, the ICC Statute, the SC Resolutions 2331/2016 and 2338/2017, the SC Resolution 1325/2000 and the following resolutions on WPS, the relevant CEDAW General Recommendations and the Conflict related-sexual violence agenda.’²⁹³ The fight against trafficking in persons and exploitation of prostitution should be mainstreamed into all pillars of the WPS agenda as suggested by the Special Rapporteur on Trafficking in Human Beings.²⁹⁴ The silence of the WPS resolutions on the matter ‘send[...] the message that trafficking is to be dealt with as a security issue, separated from other forms of gendered violence happening during conflict, including sexual

²⁸⁷ Basu, Kirby, Shepherd (Eds.), *New Directions*, cit.

²⁸⁸ S/RES/2331 (2016), preamble.

²⁸⁹ S/RES/2331 para. 2(c)..

²⁹⁰ G. Fernandez Rodriguez de Lievana, *Performing Anti-trafficking: human rights, the Security Council and the disconnect with the WPS Agenda*, *Centre for Women, Peace and Security*, Research at LSE, 20/2019, p. 6, available online at: <https://www.lse.ac.uk/women-peace-security/assets/documents/2019/working-paper/WPS20RodriguezdeLievana2.pdf> [accessed 14.01.2022].

²⁹¹ C. Chinkin and G. Fernández Rodríguez de Liévana, *Human Trafficking, Human Rights and Women, Peace and Security: The Sound of Silence*, in Basu and others, cit., p. 190. Also stressing the fragmented approach.

²⁹² UNODC, *Trafficking in persons for sexual exploitation in (post-) conflict situations: integration a comprehensive approach to trafficking in persons into the Women, peace and Security agenda of the Security Council*, Statement by Maria Grazia Giammarinaro, Special Rapporteur on Trafficking in Persons, especially women and children, 25 October 2019, available online at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=25278&LangID=E> [accessed 14.01.2022].

²⁹³ *Ibid.*

²⁹⁴ SR, para. 72. On the risks of securitisation within the UN SC, see also Chinkin.

violence.²⁹⁵ Trafficking in women and exploitation of prostitution must be considered as a violation of women and girls' rights, which exacerbates during conflicts, displacement, and in post conflict settings. There is a continuum of violence in times of peace, in times of war, and, as the pandemic has showed, in times of emergency. Therefore, trafficking in persons cannot be merely considered as a security issue. States and international organizations' policies against trafficking and exploitation of prostitution must be considered as an essential tool for peace-making and reconstruction processes. In that respect, women in peacekeeping combined with awareness-raising campaigns addressed to all genders, can play a key role in the fight against trafficking in women and girls and exploitation of prostitution.²⁹⁶

As a consequence of the conflict in Ukraine in 2022, millions of people have fled the country since 24. February.²⁹⁷ Around half of those fleeing are adult women, 40 per cent are children and 10 per cent are adult men. As reported in a research paper published by UNODC, "criminal networks operating between Ukraine and countries in Europe and Central Asia may take advantage of people separated from their support networks and with an acute need to identify alternative methods of income generation."²⁹⁸ The risk of trafficking in persons, especially women and children, is extremely high.

Practice

CAPACITY BUILDING AND INTERNATIONAL COOPERATION

South-Eastern Europe

The US Agency for International Development (USAID) collaborated with the UN Development Programme and Romania on a training manual for law enforcement officers containing regional anti-trafficking best practices.²⁹⁹ The manual is part of the capacity-building programme that was later extended to other Countries in the region - namely Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Greece, Hungary, Serbia, Montenegro, Macedonia, Moldova, Romania, Slovenia, Turkey and Ukraine - after its official adoption by the UN Office on drugs and Crime in 2003. It includes a legislative compendium and a contact directory, and provides specialized anti-trafficking training to the border police, specialized police units and prosecutors and it was adopted by numerous police academies. The best practices section of the manual includes practical suggestions for international cooperation, investigative techniques and tactics to combat and disrupt human trafficking.³⁰⁰

e) Addressing the use of digital technology in trafficking

²⁹⁵ Chinkin, Fernández Rodríguez de Liévana, cit., p. 201.

²⁹⁶ <https://peacekeeping.un.org/en/women-peacekeeping> [accessed on 14.01.2022].

²⁹⁷ UNHCR reports that more than 4.8 million of individual refugee have been recorded across Europe.

²⁹⁸ UNODC, *Conflict in Ukraine: Key Evidence on Risks of Trafficking in Persons and Smuggling of Migrants*, March 2022, https://www.unodc.org/documents/data-and-analysis/tip/Conflict_Ukraine_TIP_2022.pdf.

²⁹⁹ Allred, *Combating*, cit.].

³⁰⁰ Ibidem.

The United Nations recognized that digital technologies have the potential to ‘advance gender equality and the empowerment of all women and girls’.³⁰¹ Social media, information and communication technologies are important tools for women and girls, through which they can express themselves and engage in civic and public life.³⁰² Digital technologies support law enforcement agencies in identifying, monitoring, and researching trafficking operations. Nonetheless, online media and social platforms have also been the ground for criminal network to flourish. During the pandemic, the use of technology to perpetrate violence against women and girls, including trafficking, has increased. If digital technology becomes a means to perpetrate violence, victims can be discouraged from having access to the digital world, with the consequence of silencing women and girls.³⁰³

What was called the ‘cyber *modus operandi* of traffickers’ is composed of four stages: recruitment, transportation, exploitation of victims, and subsequent management of illicit profits.³⁰⁴ Technology has broadened the reach of criminal networks, in a way that victims with different socio-economic and geographic backgrounds become more easily entrapped. The selection of potential targets online follows some criteria, such as accessibility, vulnerability, and attractiveness (hawking).³⁰⁵ Advertising has been used by traffickers to recruit women and girls.³⁰⁶ It is a form of more passive recruitment, far less detectable by law enforcement: it consists in some ‘net fishing’ where criminal recruiters scout the internet and social media and reply to announcements posted by job seekers looking for jobs abroad.³⁰⁷ Craigslist removed its ‘adult services’ section in 2010 after receiving pressure from the widespread public for enabling sexual exploitation. After the shutdown, however, the announcements moved to other sections of the website or other websites.³⁰⁸ Evidence from legal cases demonstrates that other sites such as Backpage, VivaStreet, and Myspace have already been used for trafficking.³⁰⁹ An example of criminal action being taken against such platforms is the removal of

³⁰¹ Resolution adopted by the Human Rights Council on 11 July 2019 ‘New and emerging digital technologies and human rights’, A/HRC/RES/41/11.

³⁰² D. Ging and E. Siapera (Eds), *Gender Hate Online*, Cham, Springer International Publishing, 2019, doi: 10.1007/978-3-319-96226-9, Foreword.

³⁰³ S. De Vido, L. Sosa, *Criminalisation of gender-based violence against women in European States, including ICT-facilitated violence*, EELN, 2021, <https://www.equalitylaw.eu/publications>

³⁰⁴ S. Raets, J. Janssens, *Trafficking and Technology: Exploring the Role of Digital Communication Technologies in the Belgian Human Trafficking Business*, in “European Journal on Criminal Policy and Research” (2021) 27:215–238, and relevant bibliography.

³⁰⁵ Ibid.

See also ICAT, *Human Trafficking and Technology: Trends, challenges and opportunities*, Issue Brief 07/2019, available online at: <https://www.un.org/sexualviolenceinconflict/wp-content/uploads/2019/07/report/human-trafficking-and-technology-trends-challenges-and-opportunities/Human-trafficking-and-technology-trends-challenges-and-opportunities-WEB...-1.pdf> [accessed 12.10.2021]; Council of Europe, *Trafficking in human beings: Internet recruitment Misuse of the Internet for the recruitment of victims of trafficking in human beings*, 2007.

³⁰⁶ On the ‘magnitude’ of online advertisement, EUROPOL 2021 EU Serious and organized threat assessment report (EU SOCTA) 12 April 2021.

³⁰⁷ EUROPOL, *The challenges of countering human trafficking in the digital era*, 2020, p. 2. The recruiters request a fee from the victims in return for securing the job abroad and helping with travel arrangements. It is not until victims arrive in the new country that they discover the scam.

³⁰⁸ E. Heil, A. Nichols, *Hot Spot Trafficking: A Theoretical Discussion of the Potential Problems Associated with Targeted Policing and the Eradication of Sex Trafficking in the United States*, in ‘Contemporary Justice Review’, 2014, 17(4):1–13. In 2018 it also removed the ‘personals’ section after the approval of the US Fight Online Sex Trafficking Act, available at: <https://www.craigslist.org/about/FOSTA> [accessed 12.10.2021].

³⁰⁹ M. Latonero, *Human Trafficking Online. The Role of Social Networking Sites and Online Classifieds*, 2011, available online at: https://technologyandtrafficking.usc.edu/files/2011/09/HumanTrafficking_FINAL.pdf. On VivaStreet, Motet, *Vivastreet : les dessous de la prostitution par petites annonces*, ‘Le Monde’, 2 February 2017, available online at: https://www.lemonde.fr/les-decodeurs/article/2017/02/02/vivastreet-les-dessous-de-la-prostitution-par-petites-annonces_5073149_4355770.html [accessed 12.10.2021].

Backpage. com, which was the largest means of arranging the purchase of sex online in the United States prior to its closure.³¹⁰ It was also reported that Facebook, Twitter, and other social networking sites are susceptible to similar uses.³¹¹ The recruitment process in trafficking and exploitation of prostitution is often accompanied by a grooming process which aims at gaining the confidence of the potential target (lover boy technique).³¹² With regard to transportation, trafficking in persons operations cross the borders in a way that does not require trafficking network to be physically present at the site of exploitation. Marketing and selling human beings have acquired a dimension of great concern due to digital technology: traffickers can advertise ‘services’ to a large audience and even reach an ‘obscure client base.’³¹³ Coerced cybersex is an example of technology-supported exploitation. Digital technology can also be used for sextortion or image-based sexual abuse.³¹⁴ Finally, the financial management of criminal business is often done online, even though very few criminal networks have been found operating with cryptocurrencies.³¹⁵ Some ‘cryptoprofiles’ have been found online, such as traders, mixers, and exchangers, which might represent the a new trend in the perpetration of the crime.³¹⁶ The management of illicit profits can lead to other crimes, such as money laundering, which is used by criminal networks to hide the origins of dirty money.

Any action taken to address the use of digital technology in trafficking must be located within the human rights law framework. In that sense, it is worth recalling that freedom of expression and the right to privacy constitute fundamental – though derogable – human rights. From a human rights law perspective, addressing the use of digital technology in trafficking requires the balance between the protection of freedom of expression and the right to privacy on the one hand, and the obligation to prevent attacks on vulnerable peoples on the other hand. Freedom of expression can be subject to certain restrictions, as provided by the Covenant on civil and political rights, but only if they are introduced by law and are necessary: (a) for respect of the rights or reputations of others; (b) for the protection of national security or of public order (ordre public), or of public health or morals (Article 19(3) Covenant). The same can be said for the right to privacy: Article 17 (1) of the Covenant on civil and political rights states that ‘No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.’ As a consequence, anti-trafficking efforts should be carefully conceived to avoid restrictions – not envisaged in human rights treaties – of fundamental rights such as privacy, security, and freedom of expression.

³¹⁰ OSCE, *Discouraging the demand*, cit., p. 63.

³¹¹ *Ibid.*, p. 27.

³¹² C. Motolea, *Research method of human traffic with the „Loverboy” recruitment method*, Acta Universitatis George Bacovia. Juridica - Volume 7. Issue 2/2018, p. 212; see also European Women’s Lobby, *#HerNetHerRights*, 2017.

³¹³ *Global Report on Trafficking in Persons 2020 – Chapter V: Traffickers use of the internet; digital hunting fields*.

³¹⁴ A. Powell, A. Flynn, A. Scott, N. Henry, *Image-based Sexual Abuse: an international study of victims and perpetrators*, Melbourne RMIT University, February 2020. See also Vitis, Joseph, D. Mahadevan, *Technology and Sexual Violence: Sexual Assault Care Centre Summary Report*, August 2017, available online at <https://www.aware.org.sg/wp-content/uploads/SACC-TFSVH-Report-Final-report.pdf> [accessed 12.10.2021];

³¹⁵ EUROPOL, *The challenges*, cit., p. 1, 4. However, according to FinCEN, traffickers use the virtual currency to buy online advertisements that feature commercial sex acts to obtain customers. FinCEN also has identified transactions in which traffickers use third-party payment processors (TPPPs) to wire funds, which gives the appearance that the TPPP is the originator or beneficiary of the wire transfer and conceals the true originator or beneficiary. FinCEN Advisory, *Supplemental Advisory on Identifying and Reporting Human Trafficking and Related Activity*, FIN-2020-A008, 2020.

³¹⁶ EUROPOL, *The challenges* cit., p. 1.

Freedom of expression and the right to privacy must be respected, as said above, but cannot be invoked to prevent any action on the internet which might be helpful to track criminal networks and stop their activity. A challenge for investigations is the ability to track exploitation signs among thousands of online advertisements. Law enforcement authorities must be empowered to understand technological challenges and the constant evolution in means and practices. In countering trafficking in women and girls, some ‘red flags’ – indicators like the ones elaborated in the *Anti-Human Trafficking Manual for Criminal Justice Practitioners*³¹⁷ should be clearly defined so that the platforms can identify ads that promote trafficking and exploitation of prostitution. Some experts used keywords to explore websites to track trafficking and exploitation of prostitution.³¹⁸ Other have extracted telephone numbers to examine connections between advertisements.³¹⁹ Software tools to extract, analyze and visualize detected indicators of human trafficking have been developed, but they face many challenges, including the constant evolution of digital technology. Pornography websites can be connected to trafficking in women and girls and exploitation of prostitution as well.³²⁰ Some forms of internet pornography provide violent and exploitative imagery and can also serve traffickers to promote images of victims.³²¹ Porn that is bought and sold online legally may have been created illegally using trafficked persons.³²²

Practice

ePOOLICE,³²³ early Pursuit against Organised crime using environmental scanning, the Law and Intelligence systems, is a project funded under European Commission 7th Framework Programme security themed research (Topic SEC-2012.6.3-1), aimed at semantically filtering information from open-sources, such as the web and social media, to identify information that may constitute weak-signals of organized crime. It is based on the concept of ‘weak signals’: isolated indicators are less valuable than grouped indicators under certain conditions, such as temporal or geographic proximity to a specific location and type of activity.

