

Mandate of the Special Rapporteur on trafficking in persons, especially women and children

Concluding remarks by UN Special Rapporteur on Trafficking in Persons

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These concluding remarks by the UN Special Rapporteur on Trafficking in Persons, especially Women and Children, Maria Grazia Giammarinaro, were presented during the two webinars “20 Years After: Implementing and Going Beyond the Palermo Protocol” held on 29-30 June 2020 and on 13 and 14 July 2020 on the occasion of the 20th anniversary of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. Civil society organisations were invited to endorse these concluding remarks.

The adoption of the Palermo Protocol¹ in 2000 mobilized enormous energies worldwide to eradicate trafficking in persons. The Protocol provided an internationally recognized definition of trafficking for the purpose of exploitation in all its forms, and filled critical gaps in pre-existing international instruments against slavery, slavery-like practices and forced labour, especially by introducing the concept of abuse of a position of vulnerability, in order to overcome restrictive interpretations of the slavery and forced labour definitions by Courts. Since then, legislation was passed - or revised - in the majority of UN member states worldwide, criminalizing all forms of trafficking and establishing identification and referral mechanisms. Importantly, civil society organizations have become even more active, establishing outreach activities, providing support to trafficked and exploited persons, and empowering them, with or without government funding.

The Protocol includes among its main purposes “to protect and assist the victims of such trafficking, with full respect of their human rights”. However, weaknesses and inconsistencies emerged during its implementation concerning the respect of trafficked persons’ human rights. Most of the provisions concerning victims are non-binding, including all assistance and protection measures, and residence status; the related decisions of competent authorities are not subject to an appeal; children’s rights are undermined compared to pre-existing international instruments.

According to