In the European Union Strategy on combatting trafficking in human beings 2021-2025,³²⁴ the Commission, in line with the proposal for the Digital Services Act,³²⁵ committed to conduct a dialogue with relevant internet and technology companies to reduce the use of online platforms for the recruitment and exploitation of

³¹⁷ UNODC, *Anti-Human Trafficking Manual for Criminal Justice Practitioners - Module 2: Indicators of trafficking in persons*, available online at: <https://www.unodc.org/unodc/en/human-trafficking/2009/anti-human-trafficking-manual.html> [accessed 14.01.2022].

³¹⁸ Latonero, cit.

³¹⁹ M. Ibanez, D. Suthers, *Detection of Domestic Human Trafficking Indicators and Movement Trends Using Content Available on Open Internet Sources*, Conference: Proceedings of the 2014, 47th Hawaii International Conference on System Sciences, 2014.

³²⁰ R. Busick, *The unfortunate reality of pornography production is that, often, the production of pornography is neither harmless nor consensual*, in 42 *PEPP. L. REV.* 333, 338 (2015).

³²¹ A.J. Luzwick, *Human Trafficking and Pornography: Using the Trafficking Victims Protection Act to Prosecute Trafficking for the Production of Internet Pornography*, in *Northwestern University Law Review* 112:355 (2017), p. 356.

³²² *Ibid.*, p. 358.

³²³ S. Andrews, B. Brewster and T. Day, *Organised crime and social media: a system for detecting, corroborating and visualising weak signals of organised crime online*, in *Security informatics*, 2018.

³²⁴ EU Strategy on combatting trafficking in human beings 2021-2025, cit., para. 4.3.

³²⁵ With the approval of the European Parliament in January 2022, trilogue negotiations on the proposal with the Council can start. [https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/698873/EPRS_ATA\(2022\)698873_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2022/698873/EPRS_ATA(2022)698873_EN.pdf) [accessed on 01.02.2022].

victims. The Commission will also accompany possible similar dialogues to be conducted by Member States at national level.

Practice

In the USA, in 2011 the Obama Administration commissioned the development of an app that would inform consumers about how their purchases were connected to modern slavery. Thus, the online tool slaveryfootprint.org was created, in the form of a survey that informs users how many slaves are required to support certain lifestyles. At the intersection between human rights and technology, the website won numerous awards and “was instrumental in the passing of several modern slavery legislations.”³²⁶ Then, the Made In A Free World and FRDM programmes were developed to raise awareness and campaign for slavery free supply chains, and they have an important impact world-wide, both in the public sector and on private businesses. FRDM is now used as a software solution for compliance with national legislation such as the California Supply Chain Transparency Act, the UK Modern Slavery Act, Australia Modern Slavery Act, the French Corporate Duty of Vigilance Law and the Dutch Child Labour Due Diligence Law.

With regard to minors, advertisement may misrepresent the age of the victims, but ‘certain keywords meant to serve as signals for the purchasers who drive the demand for sex with minors make detection a possibility.’³²⁷ Furthermore, sugar dating sites (sugar daddy or sugar baby sites) have been mentioned by NGOs, including European Women’s Lobby, as extremely vulnerable to trafficking. Sugar dating is defined as a relationship with an older, wealthier person who secures an intimate relationship from a younger person through money, vacations and gifts. As reported in a university website, providing services to students, ‘Sugar dating is often presented as a fun and stress-free way for young people, especially students, to get their financial needs met. However, the less glamorous side of sugar dating often involves coercive requests for sex, harassment, tilted power dynamics, and exposure to sex traffickers.’³²⁸

Tracking trafficking in women and girls and exploitation of prostitution on the internet, in online classifieds sites, and in pornography sites is not easy. The development of software able to track weak signals and combine them to detect trafficking in women and girls sounds fundamental. Scanning procedures have been proposed in particular with regard to sexual exploitation of children,³²⁹ but have faced criticisms in light of the right to privacy.

A comprehensive strategy is required from different sectors and perspectives. It requires the cooperation of NGOs, victims and survivors, groups that have a targeted expertise, IT experts, law enforcement authorities.

³²⁶ See official website: <http://slaveryfootprint.org/> [accessed on 14.01.2022].

³²⁷ Latonero, cit., p. 18.

³²⁸ Georgia State University – Student victim assistance, *What is Sugar Dating?*, 18 December 2020, online at: <https://victimassistance.gsu.edu/2020/12/18/what-is-sugar-dating/> [accessed 12.10.2021].

³²⁹ neuralMatch was planned to scan images before they are uploaded to iCloud. If it finds a match, the image was meant to be reviewed by a human. If child pornography is confirmed, the user’s account was meant to be disabled and the National Center for Missing and Exploited Children notified. Tech company Apple has delayed its plan to implement it. <https://www.apple.com/child-safety/> [accessed 14.01.2022].

Social networking sites, online classified sites, dating and pornography sites should acknowledge that criminals are using internet to facilitate trafficking in persons and develop anti-trafficking initiatives to be included in their code of conduct.³³⁰ Third party accountability should be envisaged in legislation. Despite being content host only, the platform should be required by law to directly react to and take down disguised advertisements linked to trafficking and exploitation of prostitution. University websites should include warnings against the dangers of sugar daddy and sugar baby sites, which might be linked to trafficking in women and girls and prostitution.

Following the money should also be considered as a powerful tool to address the digital aspects of trafficking in persons and exploitation of prostitution. According to the Financial Action Task Force on Money Laundering (FATF), rather than identifying money from trafficking, ‘it is easier to profile a victim’s expenses/financial flows.’³³¹ Examining the financial transactions of the victim can help identify the individuals laundering the proceeds from the trafficking in person for the purpose of sexual exploitation offences. ‘These transactions can highlight a pattern of activity that can lead to the larger sexual exploitation trafficking network.’³³² One major challenge is represented by ‘money laundering risk from proceeds of human trafficking not adequately detailed in risk assessments and understood: [...] Due to the unseen nature of some aspects of the predicate offence and the difficulty in identifying the laundering of the proceeds of human trafficking, it is hard for national authorities to gather statistics to properly assess the ML risk from human trafficking in their jurisdiction.’³³³ The FATF recommended the good practice of assessing ‘the diverse money laundering risks from human trafficking, share with stakeholders and ensure that they’re understood.’³³⁴ Financial Intelligence Units could encourage reporting entities to flag the transactions with possible links to trafficking in persons with a specific word/phrase.

f) Awareness-raising

Awareness raising has been a constant element of the previous sessions. Any action to counter trafficking in women and girls and exploitation of prostitution must include awareness raising among the wider public and specific training for officials and law enforcement authorities as key element. School curricula should include the topic of trafficking in women and girls and exploitation of prostitution in subjects related to human rights and gender equality as part of school curricula on health, and through the training of teachers and school administration on gender mainstreaming and gender equality.³³⁵

Practice

In Paraguay, the U.S. Department of State-funded Ñande Ko’ẽ project (“Our Sunrise” in Guarani) aims at strengthening Paraguay’s capacity to prevent trafficking in persons. In the Government of Itapúa, a campaign

³³⁰ Latonero, cit., p. 39.

³³¹ *Financial Flows from Human Trafficking*, op. cit., para. 54.

³³² Ibid.

³³³ Ibid., para. 77.

³³⁴ Ibid., para. 87. See also EU Strategy on combatting Trafficking in Human Beings, cit., para. 4.1.

³³⁵ On the practice of State parties to the COE Anti-Trafficking Convention, see Mullally, Article 17, cit., p. 255.

was launched to raise awareness of potential cases of trafficking in persons and sexual exploitation to high school principals, teachers, and students through the distribution of informational toolkits. Furthermore, officials and employees in the tourism sector received specific training.³³⁶

Several European Countries, with the European Crime Prevention Network and EUROPOL launched in 2019 the campaign ‘#YouHaveRights!’ to inform: (potential) victims that they could be or become a victim of trafficking; victims of trafficking where they can find help, protection and information; victims of trafficking that they have EU-wide rights.³³⁷

B. Upholding victims’ rights

3. Context and legal background

General Recommendation No. 38 contains a series of recommendations to States with regard to the protection of victims’ rights. It focuses on:

- a) Victim identification
- b) Application of other protection frameworks
- c) Non-criminalization and non-conditionality
- d) Right to information about rights and legal assistance
- e) Right to a remedy

From a legal point of view, the Trafficking in Persons Protocol has, among its aims, (Article 2 (b)) ‘to protect and assist the victims of such trafficking, with full respect for their human rights.’ Part II of the Protocol, Articles 6 to 8, is dedicated to the protection of victims of trafficking in persons. Article 6 requires States to assist and protect victims of trafficking in persons; Article 7 deals with the status of victims of trafficking in persons in receiving States; Article 8 concerns the repatriation of victims of trafficking in persons. The protection of the victims of trafficking in persons is a key element in the action to counter the crime, that must be guided by a human rights-based and gender sensitive approach.

a) *Victim identification*

Identification is a crucial aspect in the fight against trafficking in persons. Individuals that are trafficked across international borders might be considered *prima facie* as illegal migrants ‘because these characterizations are

³³⁶ J. Torales, A. McGovern, F. Iglesias, *Paraguay Tourism Sector Warns: “Open your Eyes against Trafficking in Persons”*, 29 July 2021, available online at: <https://partners.net/blogs/paraguay-tourism-sector-warns-open-your-eyes-against-trafficking-persons> [accessed 12.10.2021].

³³⁷ <https://eucpn.org/preventhumantrafficking>

the easiest for national law enforcement authorities to make.³³⁸ As international practice shows, however, ‘illegal migrants do not generally benefit from even the minimal protections afforded to those who are identified as having been smuggled.’³³⁹

Identification allows the victims the enjoyment of human rights, including access to remedy, and improves the measures adopted to counter the crime. When a victim is identified as victim of trafficking, he/she has the right to be assisted and protected according to the Trafficking in Persons Protocol. An example is the permission to stay temporarily or permanently in the territory of the State under Article 7 of the Trafficking in Persons Protocol: ‘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.’ The Protocol itself does not expressly set an obligation for States to identify victims of trafficking.³⁴⁰ The obligation to identify victims of trafficking was however enshrined in the Council of Europe Convention on Action against Trafficking in Human Beings, at its Article 10, and in the ASEAN Convention against Trafficking in Persons, at its Article 14.

It can be argued that the identification is the prerequisite for the enjoyment of the protection granted by the Trafficking in Persons Protocol. States are obliged to exercise due diligence to protect victims of trafficking, and the exercise of due diligence enshrines the need for identification.³⁴¹ In other words, even without an express obligation to identify the victims, due diligence obligation of protecting and assisting victims of trafficking entails the proper identification of the victims. As it was noted, absence of early identification might lead to the criminalization of trafficked persons.³⁴² Victims of trafficking and exploitation of prostitution can be prosecuted for illegally entering the country, and victims of trafficking for sexual exploitation can be difficult to detect in mixed populations of women in prostitution.³⁴³ Without immigration status, victims of trafficking might be reluctant to search for help or report the exploitation to the authorities. According to the Special Rapporteur in Trafficking in Persons, Especially Women and Children, ‘a meaningful due diligence approach broadens the scope of identification to address a wider class of potential or presumed victims, as part of a comprehensive approach to prevention rather than a solely reactive or post-hoc due diligence measure. A wider and more pre-emptive approach necessarily involves a broader range of actors beyond law enforcement or border officials in identification.’³⁴⁴

The importance of identification emerged in the case *Z.Z.Z. v The Netherlands*, decided by the Committee on the Elimination of Discrimination against Women in 2012.³⁴⁵ The woman, of Chinese nationality, was trafficked to the Netherlands for the purpose of sexual exploitation. Once in the Netherlands, she applied for

³³⁸ Gallagher, *The International*, cit., p. 278.

³³⁹ Ibid, p. 279.

³⁴⁰ This is a consequence of the drafting process. Ibid, p. 280.

³⁴¹ Gallagher (p. 282) argued that ‘the obligation of identification can be argued to flow from the fact that any rights accorded to trafficked persons amount to nothing without a corresponding obligation on competent authorities to identify them as such.’

³⁴² *Recommended Principles and Guidelines, Commentary*, p. 129.

³⁴³ European Commission, *Study on the Gender Dimension of Trafficking in Human Beings*, Luxembourg, 2016 and EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 27.

³⁴⁴ Report of the Special Rapporteur on trafficking in persons, especially women and children, A/70/260, report 3 August 2015, para. 25.

³⁴⁵ *Zhen Zhen Zheng v. The Netherlands*, CEDAW/C/42/D/15/2007, UN Committee on the Elimination of Discrimination Against Women (CEDAW), 26 October 2009,.

refugee status, but her request was rejected by national authorities because ‘she could not give details about her trip from China to the Netherlands, did not have identity documents and waited for eight months before applying for asylum.’ She filed a complaint with the Committee on the Elimination of Discrimination against Women claiming a violation of her rights protected by CEDAW. The case was considered inadmissible by the UN Committee because, according to the majority of experts, the woman had neither applied for residency permit as victim of trafficking – this was allowed in the Netherlands - nor invoked Article 6 CEDAW before the Dutch authorities. Committee members Dairiam, Neubauer and Pimentel submitted a dissenting opinion arguing that the communication should have been seen as admissible and that there was a violation of Article 6 of the Convention on the Elimination of All Forms of Discrimination. Their position is worth reporting:

[i]n light of the nature of the crime of trafficking and the difficulty for victims, who are often uneducated and traumatized, to report precisely and with great details their experience, we are of the view that [the Immigration and Naturalization Service] did not act with the due diligence that the author’s situation required by failing to recognize that she might have been a victim of trafficking in human beings and accordingly inform her of her rights Under the Palermo Protocol, such a duty is clearly established under article 6.

This case is self-explanatory of the importance of the reference to victims’ identification in the GR No. 38. GR No. 38 suggests that States should create national guidelines, updated on a regular basis for early identification, provisions of services and referral of victims or presumed victims that are benchmarked against international standards, integrating a rights-based, victim-centered, age- and gender-sensitive, and trauma informed approach (para. 77). These guidelines must be applied at international borders and throughout the territory of State parties by all relevant state and non-state actors.

National guidelines cannot be uniform in all countries in the world, because different is how the crime of trafficking and exploitation of prostitution manifests itself in different contexts. All national guidelines should however take into consideration some key elements, including the removal of language barriers, and the protection of women from secondary victimization by setting a low threshold for the identification of the victim – ‘reasonable ground’ to believe the person is a victim of trafficking. As it was stressed by the Special Rapporteur on the human rights of migrants, States should:

(k) Undertake the early identification of migrant women and girls who may be victims of gender-based violence or trafficking in persons, focusing on detecting vulnerabilities, beginning at the locations of first arrival, lower the threshold for the level of evidence to be used in identification processes and provide assistance and protection as soon as there is reason to suspect that a person is a victim of gender-based violence or trafficking: such assistance should be provided regardless of whether the offender is identified, prosecuted or convicted, and irrespective of the person’s legal status, ethnicity, nationality or level of cooperation in the criminal proceedings.³⁴⁶

The ‘reasonable ground’ indicator is not easy to elaborate and to define without the support of women’s rights NGOs which, thanks to their expertise, can help the authorities in detecting the elements that lead to an early

³⁴⁶ Special Rapporteur on the human rights of migrants, Felipe González Morales, in accordance with Human Rights Council resolution 34/21, *Human rights of migrants: good practices and initiatives on gender-responsive migration legislation and policies*, A/74/191, 18 July 2019, para. 115 (k).

identification of the victims of trafficking.³⁴⁷ The collaboration with civil society organization has been clearly stressed in GR No. 38 and plays a key role in early identification.

Training for identifying authorities, including consular authorities and border guards, is fundamental and must endorse a gender perspective. It means that officials must have access to a gender-specific training, which seems particularly pivotal in the identification of victims of trafficking for sexual exploitation. The identifying source can also be a medical professional or a social worker, it may also be hotel and airline staff.³⁴⁸ Recognizing key indicators of trafficking in persons and exploitation of prostitution is the first step in identifying potential victims. This is why the Office of the UN High Commissioner for Human Rights has worked with the International Civil Aviation Organization to develop guidelines for airlines operators to train cabin crews in identifying and reporting trafficked individuals. These guidelines can be a model for further action at transnational level – by international organizations working in the transportation sector or by groups of private corporations – to be conducted against trafficking in persons. According to the guidelines, if cabin crew members suspect a case of trafficking in persons on board, a proper assessment of the situation is necessary before any response can be initiated. A list of indicators is provided, included for example, when a person on board shows that she/he is not in control of his/her documents, when he/she is unaware of the final destination of her journey, or when he/she is unusually submissive to the person he/she is travelling with.³⁴⁹ Specific guidelines should be elaborated for different means of transportations and activities that might be more easily exploited by traffickers. The importance of actions against trafficking should be included in both hard law and soft law instruments. Hence, for example, the UN World Tourism Organization adopted its first international Convention in 2017, opened to signature until October 2020, the Framework Convention on Tourism Ethics. In this convention, it is stated that media should not in any way promote sexual exploitation in tourism (Article 9), and that ‘the exploitation of human beings in any form, particularly sexual, especially when applied to children, conflicts with the fundamental aims of tourism and is the negation of tourism’ (Article 5).

Practice

Within the actions in response to the Rohingya humanitarian crisis, the 2020 mid-term report highlighted that the Anti-Trafficking Working Group (ATWG) organized training sessions to enhance awareness of human trafficking issues, reaching 31,573 individuals: 12,544 refugees (4,595 men, 5,604 women, 1,330 boys and 1,015 girls) and 19,029 host community members (6,317 men, 7,688 women, 2,507 boys and 2,517 girls). The ATWG also provided training for 498 members of the Counter Trafficking Committee and 102 youth that highlighted the links between trafficking, child marriage, and COVID-19. In collaboration with Radio NAF,

³⁴⁷ See in the EU, EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 28.

³⁴⁸ A/70/260, op. cit., para. 25: ‘Good practices in this regard include involving actors such as labour and health and safety officials in identification of trafficking victims. Another good practice is for States to assign labour attachés to the staff of diplomatic missions, particularly in those countries that receive the largest number of a State’s migrant workers. In order to facilitate victims’ trust and identification — and subsequent protection and assistance — firewalls between certain areas (e.g., between enforcement of immigration laws and enforcement of labour laws) will often be necessary.’

³⁴⁹ ICAO, circular 352, *Guidelines for Training Cabin Crew on Identifying and Responding to Trafficking in Persons*, 2018, pp. 7-8.

BBC Media Action, UNHCR, and IOM, audio messages reached 33 percent of the Teknaf population and parts of Ukhiya; including refugee camps. Tailored messages highlighting the dangers of onward movements in the context of COVID-19 also addressed the heightened risk of trafficking during the pandemic.³⁵⁰

The United States Department of Transportation's Federal Aviation Administration (FAA) developed Information for Operators (InFO) 16019 — Enhanced Training for Flight Attendants (F/A) — Human Trafficking Recognition and Response, issued on 25 October 2016. It informs operators of the statutory requirement to provide cabin crew members with training on recognizing and responding to potential victims of trafficking, and includes a link to the Blue Lightning Initiative (BLI), which is a programme created by the United States Department of Transportation and the Department of Homeland Security that serves to raise awareness about trafficking in persons as it pertains to the airline industry.³⁵¹

The European Commission has funded various projects addressing directly or indirectly the issue of identification of victims of trafficking.³⁵² Two specific documents addressed to border guards and consular services namely the 'Anti-trafficking Training for Border Guards – Trainer's Manual' of the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union (FRONTEX) and the "Handbook for diplomatic and consular personnel on how to assist and protect victims of human trafficking" of the Council of the Baltic Sea States (CBSS) have been adopted in the EU. Early identification is crucial to promptly assist, support and protect victims of trafficking in human beings and enables police and prosecution authorities to better investigate and punish traffickers.³⁵³

Concerning the identification of children, the Recommended Principles and Guidelines, Commentary, stressed the importance of the identification process and the challenge posed by the definition of child itself.³⁵⁴ According to the UN Convention on the Rights of the Child, 'a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier' (Article 1). Trafficked children may carry false identity papers that misstate their age, so that they appear to be 18 years old or even older, or they may lie because they are afraid of the consequences of being a child.³⁵⁵ At the international level, there is a growing acceptance of a presumption of age in the case of children, meaning that a victim who may be a child is treated as such unless or until other determination is made.³⁵⁶ This presumption stems from the legislative guide to the Trafficking in Persons Protocol and from the UNICEF Guidelines on

³⁵⁰ 2020 Mid-term review, *Rohingya humanitarian crisis*, p. 26, <https://www.humanitarianresponse.info/en/operations/bangladesh>

³⁵¹ ICAO, *Guidelines for Training Cabin Crew*, cit., p. 18.

³⁵² European Commission, *Guidelines for the Identification of Victims of Trafficking in Human Beings. Especially for Consular Services and Border Guards* – Reference Document, Home Affairs, Luxembourg, 2013, available online at: https://ec.europa.eu/anti-trafficking/guidelines-identification-victims_en [accessed on 14.01.2022].

³⁵³ *Ibid.*, p. 3.

³⁵⁴ *Recommended Principles and Guidelines, Commentary*, p. 162.

³⁵⁵ *Ibid.*

³⁵⁶ *Ibid.*, p. 163.

the Protection of the Child Victims of Trafficking.³⁵⁷ The best interest of the child must guide the identification and the referral procedures. Private corporations must have in mind the best interest of the child while taking actions against trafficking in persons. Hence, for example, in the *Global Study on Sexual Exploitation of Children in Travel and Tourism*, a series of studies was conducted thanks to the input from 67 partners around the world, as well as contributions from experts and children themselves. Recommendations stemming from this study have been divided into: recommendations for NGOs, for private sector companies, for national governments, and for international and regional organizations. Private corporations are invited to endorse the ‘Code of Conduct for the Protection of Children from Sexual Exploitation in Travel and Tourism or - at a minimum - adopt and enforce explicit corporate policies against SECTT and prioritize training on SECTT prevention and response for travel and tourism professionals.’³⁵⁸

Practice

In Italy Save the Children prepared *Standard Operating Procedures to Identify Minors who are Victims of Trafficking and Exploitation in Italy*, where the age assessment is based on the ‘benefit of doubt,’ meaning that the individual has the right to be regarded as a minor even in spite of doubts about that person’s actual age. According to the Guidelines, ‘the social and health check must be executed by a multidisciplinary staff in an adequate environment, in the presence of a cultural mediator and by adopting non-aggressive methods, in respect of the person and his/her alleged age.’³⁵⁹ The formal identification must be conducted through a detailed formal interview and after preliminary identification (action 8), in a child friendly place, by professionals working in human trafficking assistance offices.

WOMEN WITH DISABILITY

Women and girls face multiple forms of discrimination in trafficking and exploitation of prostitution. Women with disabilities may be targeted by traffickers because of their impairment.³⁶⁰ As reported in the 2012 OHCHR Thematic Study:

25. Women and girls with disabilities may in some cases be targeted for exploitation because of their disability, which can in turn expose them to further violence. There is evidence that some forms of disability are directly linked to different patterns of trafficking (such as forced begging and labour exploitative practices). There have

³⁵⁷ UNICEF, *Guidelines on the Protection of Child Victims of Trafficking* – UNICEF Technical Notes, New York USA, September 2006, available online at: <https://www.refworld.org/pdfid/49997af727.pdf> [accessed 14.01.2022].

³⁵⁸ Global Study on Sexual Exploitation of Children in Travel and Tourism, *Recommendations from The Global Study on Sexual Exploitation of Children in Travel and Tourism*, available online at: <https://ecpat.org/wp-content/uploads/2021/05/Recommendations-of-the-Global-Study.pdf> [accessed 14.01.2022].

³⁵⁹ Save the Children, *Standard Operating Procedures to Identify Minors who are Victims of Trafficking and Exploitation in Italy*, 2020, available online at: [https://www.savethechildren.it/sites/default/files/files/Standard%20operating%20procedures%20to%20identify%20minors%20who%20are%20victims%20of%20trafficking%20and%20exploitation%20in%20Italy\(1\).pdf](https://www.savethechildren.it/sites/default/files/files/Standard%20operating%20procedures%20to%20identify%20minors%20who%20are%20victims%20of%20trafficking%20and%20exploitation%20in%20Italy(1).pdf) [accessed 14.01.2022].

³⁶⁰ *General comment No. 3 (2016) on women and girls with disabilities*, CRPD/C/G/C/3, 25 November 2016, para. 31.

been reports of persons, particularly women and girls, with physical or visual impairments being trafficked into forced begging because a visible disability may have a stronger impact on public sympathy.³⁶¹

The report also stressed that ‘women and girls with disabilities are also particularly vulnerable to violence during situations of conflict and other natural disasters, which may force migration and or displacement.’³⁶²

The connection between disability and trafficking in persons and exploitation of prostitution has not been adequately addressed in terms of law and policies. As highlighted by NGOs working with persons with disabilities, there are several shortcomings that must be addressed, including lack of awareness, lack of data and the invisibility of women with disabilities in international legal instruments against trafficking.³⁶³ A 2018 exploratory study conducted in the US showed a disproportionate risk for exploitation in juvenile sex trafficking for girls with intellectual disabilities, determined by complex dynamics, victim lack of awareness of exploitation and its endangerments, the inability of victims to self-identify, and the ease with which traffickers can manipulate them.³⁶⁴ The identification of victims must consider disability as a factor that increases the risk of trafficking. Actors involved in referral mechanisms must recognize this risk. As stressed by GR No. 38, ‘adequate assistance must be provided to women and girls with disabilities who are a particularly vulnerable group to be trafficked.’³⁶⁵ Protection services must be sensitive and prepared to respond to the needs of victims with disability. For example, shelters could provide adequate housing and service to victims with disabilities; specialized services must ensure psychological and physical support, rehabilitation and inclusion.

In order to tailor the response, data must be collected and published to identify the intersection of forms of discrimination in victims’ identification and to make women and girls with disability visible, as they are worth of attention at the international level. Awareness that women, and especially girls, with intellectual disabilities face a higher risk of being trafficked and exploited for prostitution must lead to the definition of sensitive preventive measures and to the inclusion – in domestic legislation where this is not already present – of disability as aggravating circumstance of the crime of trafficking. The eradication of stereotypes is also pivotal in granting access to justice to women and girls with disability.³⁶⁶

REFERRAL MECHANISMS

A National Referral Mechanism (NRM) is a framework for identifying victims of trafficking in persons and ensuring they receive the appropriate protection and support. It can also be aimed at the collection of relevant data about victims of trafficking. As reported by IOM, ‘there is no standardized NRM in the world. Generally, the NRM refers to a collaborative effort among governmental authorities, civil society organizations and

³⁶¹ *Thematic study on the issue of violence against women and girls and disability*, Report of the Office of the United Nations High Commissioner for Human Rights A/HRC/20/5 30 March 2012.

³⁶² *Ibid.*, para. 26.

³⁶³ Submission by [International Disability Alliance](#) and [European Disability Forum](#), 22 February 2018.

³⁶⁴ J.A. Reid, *Sex Trafficking of Girls with Intellectual Disabilities: An Exploratory Mixed Methods Study*, in *Sexual Abuse*, vol. 30 (2), p. 107 ff.

³⁶⁵ GR No. 38, para. 20.

³⁶⁶ *Statement to the 24th Session UN Committee on the Rights of Persons with Disabilities*, March 8 2021, available online at: <https://www.ohchr.org/Documents/Issues/Trafficking/CRPD-2021-March-8.docx> [accessed 11.01.2022].

international organizations to jointly protect the basic rights of victims of human trafficking.³⁶⁷ GRETA highlighted the importance of multiagency cooperation in the framework of a NRM, and that ‘victims of trafficking should be given the opportunity to play a role in criminal proceedings against traffickers, if they so wish, and to receive compensation.’³⁶⁸ Measures to support victims should include consultation of survivors of trafficking in women and girls, risk and assessment of victims, repatriation and social inclusion functions, child-specific aspects, as well as long-term support and social inclusion functions. NRM should be funded by the State to ensure consistent financing. Specific financial allocation of funds can be envisaged to protect women from sexual exploitation.

Practice

In Spain, the National Budget contains a specific item in the budget of the Ministry of the Presidency, Relations with Legislative and Equality devoted to women victims of trafficking for sexual exploitation. The amount earmarked is 4,000,000 EUR, within the total budget for actions for the comprehensive prevention of gender-based violence (159,508,050 EUR).³⁶⁹

Referral mechanisms can be both national (NRM) and transnational (TRM). ODIHR defined the latter as ‘the concept of a co-operative agreement for the cross-border comprehensive assistance and/or transfer of identified or potential trafficked persons, through which state actors of different countries fulfill their obligations to promote and protect the human rights of trafficked persons.’³⁷⁰ It is an operational framework connecting different stakeholders from two or more countries involved in the identification, referral, assistance, repatriation, and monitoring. Each stakeholder should have a specific role, along with a procedure to follow, to ensure the respect for the victims’ human rights. A human rights-based and gender-sensitive approach should guide the referral of trafficked persons to specialized agencies.³⁷¹

An interesting mechanism was proposed by the IOM and ICMPD: the Transnational Referral Mechanism (TRM) can serve as a first step in the development towards the adoption of mutual recognition of victim status.³⁷²

Practice

³⁶⁷ G. Liu, *National Referral Mechanisms for Victims of Human Trafficking: Deficiencies and Future Development*, IOM, 2017, p. 2, available online at: https://publications.iom.int/system/files/pdf/national_referral_mechanisms.pdf [accessed 14.01.2022].

³⁶⁸ GRETA, *Assistance to Victims of Human Trafficking*, Thematic Chapter of the 8th General Report on GRETA’s activities, 2019, p. 9.

³⁶⁹ Practice reported in European Commission, *Study on reviewing the functioning of Member States’ National and Transnational Referral Mechanisms*, Migration and Home Affairs, Luxembourg, 2020, p. 22, available online at: https://ec.europa.eu/anti-trafficking/sites/antitrafficking/files/study_on_reviewing_the_functioning_of_member_states_national_and_transnational_referral_mechanisms.pdf [14.01.2022].

³⁷⁰ *National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons, A Practical Handbook*, OSCE Office for Democratic Institutions and Human Rights, n.d. Web. 29 November 2012.

³⁷¹ Ibid. Gender sensitive approaches have proved to be covered in only a half of the Member States (14) in a study of the European Commission, *Study on reviewing the functioning of Member States’ National and Transnational Referral Mechanisms*, 2020, available online at: https://ec.europa.eu/anti-trafficking/system/files/2020-10/study_on_reviewing_the_functioning_of_member_states_national_and_transnational_referral_mechanisms.pdf [accessed on 14.01.2022].

³⁷² See IOM, *Enhancing the Safety and Sustainability of the Return and Re-integration of Victims of Trafficking*, and ICMPD, *Guidelines for the Development of a Transnational Referral Mechanism for Trafficked Persons in Europe: TRM-EU (ICMPD 2010)*. See R. Piotrowicz and C. Rijken, Article 16, in L Planitzer and others, *A Commentary*, cit., p. 246.

ASEAN prepared gender sensitive guidelines for handling women victims of trafficking in persons. With regard to referral, it is suggested that a standard ASEAN procedure is established to utilize focal points and create the most effective system for referral of victims as well as national referral mechanisms with clear roles and responsibilities and encourage data sharing among ASEAN member states (3.4.2.) During the referral process, origin, transit, and destination countries shall cooperate in order to promote and protect the rights of victims of trafficking in persons and to reintegrate victims into the community (3.4.3). Interviews must be conducted by trained female personnel, if possible, in a safe place where the victim and suspects or perpetrators must not have direct contact; the victim should be interviewed in separate rooms from the alleged trafficker (3.5.2).³⁷³

TACT Project is the transnational Action-Safe and sustainable return and reintegration for victims of trafficking returning from France, Greece, Italy, Poland and Spain to priority countries, as Albania, Morocco and Ukraine were defined by the European Union and the Member States in the Action Oriented Paper, adopted in 2009. The overall objective of the project is to contribute to the improvement of the safe return and reintegration conditions of victims of trafficking (VoTs) returning from France, Greece, Italy, Poland and Spain to the 3 priority countries. As reported on the website of the project, this project has enhanced the capacities of the priority countries authorities in the field of protection and assistance with specific focus on return and reintegration assistance for victims of trafficking.³⁷⁴

States have included referral mechanisms in different legal instruments, either binding or non-binding.³⁷⁵

b) Application of other protection framework

The fight against trafficking in women and girls and exploitation of prostitution can benefit from the legal framework related to the protection of migrants. GR No. 38 grasps this aspect by suggesting the improvement of cross-border collaboration, coordination and knowledge exchange among border control, law enforcement, child and social protection authorities and non-governmental organizations to provide displaced and migrant women and girls with appropriate and sufficient reception facilities (para. 84). The principle of *non-refoulement* and the prohibition of arbitrary and collective expulsion must apply in cases of trafficked women and girls, being rules that have consolidated at the international level. GR No. 38 refers to a 'due diligence framework' to the risk assessment conducted by multidisciplinary teams for the identification and protection

³⁷³ ASEAN, *Gender Sensitive Guideline for Handling Women Victims of Trafficking in Persons*, 2016; see also WHO, *Ethical and Safety Recommendations for Interviewing Trafficked Women*, 2003, available online at: https://www.who.int/mip/2003/other_documents/en/Ethical_Safety-GWH.pdf [accessed on 14.01.2022].

³⁷⁴ IOM, *The TACT Project*, available online at: <https://www.iomfrance.org/tact/the-tact-project.html> [accessed 14.01.2022].

³⁷⁵ For example, in Moldova, *The Regulation on operation of the territorial multidisciplinary teams within the National Referral System* (Government Decision No. 228 of 28 March 2014) clarified the roles of responsibilities of the entities participating in these teams with regard to victim assistance; in Spain, a *Framework Protocol for the Protection of Victims of Trafficking* was signed in October 2011. It establishes procedures for the detection, identification, referral, support and protection of adult and child victims of trafficking, covering both EU nationals and third-country nationals, whereas in Bulgaria, the authorities have adopted a *Co-ordination Mechanism for Referral, Care and Protection of Repatriated Unaccompanied Minors*. GRETA, *Assistance to Victims of Human Trafficking*, Thematic Chapter of the 8th General Report on GRETA's activities, 2019..

of trafficked women and girls. It means that States must provide the adequate training and the legal conditions to grant the highest level of identification of trafficked women and girls. With regard to hotspots, the identification of victims of trafficking in women and girls is particularly challenging. Proactive measures are necessary, and specific training to all the actors present in the hotspots provided. It was reported that in hotspots at the border of Europe ‘interviews are often conducted very quickly, in a limited number of languages, and often in ways that are not adequate given the level of stress, shock and anxiety refugees and migrants are experiencing.’³⁷⁶ Even if a healthcare provider becomes aware of the fact that a person might be victim of trafficking, the lack of information concerning the referral procedures might prevent providers from taking further action. Victims of trafficking might be reluctant to report their situation to the authorities because they fear retaliation from the traffickers once they become aware of the reporting activity. Victims of trafficking for sexual exploitation should be treated as ‘vulnerable victims’ and ‘special measures should be taken when interviewing them to avoid secondary victimization.’³⁷⁷ Therefore, particular care must be paid in the training and in the management of hotspots. For example, during interviews, specific questions should be elaborated to identify whether a person is victim of trafficking. More female police staff and interpreters should be present to protect women during the procedures in hotspots. All interviews with victims should be conducted in a gender-specific manner.³⁷⁸ Interviews should take place in a safe location, where women and girls feel comfortable and their needs are met. Interpretation services and health support should always be granted.

Another practice could be to define a contact point – a person or office that is in charge of having this function – to which anyone can safely report to be victim of trafficking and exploitation of prostitution. The existence of this contact point should be clearly advertised, in all languages migrants can understand, in all possible ways. Security in hotspots should also be improved. The use of hygiene facilities can become a nightmare for women and girls who fear to be sexually abused or detected by traffickers. A very simple but fundamental action can be, for example, to enlighten the path to the hygiene facilities.

In armed conflicts, a list of indicators to identify trafficked women and girls, especially sexually exploited women and girls, that is also recommended by GR No. 38 (para. 87 d)), should be elaborated. As highlighted in a study for the UNODC:

personnel who may encounter victims in their day-to-day work may be given a summary of indicators or signs that suggest a person has been trafficked. The indicators could be printed on small cards that they could carry with them. Indicators are not conclusive on their own; their purpose is to alert non-specialists to the possibility that certain individuals may be victims of trafficking so that they can refer them to a trained specialist. The specialist will determine whether they are indeed a victim of trafficking and, if necessary, ensure they receive appropriate support. Indicators are most effective when tailored to the context of those who are in contact with potential victims, whether along migration routes, in conflict settings, in refugee camps or elsewhere. Generalized and publically available indicators should be adapted to the specific situation of the conflict or post-

³⁷⁶ EPRS, *Detecting and protecting victims of trafficking in hotspots*, 2019, p. 16..

³⁷⁷ EIGE, *Gender-specific measures in anti-trafficking actions*, 2018, p. 29.

³⁷⁸ OHCHR, UNHCR, UNICEF, UNODC, UN Women and ILO, *Joint UN Commentary on the EU Directive: a human rights-based approach*, 2011, available online at: https://ec.europa.eu/anti-trafficking/joint-un-commentary-eu-directive-human-rights-based-approach_en [accessed on 14.01.2022].

conflict setting. They should be shared as soon as practical after the onset of a crisis and be continually updated as trafficking trends and modi operandi change and new information is acquired.³⁷⁹

Since trafficking in women and girls and exploitation of prostitution is a form of gender-based violence against women, States are encouraged to consider trafficking as a form of persecution to grant refugee status, and women should be informed and enjoy the right to access to fair, efficient, trauma-informed and clear asylum procedures (para. 88 GR No. 38). For example, the requirement of recognizing violence against women as a form of persecution is a legal obligation – for the forms of violence enshrined in that legal instrument – for the State parties to the Istanbul Convention (Article 61). Already in 1984, the Executive Committee of the UN High Commission for refugee stated that States were ‘free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.’³⁸⁰ The document also stressed the ‘special needs and problems’ of refugee women in international protection. In 1991, the UNHCR adopted a set of guidelines to increase international protection for women, and asked States to improve their standards of asylum and refugee determination procedures. These guidelines were followed by additional guidelines precisely dealing with the problem of sexual violence in 1995, and by the 2002 guidelines on international protection and gender-related persecution (‘Gender Guidelines’), which complemented the interpretative guidance in the UNHCR Handbook. In the ‘Gender Guidelines,’ women are ‘a clear example of a social subset defined by innate and immutable characteristics [...] and who are frequently treated differently than men.’ However, as the UNHCR has repeatedly stressed, ‘mere membership in the group will not itself establish a valid claim to refugee status; the applicant must also demonstrate that she is specifically at risk because of such membership.’³⁸¹ Therefore, two cumulative requirements are needed: on one hand, the fact that the woman belongs to a particular group, for example women that are victims or risks to be victims of female genital mutilation, and, on the other hand, the fact that the applicant is ‘specifically’ at risk. According to the ‘Gender Guidelines’:

18. Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman’s freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked

³⁷⁹ UNODC, *Countering Trafficking in Persons in Conflict Situations*, thematic paper, 2018, available online at: https://www.unodc.org/documents/human-trafficking/2018/17-08776_ebook-Countering_Trafficking_in_Persons_in_Conflict_Situations.pdf [accessed 14.01.2022].

³⁸⁰ UNHRC, EXCOM, *Conclusion No. 39, Refugees, Women and International Protection*, 1985, contained in United Nations General Assembly Document No. 12A, A/40/12/Add.1, letter k).

³⁸¹ UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, November 2016, p. 3. available at: <https://www.unhcr.org/en-us/5822266c4.pdf> [accessed 14.01.2022].

for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.

CHILDREN'S RIGHTS

GR No. 38 dedicates a specific paragraph to children, stressing the need to protect children born of trafficking from re-victimization and stigmatization, including through clarifying and securing the legal status of undocumented children, providing comprehensive support and ensuring they are not separated from their mothers (para.89, b)). This is a particularly sensitive and insufficiently explored issue. Children born of trafficking are exposed, from the very beginning of their lives, to violence and they witness the exploitation of their mothers. According to a study, they also face challenges and complications when they 'return home' with their mothers.³⁸² Children may exhibit 'multiple psychological symptoms as a result of the constant physical, emotional, and sexual abuse that they experience.'³⁸³ Aftercare for them should be specifically envisaged. Furthermore, girls who are victims of being re-trafficked should not be returned to their country of origin if they face a risk of re-trafficking, unless 'it is in their best interest and appropriate measures for their protection have been taken including a risk and security assessment to ensure a safe return, including the availability of long-term reintegration support in the country of return' (para. 90 GR No. 38). This is a pivotal aspect, though it might be difficult to implement. In that case, due diligence should be applied in asylum cases: a State should assess with due diligence the situation in the country of origin before any decision to be taken with regard to a specific case of expulsion. Due diligence is however almost never applied in asylum cases.³⁸⁴ To borrow the legal reasoning which is applied in relation to the prohibition of torture, inhuman or degrading treatment, the State that refuses expulsion to a country where there is a risk of torture or inhuman or degrading treatment decides thus on the basis of international reports, and reports of NGOs, which depict the situation of the country. It means, in other words, that the State is not responsible for a direct violation of rights, but for an omission in its compliance with its due diligence obligations. Back in 1993, it was interestingly contended that a 'conceptualization of persecution as the failure of basic State protection demonstrated through the denial of core, internationally recognized human rights is a helpful means of breathing new life into refugee law.'³⁸⁵ Given the role of international human rights law in defining the basic duties of the States to their nationals, 'individuals ought not to be required to endure life in societies which fail to meet its standards.'³⁸⁶ Using this argument for our purposes, the question is the following: has the State of origin put in place reasonable

³⁸² R. Surtees, *What's Home? (Re)integrating Children Born of Trafficking*, in *Women & Therapy*, 40, 2017.

³⁸³ D. Neriah Muraya and D. Fry, *Aftercare Services for Child Victims of Sex Trafficking*, in *Trauma Violence & Abuse*, 17(2), 2016, pp. 204-220, p. 205.

³⁸⁴ *Implementation of the non-punishment principle*, Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, UN GA – Human Rights Council forty-seventh session, A/HRC/47/34, 17 May 2021, available online at: <https://undocs.org/A/HRC/47/34> [accessed 07.10.2021].

³⁸⁵ M. Crock (ed.), *Refugees and Rights*, Routledge, London – New York, 2015, p. 68.

³⁸⁶ A. Hathway, *The Rights of Refugees under International Law*, Cambridge University Press, 2005, p. 669.

measures to protect girls from trafficking?³⁸⁷ And consequently, can repatriation be safely decided? As highlighted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children:

31. In addition to the obligation to conduct a domestic investigation into events occurring on their own territories, due diligence also means that States have a ‘duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories.’ In order to comply with the extraterritorial implementation of due diligence obligations, States should also, for example, incorporate extraterritorial jurisdiction into national legislation criminalizing trafficking and strengthen protections against trafficking in contracting or procurement practices for activities abroad.³⁸⁸

REPATRIATION

What was argued above with regard to girls who risk of being re-trafficked can be applied to voluntary repatriation. GR No. 38 states that States must improve cooperation with receiving countries to ensure voluntary repatriation of citizens and permanent residents who have been trafficked abroad, ‘ensuring that the receiving country complies with international standards for protection and assistance to victims of trafficking’ (para. 91). This sentence can be read as an affirmation of due diligence obligations of the receiving country, which must ensure repatriation where the conditions of protection and assistance to victims of trafficking are met in the country of origin. Information on the receiving country can be obtained through reports by UN Bodies and by NGOs working in the receiving country, which should show whether that State has put in place reasonable measures to protect women from trafficking. This is confirmed by GRETA practice.³⁸⁹ States must ensure risk assessment prior to return and repatriation. The lack of opportunity for social integration, including re-integration, may result contrary to the *non-refoulement* principle. Thus, ‘a risk assessment for trafficking victims should specifically focus on the risk of re-victimisation and re-trafficking, and, if such risk exists, it should be enough to prevent forced repatriation.’³⁹⁰

c) *Non-criminalization and non-conditionality*

Non-criminalization and non-conditionality are key aspects of the protection of victims of trafficking, which must include the provision of specialized services to victims of trafficking that are individualized, gender- and child sensitive and trauma-informed. These services should be provided by specific organizations that also include victims of trafficking. It has been reported that reception and accommodation systems are often not

³⁸⁷ For a similar reasoning regarding female genital mutilation, see De Vido, *Violence against Women’s Health in International Law*, Manchester University Press, 2020, p. 51 ss.

³⁸⁸ A/70/260, cit., para. 31.

³⁸⁹ 10th General Report on GRETA’s activities, 2020, para. 141: ‘GRETA has made recommendations to several State Parties to ensure that pre-removal risk assessments are conducted and include a thorough evaluation of the risks of being trafficked or re-trafficking on return, giving full consideration to the UNHCR’s Guidelines on the application of the Refugee Convention to trafficked people.145 GRETA has further stressed that repatriation of all trafficked persons must be carried out in compliance with the obligation of non-refoulement.’

³⁹⁰ R. Piotrowicz and C. Rijken, *Article 16*, cit., p. 244.

gender-specific, and they are not capable of addressing the vulnerabilities of women and girl victims of trafficking.³⁹¹

NON-CONDITIONALITY

Non-conditionality is not present in the Trafficking in Persons Protocol. However, as stressed in the Recommended Principles and Guidelines, Commentary, ‘placing conditions on the provision of assistance denies the legal nature of both the entitlement [to receive assistance as victim of crime] and the obligation [to provide such assistance].’³⁹² Furthermore, conditional assistance can exacerbate ‘the high levels of distrust that may already exist between victims and law enforcement officials.’³⁹³ The recommendation is therefore to separate the protection and support to victims from victim cooperation. The principle of non-conditionality is present in several parts of the Recommended Principles and Guidelines, Commentary. According to GR No. 38, assistance to victims is pivotal and must not be made conditional on the victims’ participation in the criminal justice process (para. 92).

At regional level, the Council of Europe Convention on Action against Trafficking in Human Beings provides that each Party shall adopt such legislative or other measure as may be necessary to ensure that assistance to a victim is not made conditional on his or her willingness to act as a witness or otherwise cooperate with competent authorities in the investigations and criminal proceedings (Article 12, para. 6). According to the Explanatory Report on the Convention, in the law of many countries, it is compulsory to give evidence if requested to do so. Furthermore, Article 12, paragraph 6, of the Convention is without prejudice to the activities carried out by the competent authorities in all phases of the relevant national proceedings, and in particular when investigating and prosecuting the offences concerned. Thus, no one may rely on paragraph 6 in refusing to act as a witness when they are legally required to do so.³⁹⁴ GRETA recommended the authorities of several countries to guarantee access to assistance irrespective of the victim’s readiness or capacity to co-operate with police/prosecution.³⁹⁵ For example, in Luxembourg, even though the assistance is not dependent on the victims’ co-operation with the investigation and prosecution, assistance measures commence on the day when the police possess indications that the person is a presumed victim of trafficking. In the event of victims not wishing to meet the police, this means that they cannot benefit from assistance measures. GRETA urged the authorities not to link the assistance provided to their co-operation with the police and to systematically refer all potential, presumed and identified victims to specialised assistance services.³⁹⁶

³⁹¹ EIGE, p. 33.

³⁹² OHCHR, *Recommended Principles and Guidelines, Commentary*, cit., p. 142. This is echoed in the Legislative Guide, para. 199.

³⁹³ Ibid.

³⁹⁴ Explanatory Report to the Council of Europe Convention on Action against Trafficking in Human Beings, Warsaw, 16 May 2005, para. 170.]

³⁹⁵ GRETA, op. cit., para. 13.

³⁹⁶ Ibid. At EU level, the granting of a residence permit can be conditioned upon the victim’s cooperation in criminal proceedings. EU Strategy on combatting trafficking in human beings, cit., para. 5.

PRINCIPLE OF NON-CRIMINALIZATION

Similar to non-conditionality, the principle of non-criminalization is not enshrined in the Trafficking in Persons Protocol. However, since one of its purposes is ‘to protect and assist victims of trafficking, with full respect for their human rights,’ the non-criminalization principle supports this purpose and is rooted in a human rights-based approach that recognizes the liberty and dignity of trafficked persons.³⁹⁷ The non-punishment principle has been explicitly included in Article 26 of the Council of Europe Convention on Action against Trafficking in Human Beings, and Article 14(7) of the ASEAN Convention Against Trafficking in Persons, Especially Women and Children,³⁹⁸ as well as in Article 5 of the Model Law on Providing Assistance to the Victims of Trafficking of the Commonwealth of Independent States.

According to the Recommended Principles and Guidelines, Commentary, the provision of the Council of Europe Convention is narrower than the one included in the Trafficking Principles and Guidelines, in that ‘it would prevent only the punishment of a trafficked person for a status-related offence, not their arrest, prosecution or conviction.’³⁹⁹ Principle 7 of the Recommended Principles and Guidelines states that trafficked persons should not be charged or prosecuted for offences that have been committed in the course of their being trafficked. Guideline 2.5, in the context of identification, calls on States and others to ensure that ‘trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked person.’ In her report on the *Implementation of the non-punishment principle*, the Special Rapporteur on trafficking in persons, especially women and children underlined how ‘punishment of victims also undermines the fight to combat impunity for trafficking in persons, given that it targets victims rather than perpetrators, limiting both the effectiveness of investigations and the promise of accountability. [...] It also limits the effectiveness of prevention measures and limits the implementation of States’ obligations of effective prevention.’⁴⁰⁰ Moreover, the same report emphasized how ‘the principle of non-punishment is linked to several other legal obligations of States, including that of due diligence and specifically due diligence in the exercise of prosecutorial discretion. Early identification and prompt assessment by trained and qualified individuals is essential to ensuring the effective implementation of States’ obligations of non-punishment.’⁴⁰¹ The Rapporteur also explained that the non-punishment principle applies extraterritorially to identified or presumed victims of trafficking. Consequently, ‘States are required to fulfil positive obligations to take protective operational measures to ensure non-punishment, including by ending detention or other restrictions on liberty or other forms of punishment such as denial of consular assistance and repatriation.’⁴⁰² The Special Rapporteur on Trafficking in Persons eventually acknowledged that ‘in practice, the principle of non-punishment is often incorrectly treated as a mitigating factor in

³⁹⁷ ICAT, *Non-punishment of victims of trafficking*, Issue Brief 08/2020.

³⁹⁸ See also Article 5 of the Model Law on Providing Assistance to the Victims of Trafficking, Commonwealth of Independent States.

³⁹⁹ *Recommended Principles and Guidelines, Commentary*, cit., p. 131.

⁴⁰⁰ Implementation of the non-punishment principle, Report of the Special Rapporteur on trafficking in persons, especially women and children, Siobhán Mullally, UN GA – Human Rights Council forty-seventh session, A/HRC/47/34, 17 May 2021, p. 3.

⁴⁰¹ *Ibid.*, para. 25.

⁴⁰² *Ibid.*, para. 44.

punishment rather a full guarantee that victims will not be penalized for these activities as is required under a human rights-based approach to trafficking.⁴⁰³

GR No. 38 confirmed what is now considered a well consolidated principle of non-criminalization (para. 98): ‘ensure that all women and girl victims of trafficking, without exception, are not subject to arrest, detention, prosecution or penalty or otherwise punished for irregular entry or stay in countries of transit and destination, absence of documentation, or for their involvement in unlawful activities to the extent that such involvement is a direct consequence of their situation as victims of trafficking.’ GR No. 38 specifies that this principle must be encapsulated in a provision of national law and be implemented with appropriate training; must not compel victims to provide evidence or testimony in exchange for immunity from prosecution redress or services; provide recourse for trafficking victims to clear their criminal records in cases the crimes for which they are convicted have been committed as a direct consequence of being a victim of trafficking.

The key issue is the interpretation of the expression ‘direct consequence of being a victim of trafficking.’ There are two approaches: (a) causation-based and (b) duress-based.⁴⁰⁴ A causation-based approach provides that trafficked persons should not be penalized for offences committed in the ‘process of trafficking.’ It is also described as applying to offences committed ‘in the course of trafficking.’ Violation of immigration laws is one of the most notable examples. A duress-based approach focuses on crimes that victims were forced to commit. It has been argued that a causation-based approach may be easier to establish and otherwise apply to a broader range of conduct.⁴⁰⁵ It might be considered as a more encompassing approach. It is clear that this principle is not meant to grant immunity on trafficked victims who may intentionally commit non-status related crime, such as sexual violence on another victim of trafficking.

The non-criminalization principle is however useless without early victim identification and should not be impaired by the alleged consent or agreement of a victim to the commission of the offence.⁴⁰⁶ With regard to the importance of early identification, the European Court of Human Rights, in *V.C.L. and A.N. v. The United Kingdom*, the first case in the history of the Court on the prosecution of victims of trafficking, decided on 21 February 2021, stated that obligations of protection of victims of trafficking and investigation are triggered as soon as there are reasonable grounds to believe that the person was victim of trafficking, and that specific care must be granted to children:

160. In order for the prosecution of a victim or potential victim of trafficking to demonstrate respect for the freedoms guaranteed by Article 4, his or her early identification is of paramount importance. It follows that, as soon as the authorities are aware, or ought to be aware, of circumstances giving rise to a credible suspicion that an individual suspected of having committed a criminal offence may have been trafficked or exploited, he or she should be assessed promptly by individuals trained and qualified to deal with victims of trafficking. That

⁴⁰³ Ibid., para. 32.

⁴⁰⁴ OSCE, *Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking*, 25 June 2013, available online at: <https://www.osce.org/secretariat/101002> [accessed 14.01.2022].

⁴⁰⁵ ICAT, *Non-punishment*, cit.

⁴⁰⁶ R. Piotrowicz, ‘Article 26’, in J. Planitzer and others (eds), *A Commentary*, cit.

assessment should be based on the criteria identified in the Palermo Protocol and the Anti-Trafficking Convention.⁴⁰⁷

Recommendations on non-criminalization consist in: a) training to support early victim identification (this was particularly clear in the abovementioned *V.C.L.* case); b) application of a human rights-based approach; c) application of law and policy measures that implement this principle; d) development of clear and understandable policies, practices and laws to support the effective implementation of the non-punishment principle at all stages of the criminal justice system, as well as in non-criminal processes that expose the victim to possible punishment (e.g., immigration matters, or administrative and public-order related offences); e) extension of the non-punishment principle to enable criminal records to be vacated or expunged for individuals who were convicted of crimes committed as a direct result of trafficking; f) irrelevance of the consent (either to the intended exploitation or to committing the alleged offence, and g) to deny access to measures that implement the non-punishment principle at the national level.⁴⁰⁸

SUPPORT TO WOMEN AND GIRLS WHO ARE VICTIMS OF TRAFFICKING AND EXPLOITATION OF PROSTITUTION

Article 6 of the Trafficking in Persons Protocol contains a list of measures that must be granted to victims of trafficking in persons: (a) Protecting the privacy and identity of victims (paragraph 1); (b) Participation of victims in proceedings (paragraph 2) in order to achieve prosecution and punishment of perpetrators; (c) Social assistance and protection of victims (paragraph 3); (d) Age, gender, and special needs of victims (paragraph 4); (e) Physical safety of victims (paragraph 5); (f) Possibility of obtaining compensation (paragraph 6 Article 7 are asked to ‘consider’ adopting legislative or other appropriate measures that permit foreign trafficked persons to remain in the territory of the receiving State, temporarily or permanently, in appropriate cases. In particular, with regard to social assistance and protection of victims, States Parties shall ‘consider’ implementing measures to provide for the physical, psychological and social recovery of victims of trafficking in persons, including the provision of:

- (a) Appropriate housing;
- (b) Counselling and information, in particular as regards their legal rights, in a language that the victims of trafficking in persons can understand;
- (c) Medical, psychological and material assistance; and
- (d) Employment, educational and training opportunities.

Under the human rights-based approach, victims should not be compelled to accept any such support but should instead receive information on their entitlements so that they can make an informed decision;⁴⁰⁹ assistance and protection must be consistent with the victims’ human rights and their dignity and welfare. Reflection periods

⁴⁰⁷ ECtHR, *V.C.L. and A.N. v. The United Kingdom*, applications nos. 77587/12 and 74603/12, judgment of 16 February 2021.

⁴⁰⁸ ICAT, *Non-punishment*, cit.

⁴⁰⁹ Conference of the Parties to the United Nations Convention against Transnational Organized Crime, Working Group on Trafficking in Persons, International cooperation in cases of trafficking in persons: considering the needs and rights of victims, UN Doc. CTOC/COP/WG.4/2018/2, 3 May 2018, 6 [16]. Reported in the Legislative Guide, p. 60.

have also been recommended.⁴¹⁰ As noted in the Legislative Guide, ‘the high costs of these measures and the fact that they apply equally to all States Parties in which victims are found, regardless of the level of socio-economic development or availability of resources, precluded these measures from being made obligatory under the Protocol.’⁴¹¹ The UN General Assembly has also called upon States to take appropriate measures to promote the recovery of victims of trafficking.⁴¹² However, Article 6, paragraph 3, should be read in conjunction with paragraph 5, protection from further harm, stating that ‘Each State Party shall endeavour to provide for the physical safety of victims of trafficking in persons while they are within its territory.’ As clearly stressed in the Recommended Principles and Guidelines, ‘while this provision is limited by the soft nature of the obligation and the specific reference to physical safety,’ it contains an obligation States must abide by.⁴¹³ This obligation requires States Parties to ‘take concrete steps in furtherance of the goal of protecting the safety of the victim.’⁴¹⁴ According to the Recommended Principles and Guidelines, Commentary, the content of this obligation will depend on the circumstances of each case and the standard of due diligence ‘will certainly require States to take reasonable measures to this end.’⁴¹⁵

Article 6, para. 3, also stresses the important role of civil society in the delivery of assistance measures where appropriate. Victims may be willing to approach non-governmental organizations rather than public authorities. This is why States are encouraged to work with non-governmental organizations.⁴¹⁶ Gender and age sensitive approaches are critical to effectively supporting victim-centered responses.⁴¹⁷ The multiplicity of forms of discrimination is a relevant matter to be considered in the responses to victims. A woman or a girl can be victim of trafficking in persons because they are women, but also because they belong to a specific ethnic group, and because they live in a certain social condition, and because they are vulnerable owing to their age. All these elements should be considered in the response to trafficking. GR No. 38 stresses the importance of ‘individualized, gender and child sensitive and trauma informed emergency and longer-term access to accommodation, welfare benefits, educational and employment opportunities, high quality medical care, including sexual and reproductive health services and counseling, no-cost issuance of official identification documents, family reunification measures and to asylum procedures where relevant’ (para. 92). Individualized responses are relevant because, under a human rights-based approach, every victim’s human rights must be respected and a victim must receive appropriate care which takes into consideration multiple forms of discriminations. In particular, GR No. 38 importantly refers to the provision of sexual and reproductive health services to victims, including in refugee centers, where often even separate hygiene facilities for women and girls are missing. Services and counselling are pivotal to allow women and girls to

⁴¹⁰ S. Marchetti, L. Palumbo, 10 Years After the Directive 2011/36/EU Lights and shadows in addressing the vulnerability of trafficked and exploited migrants, 2022, https://population-europe.eu/files/documents/pb33_vulner_human-trafficking_final.pdf [last accessed on 1. March 2022].

⁴¹¹ *Legislative Guide*, para. 216.

⁴¹² UN General Assembly, *Trafficking in Women and Girls*, UN Doc. A/RES/61/144, 1 February 2007, 5 [15]; UN General Assembly, *Improving the Coordination of Efforts against Trafficking in Persons*, UN Doc. A/RES/61/180, 8 March 2007, 3 [9].

⁴¹³ *Recommended Principles and Guidelines, Commentary*, p. 144.

⁴¹⁴ *Legislative Guide*, para. 228.

⁴¹⁵ *Recommended Principles and Guidelines, Commentary*, p. 145.

⁴¹⁶ *Ibid.*, para. 219.

⁴¹⁷ *Ibid.*, para. 223.

overcome the consequences of trafficking and exploitation of prostitution, which have inevitable consequences on the sexual and reproductive health of a woman or girl, such as sexually transmitted diseases; pregnancy, resulting from rape or sexual exploitation; infections caused by unsafe procedures performed by unauthorized health personnel. Shelters must be adequately funded and well equipped and must guarantee separate units for victims of sexual violence and enforced prostitution within shelters and crisis centres, which are safe, accessible, and appropriate for trafficked women and girls, including women accompanied by their children (GR, para. 93). Shelters should provide a safe and secure environment, be managed by trained staff, endorse a holistic approach to the assistance to victims of trafficking, and endorse a human rights-based approach which puts at the center the dignity of the victims.⁴¹⁸ Trauma-informed services derive from the impact of trafficking on the victims of trafficking's health. A survey found that trafficking is associated with high levels of physical and sexual violence prior to and during trafficking and a range of health problems in the post-trafficking period.⁴¹⁹ The importance of a trauma-informed approach when providing care to trafficked people has been emphasized in several papers and includes a commitment to empowerment and victim safety, the central role of informed consent before providing any forms of support and the importance of avoiding re-traumatization, by ensuring that victims are not pressured to share the details of their experience.⁴²⁰ Innovative therapeutic interventions could also be considered, promoting a holistic understanding of 'the uniqueness of refugee women's traumatic experiences and the range of their needs in the post-migration phase. They go beyond the biomedical model and promote reconnection with family and community and strategies to integrate them into daily life.'⁴²¹ These interventions have not been adequately investigated. Some authors focused on another related approach, which is 'culturally sensitive', meaning 'the provision of care that is attentive to the various ways people from diverse backgrounds experience and express illness and how they respond to care.'⁴²² Children must receive special care. The Legislative Guide recommended, for example, procedures for the rapid identification of child victims of trafficking, the appointment of a guardian for the child until a durable solution in the best interests of the child is found, the avoidance of any contact between child victims and suspected offenders, special protection measures to children who agree to testify, the provision of shelters, special recruitment practices and training programmes to ensure that individuals responsible for the care and protection of the child victims understand their special needs, are sensitive to gender issues and possess the necessary skills both to assist children and to ensure that their rights are safeguarded.⁴²³ The protection and assistance to children are particularly relevant for asylum seekers and refugees.⁴²⁴ In its 6th General report, GRETA has highlighted some positive practices from countries which have set up specialized shelters for child victims of

⁴¹⁸ International Centre for Migration Policy Development (ICMPD), *Manual for Management of Shelters and Assistance Centres for Victims of Trafficking*, 2017.

⁴¹⁹ S. Oram, et al., *Prevalence and risk of violence and the physical, mental, and sexual health problems associated with human trafficking: systematic review*, PLoS Med. 2012, 9(5).

⁴²⁰ Hemmings and others, *Responding to the health needs of survivors of human trafficking: a systematic review*, BMC Health Services Research, 2016, 16:320.

⁴²¹ European Parliament, *The traumas endured by refugee women and their consequences for integration and participation in EU host country*, PE 691.875– April 2021, p. 47.

⁴²² C. Borland, R. Zimmerman, *Caring for Trafficked Persons: Guidance for Health Providers*, Geneva: International Organization for Migration, 2009. See also European Parliament, *The traumas*, cit., p. 32 ff.

⁴²³ *Legislative Guide*, para. 224.

⁴²⁴ *Ibid.*, para. 225.

trafficking, but when also expressed concern that specialized facilities are absent, child victims of trafficking are sometimes placed in detention institutions.⁴²⁵

The provision of services that are capable of addressing the needs of victims of trafficking can only be granted if professionals are trained according to these approaches. As it was reported by the WHO, sexual health outreach workers and practitioners assisting migrant populations are well placed to address trafficking. For example, health workers may have opportunities to alert individuals to the risk of human trafficking; identify and refer people who are in exploitative circumstances; and provide care as part of a post-trafficking referral system.⁴²⁶

The support and protection provided to victims of trafficking should be aimed at reintegration and social inclusion. In fact, the Special Rapporteur on trafficking in persons, especially women and children, pointed out how the social inclusion of survivors of human trafficking ‘stems from the due diligence standard and the right to effective remedy’⁴²⁷ and underlined that full participation in society is the result of a complex process and should be a long-term viable solution, but unfortunately the majority of the programmes available at the moment focus mainly on short-term interventions. For this reason, in her report, she proposes innovative and transformative models of social inclusion, based on several examples of best practices that ‘should be replicated, funded and implemented on larger scale’.⁴²⁸ She also emphasized the importance of allowing victims/survivors to obtain residence status and asylum, and have access to long-term medical services as well as safe and affordable residence, and also restoring their dignity, self-esteem, reputation and independence, by providing them with education and professional or vocational training, job opportunities for their economic empowerment, and recreational activities.⁴²⁹

Practice

Numerous NGOs and volunteering associations play an active role for the protection of human rights and offer basic services to victims / survivors of trafficking in persons, including emergency housing, counselling and legal aid.⁴³⁰ A21 is one of the largest organisations in the world fighting trafficking in persons at local, domestic and international level.⁴³¹ It has offices in North America, Europe and in the Asia Pacific, as well as an office in South Africa and one in Australia. Its solution to break the vicious circle of vulnerability – exploitation – re-victimisation is a parallel corresponding three-step response consisting in reach – rescue – restore. Reach is the solution to vulnerability, providing safety through understanding and identifying, first of all, the common scenarios of trafficking. Awareness programmes, education and primary prevention programmes are also part of the first phase of the solution. The central part of the 3-step approach designed by A21 is rescue, which

⁴²⁵ GRETA, 6.th General Report, 2016, p. 21-22.

⁴²⁶ *Caring for trafficked persons: guidance for health providers*, op. cit. OSCE, *National referral mechanism for the victims of trafficking in human beings*, Vienna: Organization for Security and Cooperation in Europe, 2007. WHO, *Understanding and addressing violence against women*, Human Trafficking, 2012, WHO/RHR/12.42.

⁴²⁷ *Trafficking in persons, especially women and children*, Report of the Special Rapporteur on trafficking in persons, especially women and children, UN GA – Human Right Council forty-first session, A/HRC/41/46, 23 April 2019.

⁴²⁸ Ibidem.

⁴²⁹ Ibid.

⁴³⁰ J. Barner, D. Okech, M. Camp, *Socio-Economic Inequality, Human Trafficking, and the Global Slave Trade*, in *Societies*, 2014, 4, p.148 – 160.

⁴³¹ For further information visit the official website: <http://www.thea21campaign.org> [accessed 14.01.2022].

includes hotlines, victim identification, advocacy centres, legal assistance and professional training. The third and final step, restore, was envisaged to provide aftercare services with a holistic approach for victim / survivors to overcome trauma. In the first months, A21 can provide emergency shelter and then help them find stable long-term housing. Freedom centres contribute to empowering survivors and help them with resources and skill-development to reintegrate safely into society and become independent. A21 proposes 21 initiatives to raise awareness and fight trafficking in persons, including “walks for freedom”, in solidarity with the victim / survivors of trafficking.

In Latvia, *Patverums droša mājā* – translated as *Shelter. Safe Home* – is an NGO providing residential services, outreach and aftercare services to victims of trafficking, immigrants, asylum seekers, refugees and persons granted subsidiary protection status.⁴³² It provides for the basic necessities including safe shelter, clothing, food and medicines, as well as training and educational programmes. Part of the work is raising awareness, also through the mass media. One of their projects is the Migrant Talent Business Incubator, in cooperation with partners from Lithuania, Norway, Iceland, Croatia, Bulgaria and Greece, to provide assistance in guidance in starting up a new business, through mentoring and business training, aiming at creating a network of opportunities.

Anti-Slavery international supports girls and women in Nepal personally affected by trafficking, training them as paralegals and arranging placements at police stations.

Life Beyond the Shelter aims to ensure positive long-term integration for third-country national victims of trafficking in the host society by reinforcing support in the transition from shelter life to independence.⁴³³

Although States are encouraged to adopt the measures under Article 6, para. 3, hence an obligation to provide subsistence cannot be formulated, national legislation can provide for such obligation on governmental authorities.

Practice

In the UK, the High Court reversed the Home Office’s decision to cut weekly support monies paid to asylum seeking victims of trafficking. Two women victims of trafficking, M and K, challenged the Home Office’s decision to cut to weekly support monies paid to asylum seeking victims of trafficking by over 40%. These cuts caused a deterioration of their physical and mental health. The High Court agreed with them and ordered the Home Office to repay the money to all asylum-seeking trafficking victims, backdated to April 2018.⁴³⁴

d) Right to information about rights and legal assistance

⁴³² For further information please visit the official website www.patverums-dm.lv/en/

⁴³³ LIBES – Life Beyond the Shelter Project official website: <https://libes.org/project/> [accessed on 14.01.2022].

⁴³⁴ Anti-Slavery International, *High Court Reverses Cuts to Victim Support*, 8 November 2018, available online at: <https://www.antislavery.org/high-court-reverses-cuts-to-victim-support/> [accessed on 14.01.2022].

According to the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁴³⁵ victims of crime should be informed of their rights to seek redress, of the role of judicial and administrative processes, of the scope, timing and progress of the proceedings and of the disposition of their cases, especially where serious crimes are involved and when they have requested such information, and of the availability of health and social services and other relevant assistance.

Article 6, paragraph 2, of the Trafficking in Persons Protocol reads that:

‘2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.’

‘Assistance’ should be interpreted as legal assistance including, where appropriate, legal representation.⁴³⁶

Article 6 paragraph 2 of the Protocol goes further than article 25 paragraph 3 of the Convention against transnational organized crime: ‘it must not only be possible for the views and concerns of victims to be heard; the victim must, in appropriate cases, be helped to put them forward.’⁴³⁷

Principle 9 of the Recommended Principle states that ‘legal and other assistance shall be provided to trafficked persons for the duration of any criminal, civil or other actions against suspected traffickers.’ Victims’ involvement in the proceedings can take different forms. For example, in criminal proceedings, victims of trafficking and exploitation of prostitution may provide evidence against their exploiters, while in civil proceedings trafficked persons may be applicants and/or witnesses to ask for compensation.⁴³⁸ Legal assistance must be provided for the duration of any criminal proceedings against the exploiters.

Victims of trafficking must be supported in their participation in the judicial process through direct and indirect means, timely notification of critical events and decisions, provision in full of information on the procedures and processes involved, support of the presence of victims at critical events and assistance when there are opportunities to be heard.⁴³⁹ Trafficked women and girls need information in a language they understand about the judicial process and about their own rights and responsibilities as participants in criminal proceedings. Women and girls must feel safe and protected, and their participation must not constitute a form of revictimization. Attention must be paid to their mental and psychological well-being. As emphasized by the Recommended Principles and Guidelines, Commentary, ‘trafficked persons are the major source of the evidence necessary to secure the conviction of traffickers for the grave physical, sexual and psychological abuse that they typically inflict upon their victims,’ and therefore ‘it is essential that States work towards a

⁴³⁵ UN General Assembly Resolution 40/34, Annex, A/RES/40/34, 29 November 1985.

⁴³⁶ *Legislative Guide*, para. 209.

⁴³⁷ *Legislative Guide*, para. 210.

⁴³⁸ *Recommended Principles and Guidelines, Commentary*, p. 153.

⁴³⁹ *Handbook on Justice for Victims of Crime and Abuse of Power*, Chapter II, sect. D, available at: www.unodc.org/pdf/crime/publications/standards_9857854.pdf [accessed 14.01.2022].

situation in which victims of trafficking are sufficiently informed and supported for those who wish to do so to be able to participate effectively and safely in the prosecution of the exploiters.’⁴⁴⁰

Free legal aid should be granted. As stressed by GRETA, ‘the availability of information on their rights, in languages the victims can understand, as well as qualified interpretation and specialised legal assistance, are crucial for building trust with the victims, helping them understand their situation and increasing the chances of successful investigation and prosecution.’⁴⁴¹

Practice

Asean-Australia Counter-Trafficking is a partnership that supports the implementation of the ASEAN Convention Against Trafficking in Persons, especially Women and Children. ASEAN-ACT’s Vietnam Country Manager, Ms. Dang Thi Hanh, explained that ‘many victims who return home of their own accord are often not identified as having been trafficked. Ethnic minorities and other marginalised groups often don’t have access to information on what to do. And in all instances, victims need to submit government-issued certificates confirming their eligibility to access legal aid. Imagine, the difficulties for victims who are children and other marginalised groups.’⁴⁴² A three-day training for lawyers and legal aid officers from Northern Vietnam was promoted through a new partnership between the Vietnam Judicial Support Association for the Poor and the Australian Government through this programme.

e) Right to a remedy

The right to an effective remedy is a well consolidated human right, present in international human rights legal instruments⁴⁴³ as well as in national constitutions. The existence of ‘State duties to provide a remedy and reparations forms the cornerstone of establishing accountability for violations and achieving justice for victims.’⁴⁴⁴ In the 1985 UN GA Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power,⁴⁴⁵ ‘victims’ are those persons who ‘individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights,

⁴⁴⁰ *Recommended Principles and Guidelines, Commentary*, p. 156.

⁴⁴¹ GRETA, *8th General Report on GRETA’s Activities covering the period from 1 January 2018 to 31 December 2018*, CoE, May 2019, p. 45.

⁴⁴² Australian Aid – ASEAN Australian Counter-Trafficking, *Free Legal Assistance to Protect the Rights of Trafficking Victims*, 27 July 2021, available online at: <https://www.aseanact.org/story/vietnam-legal-aid/> [accessed 14.01.2022].

⁴⁴³ See for instance Art. 8 of the Universal Declaration of Human Rights, Art. 2(3) of the International Covenant on Civil and Political Rights, Art. 6 of the International Convention on the Elimination of All Forms of Racial Discrimination; among regional human rights legal instruments see Art. 13 of the European Convention on Human Rights and Art. 47 of the European Charter of Fundamental Rights; see also the reference to right to redress and right to fair and adequate compensation, including rehabilitation in Art. 14(1) of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment; as well as the reference to effective protection in Art. 2(c) of the Convention on the Elimination of All Forms of Discrimination against Women; among soft law instruments see the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) and the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law (2005).

⁴⁴⁴ M.C. Bassiouni, ‘International recognition of victims’ rights’, in *Human Rights Law Review* 6 (2006), p. 231.

⁴⁴⁵ Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly Resolution 40/34 of 29 November 1985

through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.’ The Declaration acknowledged that the victims have the right to ‘access to the mechanisms of justice and to prompt redress, as provided for by national legislation, for the harm that they have suffered.’⁴⁴⁶ In 2005, the UN GA adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, which constitutes ‘a milestone in the lengthy process towards the framing of victim-orientated policies and practices.’⁴⁴⁷ Gross violations of human rights is a term that ‘would incorporate egregious cases of trafficking.’⁴⁴⁸ According to this soft law instrument, reparations for harm suffered include: restitution; compensation; rehabilitation; satisfaction and guarantees of non-repetition.⁴⁴⁹

Article 6 (6) of the Trafficking in Persons Protocol reads that: ‘Each State Party shall ensure that its domestic legal system contains measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered.’ The Trafficking in Persons Protocol does not provide for an obligation to provide compensation or restitution, but for an obligation to ‘ensure that their domestic legal systems contain mechanisms to provide victims of trafficking with the opportunity of obtaining compensation for damage suffered.’⁴⁵⁰ Compensation is however one aspect of remedy only. As highlighted by the Special Rapporteur on Trafficking in Persons, Especially Women and Children in 2011, the multidimensional gender-sensitive approach to the right to an effective remedy goes beyond compensation: ‘it encompasses recovery, restitution, satisfaction and guarantees of non-repetition, as well as a set of ancillary procedural rights that enable trafficked persons to exercise the right to an effective remedy in a meaningful manner. Such procedural rights of access to substantive remedies may include the rights to legal, medical, psychological, social, administrative and other assistance.’⁴⁵¹ In the context of trafficking and exploitation of prostitution, the Recommended Principles and Guidelines stressed how States are obliged to provide victims of trafficking with access to effective and appropriate remedies (principle 17) and how this obligation stems from an international legal right of trafficked persons, as victims of human rights violations (guideline 9). In particular, ‘rehabilitation’ is pivotal because it acknowledges the importance of a victim-centered notion of remedy, which, in a gender-sensitive perspective, takes into consideration the disproportionate impact of trafficking and exploitation of prostitution on women and girls.

A gendered approach to remedies for harm deriving from trafficking in women and girls and exploitation of prostitution should be encouraged and endorsed at national level. To ‘gender’ reparations means to rely on the ‘transformative potential of reparations,’ which is capable of disrupting the domino effect that condemns

⁴⁴⁶ *Ibid.*, para. 4.

⁴⁴⁷ T. van Boven, ‘Victims’ Rights to a Remedy and Reparation: The New United Nations Principles and Guidelines’ in C. Ferstman, M. Goetz, A. Stephens (eds) *Reparations for Victims of Genocide, War Crimes and Crimes Against Humanity* (Brill 2009) 21.

⁴⁴⁸ Recommended Principles and Guidelines, Commentary, p. 226.

⁴⁴⁹ Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by General Assembly resolution 60/147 of 16 December 2005, IX.

⁴⁵⁰ *Legislative Guide*, cit., para. 231.

⁴⁵¹ Report of the Special Rapporteur on trafficking in persons, especially women and children, A/66/283, 9 August 2011, para. 13.

victims/survivors to continue suffering.⁴⁵² As Margaret Urban Walker argued, the project of gendering reparations does not aim at disregarding men's suffering, but rather to considering that, with regard to women, 'the original violation is extended, ramified, and augmented in multiple ways.'⁴⁵³ Rubio-Marín and de Greiff considered that there is 'a growing sense of the necessity of "engendering" reparations', since this represents a singular opportunity for 'transformation' rather than mere restitution to the original situation.⁴⁵⁴ In Europe, however, 'this transformative take is yet to be reflected in the European normative framework.'⁴⁵⁵ The jurisprudence of the Inter-American Court of Human Rights has proved to be opened to broaden the scope of reparations, following a 'holistic gender approach.'⁴⁵⁶ In the *Maria da Penha* case, for example, the State was required to adopt measures 'to grant the victim appropriate symbolic and actual compensation for the violence [...], in particular for its failure to provide rapid and effective remedies, for the impunity that has surrounded the case for more than 15 years,' but also 'for making it impossible, as a result of that delay, to institute timely proceedings for redress and compensation in the civil sphere.'⁴⁵⁷ The inclusion of free gender-sensitive medical and psychological treatment to the victim is another example of how to 'gender' reparations. Hence, for example, in *I.V. v Bolivia*, the Inter-American Court of Human Rights required the State to 'immediately' provide to the applicant, without any expense, through its specialised institutions, medical treatment related to the applicant's sexual and reproductive health, 'as well as psychological and/or psychiatric treatment,' including all medicines that might be necessary.⁴⁵⁸

C. Gender-sensitive court proceedings

4. Context and legal background

The availability of effective judicial remedies is a key element of the protection of human rights in international law, as in any domestic legal system. In case rights are violated, access to justice is of fundamental importance for the injured individual and it is an essential component of the system of protection and enforcement of human rights. Article 2, letter c) of the CEDAW requires States 'to establish legal protection of the rights of

⁴⁵² C. Duggan and R. Jacobson, 'Reparation of sexual and reproductive violence. Moving from codification to implementation' in R. Rubio-Marín (ed), *The Gender of Reparations* (CUP 2009) 121, 148.

⁴⁵³ M. Urban Walker, 'Gender and violence in focus: A background for gender justice in reparations', in Ruth Rubio-Marín (ed), *The Gender of Reparations* (CUP 2009) 18, 50 and 53. She uses the example of women and men in detention. Violence suffered by women is similar to the one suffered by men, but 'even so, there are distinctive and additional forms of cruelty and humiliation that are directed to women's real and perceived vulnerabilities.'

⁴⁵⁴ R. Rubio-Marín and P.de Greiff, 'Women and Reparations' (2007) *International Journal of Transitional Justice* 318.

⁴⁵⁵ S. De Vido, Lorena Sosa, *Criminalisation*, cit., p. 190.

⁴⁵⁶ R. Rubio-Marín and C. Sandoval, 'Engendering the reparations jurisprudence of the Inter-American Court of Human Rights: The promise of the Cotton Field judgment' (2011) *Human Rights Quarterly* 1062, 1076. See also Inter-American Commission of Human Rights, *Access to Justice for Women Victims of Sexual Violence in Mesoamerica*, para. 106.

⁴⁵⁷ *Maria da Penha Maia Fernandes v Brazil* Case No 12.051 (Inter-American Commission of Human Rights, 16 April 2001) para. 23.

⁴⁵⁸ *I.V. v Bolivia* Case No 12.655 (Inter-American Court of Human Rights, 30 November 2016) para. 332. The translation is mine.

women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination.’

The Trafficking in Persons Protocol, at its Article 6(2), states that:

2. Each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

(a) Information on relevant court and administrative proceedings;

(b) Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defence.

GR No. 38 dedicates an entire part to the way court proceedings must respond to the needs of victims of trafficking and exploitation of prostitution. In particular, it stressed: the right of women and girls to a fair hearing and due process; the right to have access to adequate trauma-informed, culturally-specific and gender- and age-sensitive accommodation, support and protection;⁴⁵⁹ the right to privacy of trafficked girls and the right to special protection in court.⁴⁶⁰ It also recommended the implementation of protection systems for trafficked women and girls, their family members, witnesses and informants, including temporary residence permits for non-residents;⁴⁶¹ the prompt investigation, prosecution and adequate punishment of those directly involved in trafficking and those negligent in dealing with or preventing the crime;⁴⁶² the provision of programmes for all court officials and support staff on the trauma-informed age-, gender- and culturally-sensitive, human rights-based application of anti-trafficking legislation and treatment of victims.⁴⁶³ Mutual legal assistance, also through international agreements, which is capable of grasping the complexity of trafficking and exploitation of prostitution, should be encouraged, along with the cooperation in investigation to confiscate and redistribute the proceedings of criminal conducts.⁴⁶⁴

AVOIDING STEREOTYPING IN THE JUDICIARY

One element of the provision of remedies to victims of trafficking and exploitation of prostitution which is often neglected is the need to ensure gender-sensitive court proceedings. ‘All persons shall be equal before the courts and tribunals’ using the words of the UN Covenant on Civil and Political Rights.⁴⁶⁵ If it is so, one might ask the reasons why it is thus fundamental to talk about *women and girls*’ access to justice, with specific regard to conditions of vulnerability such as being trafficked and exploited. In that respect, the key issue is not *de jure* equality, but rather *de facto* equality. The women’s unhindered access to justice systems is far from being achieved, indeed. As the Committee on the Elimination of Discrimination against Women highlighted in General Recommendation No. 33 (2015): ‘the centralization of courts and quasi-judicial bodies in the main cities, their non-availability in rural and remote regions, the time and money needed to access them, the

⁴⁵⁹ GR No. 38, para. 102.

⁴⁶⁰ Ibid., para. 103.

⁴⁶¹ Ibid., para. 104.

⁴⁶² Ibid., para. 105.

⁴⁶³ Ibid., para. 106.

⁴⁶⁴ Ibid., paras. 107 and 108.

⁴⁶⁵ OHCHR, *International Covenant on Civil and Political Rights*, Art. 14.

complexity of proceedings, the physical barriers for women with disabilities, the lack of access to quality, gender-competent legal advice, including legal aid, as well as the deficiencies often noted in the quality of justice systems (gender-insensitive judgments/decisions due to the lack of trainings, delays and excessive length of proceedings, corruption, etc.) all prevent women from accessing justice.⁴⁶⁶ The Committee identified six interrelated and essential components: justiciability, availability, accessibility, good-quality, accountability of justice systems, and the provision of remedies for victims, which have been considered as necessary to ensure access to justice. Intersecting factors also make it more difficult for women who are discriminated not only on the basis of gender but also because of other compounded grounds, to gain access to justice.

The cause of gender-insensitiveness in courts and in the activity of public authorities more generally must be found in the persistence and resilience of stereotypes. A stereotype has been defined as: ‘a generalized view or preconception of attributes or characteristics possessed by, or the roles that should be performed by, members of a particular group.’⁴⁶⁷ In her report for the UN Office of the High Commissioner for Human Rights, Simone Cusack stressed the presence of ‘judicial stereotypes.’⁴⁶⁸ She argued that ‘such stereotyping causes judges to reach a view about cases based on preconceived beliefs, rather than relevant facts and actual enquiry. This can have potentially wide-ranging consequences. It may, for instance, distort judges’ perception of the facts, affect their vision of who is a ‘victim’, and influence their views about witness credibility. Ultimately, however, it compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice and the revictimization of complainants.’ Enduring negative cultural norms still actively influence jurors and legal professionals alike.⁴⁶⁹

Eliminating judicial stereotyping is therefore a crucial step in ensuring equality and justice for victims and survivors. Article 5(a) CEDAW is the key provision to take action in that respect. It provides a cross-cutting obligation to ‘modify and transform gender stereotypes and eliminate wrongful gender stereotyping.’ In *V.K. v. Bulgaria* of 2011, the CEDAW Committee determined that the refusal of the Plovdiv District and Regional Courts to issue V.K. a permanent protection order against her violent partner was based on ‘stereotyped, preconceived and thus discriminatory notions of what constitutes domestic violence.’⁴⁷⁰ In *Karen Tayag Vertido v. The Philippines*, a majority of the CEDAW Committee concluded that the national judge evaluated Ms Vertido’s behaviour against stereotypes and formed a negative view of her credibility, as she had not responded according to how a rational and ‘ideal’ victim was expected to respond in a rape situation.⁴⁷¹

In order to ensure gender-sensitive court proceedings, it is necessary to: raise awareness about stereotypes that permeate practice, as a first step towards behavioral change; increase knowledge about legal arguments that

⁴⁶⁶ CEDAW, *General recommendation on women’s access to justice*, CEDAW/C/GC/33, 23 July 2015, para. 13.

⁴⁶⁷ R. Cook and S. Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, University of Pennsylvania Press, Philadelphia, 2010.

⁴⁶⁸ S. Cusack, *Eliminating Judicial Stereotyping: Equal Access to Justice for Women in Gender-based Violence Cases*, Commissioned by the UN Office of the High Commissioner for Human Rights, 9 June 2014.

⁴⁶⁹ K. Stevenson, ‘*She Never Screamed out and Complained*’: recognizing gender in legal and media representations of rape, in Jones, A. Grear, R. Fenton, K. Stevenson (eds.), *Gender, Sexualities and Law*, Routledge, 2011, p. 121.

⁴⁷⁰ *Ms. V.K. v. Bulgaria*, CEDAW Committee Views, Communication no. 20/2008, CEDAW/C/49/D/20/2008, 17 August 2011, para. 9.12.

⁴⁷¹ *Karen Tayag Vertido v. Philippines*, CEDAW Committee Views, Communication no.18/2008, CEDAW/C/46/D/18/2008, 22 September 2010.

frame a more appropriate practice for supporting victims; improve the ability to use legal standards to counteract trafficking in women and girls and exploitation of prostitution in practice; avoid secondary victimization by developing a human rights-based approach which must permeate the activity in court. There should also be recognition of the harm that intersecting forms of discrimination cause, which could lead to a judicial discourse that addresses structural gender inequality and does not stay on the surface of the problem. Training should be addressed to lawyers and judges alike.

Practice

In Bulgaria, the Council of Ministers adopted by decision No. 236 of 19 March 2021, the ‘National Programme for Preventing and Combating Trafficking in Human Beings and Protection of Victims’ for 2021, implementing the National Strategy for Combating Trafficking in Human Beings 2017-2021. The National Programme for 2021 provides for three national campaigns and a number of initiatives at national and local level. The 2021 National Programme focuses on increasing the capacity of professionals, including magistrates, prosecutors, investigators, diplomats, social workers, etc. In addition to the specifics in the identification, targeting and support of victims of trafficking in human beings, the trainings will also include important topics related to preventing the culture of impunity of traffickers, especially the possibilities for parallel financial investigations and confiscation of property.

D. Data Collection, legislative, policy and institutional framework

Data on trafficking in persons and exploitation of prostitution are fundamental in order to map the trends in the commission of the crime and to enhance a prompt gender-responsive, human rights- and needs-based assistance to victims.⁴⁷² GR No. 38 requires that data are disaggregated on the basis of sex, age, disability, ethnicity, nationality, immigration status, location, socio-economic status and all forms of exploitation, and concern both the victims and the perpetrators. A ‘Trafficking in Women and Girls and Exploitation of Prostitution Watch’ should be globally elaborated on the basis of the experience of the Femicide Watch launched and established by the former Special Rapporteur on Violence Against Women. On 25 November 2015, on the International Day for the Elimination of Violence against Women, Dubravka Šimonović called upon all States to establish a femicide watch or a ‘gender-related killing of women watch.’ She proposed that data on the number of femicides or cases of the gender-related killing of women, disaggregated by the age and the ethnicity of victims and the sex of the perpetrators and indicating the relationship between the perpetrator and the victim or victims, should be published annually, on 25 November, along with information concerning the prosecution and punishment of perpetrators. A ‘Trafficking in Women and Girls and Exploitation of Prostitution Watch’ would contribute to the understanding of the complexity and the dimension of the problem, the identification of groups at high risk, the understanding of the relevance of intersectionality, to the

⁴⁷² GR No. 38, para. 109.

monitoring of changes over time, and to the assessment of interventions at national, regional and international level. It can be established at regional or global level and work on disaggregated data. The analysis of data could start from the UNODC Trafficking in Persons Global Report, which focuses on age, sex, forms of exploitation, subregion of detection. Other elements should be considered, though, including disability, ethnicity, nationality, immigration status, location, socio-economic status, among others, to grasp the complexity of the crime and activate effective measures of prevention. There have been some private initiatives (see box below) in this respect already.

The use of technology can help in the collection and analysis of data. The processed data lead to the determination of routes and trends in trafficking in persons, forms of exploitation and techniques used to exploit. Prevention actions can be tailored on the basis of these data. Artificial intelligence can be used to map the global trends in trafficking in women and girls and exploitation of prostitution.

The Stop App

Originally developed by 5 Stones and launched in 2016, the STOP APP is the first of its kind to enable people anywhere in the world to report suspicious incidents of human trafficking anonymously and securely. All information reported into the STOP APP is fed directly into STOP THE TRAFFIK's secure database where it is analyzed alongside multiple different datasets on human trafficking and modern slavery activity. Analysts transform this raw data into useful insights that contribute to a better understanding of global human trafficking activity globally. The insights are developed into informative and easily digestible visualized reports, which are then shared with appropriate authorities, organizations, communities and individuals to enable an informed and targeted response to prevent and combat human trafficking.⁴⁷³

The Traffik Analysis Hub (TA Hub) program consists in the collaboration across multiple sectors in preventing trafficking in persons. The TA Hub partners gather information and share highly accessible analysis of human trafficking drawing on over 300,000 records, as part of their day-to-day business. IBM uses artificial intelligence technology to quickly analyze and process volumes of data from a variety of sources.⁴⁷⁴

NATIONAL ACTION PLANS

GR No. 38 recommends a comprehensive, victim-centered, child and gender-sensitive anti-trafficking legislation that provides a harmonized approach to criminalizing trafficking at all jurisdiction levels. Criminalization alone is not enough to counter trafficking in persons and exploitation of prostitution but must be surely pursued in all countries in the world. It must respect human rights law and put at the center the victims.

GR No. 38 requires States to elaborate a national action plan, which is in compliance with the Recommended Principles and Guidelines, harmonized with national action plans on gender equality, combating violence

⁴⁷³ For further information see the official website: <https://www.stopthetraffik.org/stopapp/> [last accessed 14.01.2022].

⁴⁷⁴ For further information see the official website: <https://www.stopthetraffik.org/what-we-do/traffik-analysis-hub/> [accessed on 14.01.2022].

against women, migration and asylum management, women peace and security agenda and sustainable development, and adequately funded.⁴⁷⁵ The International Centre for Migration Policy Development (ICMPD) developed Guidelines for the Development and Implementation of a Comprehensive National Anti-Trafficking Response.⁴⁷⁶

Practice

The United Nations High Commissioner for Refugees (UNHCR) and the International Organization for Migration (IOM) commended the Sudanese Government for the launch of its 2021–2023 National Action Plan (NAP) to Combat Human Trafficking.⁴⁷⁷

The plan, officially launched by the National Committee for Combating Human Trafficking (NCCT), seeks to reinforce Sudan’s efforts to curb human trafficking and to build on the previous action plan for 2017–2019.

The new NAP, which was drafted with the support of the Counter-Trafficking and Mixed Migration Working Group (CTWG), of which UNHCR and IOM are co-chairs, has a broader scope and takes into consideration contributions from all concerned actors including officials and civil society.

Sudan has a complex and diverse migration profile as a major source, transit and destination country at the centre of multiple migration routes. Over the past decade, thousands of migrants, refugees and asylum seekers have been transiting to and through Sudan which currently hosts millions of displaced persons many of which are at increased risk of exploitation and abuse, including trafficking.

The overarching goal of the new NAP is to prevent and respond to human trafficking and migrant smuggling, which women and children are at heightened risk of. The plan outlines activities aimed at eradicating trafficking in persons.

While the NCCT will coordinate collective actions to fulfil the NAP’s objectives and priorities, UNHCR and IOM calls on the international community to fully support concerned authorities and engaged actors in the implementation of this plan.

A national rapporteur should be appointed.⁴⁷⁸

Practice

⁴⁷⁵ GR No. 38, para. 113.

⁴⁷⁶ ICMPD, *Guidelines for the Development and Implementation of a Comprehensive National Anti-Trafficking Response*, Vienna, 2006.

⁴⁷⁷ *UNHCR and IOM Welcome Government New Action Plan to Combat Human Trafficking in Sudan*, OCHA – reliefweb, 31 August 2021, available online at: <https://reliefweb.int/report/sudan/unhcr-and-iom-welcome-government-new-action-plan-combat-human-trafficking-sudan-enar> [accessed 14.01.2022].

⁴⁷⁸ The list of national rapporteurs in the EU Member States is available here: https://ec.europa.eu/anti-trafficking/national-rapporteurs_en [accessed 14.01.2022].

In the EU, the EU Anti-Trafficking Coordinator is responsible for improving coordination and coherence among EU institutions, EU agencies, Member States and international actors, and for developing existing and new EU policies to address Trafficking in Human Beings. This includes monitoring the implementation of the EU Strategy on Combatting Trafficking in Human Beings 2021-2025. The EU Anti-Trafficking Coordinator is based in the European Commission. The tasks of the EU Anti-trafficking Coordinator are laid down in the Directive on preventing and combating trafficking in human beings and protection of its victims. As provided for under the Directive, the EU Anti-trafficking Coordinator also contributes to the reporting carried out by the European Commission every two years on the progress made in the fight against trafficking in persons.

E. Dissemination and Reporting

F. Treaty Ratification

The final two parts of GR No. 38 consists in dissemination and reporting and treaty ratification and accession. States can be bound by a treaty they have ratified to submit periodic reports to the Committee established by the treaty itself. Article 18 CEDAW states:

1. States Parties undertake to submit to the Secretary-General of the United Nations, for consideration by the Committee, a report on the legislative, judicial, administrative or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect:

(a) Within one year after the entry into force for the State concerned;

(b) Thereafter at least every four years and further whenever the Committee so requests.

2. Reports may indicate factors and difficulties affecting the degree of fulfilment of obligations under the present Convention.

GR No. 38 encouraged States to include in their reports – not only to the Committee on the Elimination of All Forms of Discrimination against Women but also to other mechanisms, including the Global Compact on Safe, Regular and Orderly Migration – information regarding strategies implemented to promote and protect women and girls’ human rights in their anti-trafficking responses.⁴⁷⁹ At the same time, UN specialized agencies, rapporteurs and experts are invited to provide country and region-specific input to the Commission on the situation of trafficking and sexual exploitation in women and girls in the context of global migration.⁴⁸⁰

With regard to ratification, GR No. 38 recommends States ratify several international conventions, if they have not ratified them already. Ratification of an international treaty is expression of the State’s will to be bound by its provisions. States cannot be obliged to ratify an international treaty, but they can be encouraged to do so.

Conclusions

⁴⁷⁹ GR No. 38, para. 117.

⁴⁸⁰ *Ibid.*, para. 118.

These guidelines have been elaborated and later concluded during the COVID-19 pandemic. As highlighted by UNODC in its 2021 report, the pandemic has had an impact on both victims and frontline organizations, exacerbating existing patterns of discrimination.⁴⁸¹ Victims have faced heightened risk of exposure to the virus, tighter controls, and stigma.⁴⁸² The pandemic has also highlighted the current lack of adequate plans and strategies for implementing anti-trafficking mechanisms in crisis situations.⁴⁸³ Most significantly and of great concern is the use of social media and other online platforms to recruit victims of trafficking in persons and exploitation of prostitution.

The challenges in the post-pandemic setting are enormous, and these guidelines are aimed at providing guidance among different legal regimes and State practice. Some key aspects must be highlighted:

- The importance of a criminal response must not shadow the pivotal role played by preventive and protective measures.
- Any policy dealing with trafficking in women and girls and exploitation of prostitution must incorporate a human rights-based and a gender-sensitive approach.
- The collection of disaggregated data, using an intersectional approach, is still insufficient, and must be improved.
- Actions against trafficking in women and girls and exploitation of prostitution must involve numerous actors: States, international organizations, NGOs, businesses, private citizens.
- All women and girls that are victims of trafficking and exploitation of prostitution must be represented and protected by the measures that are recommended in these guidelines. Protection measures must be granted to every woman and girl who faces huge violations of human rights because of trafficking in persons and exploitation of prostitution, irrespective of the way in which prostitution is regulated at national level.

⁴⁸¹ UNODC, *The Effects of the COVID 19 pandemic*, cit.

⁴⁸² Ibid.

⁴⁸³ Ibid.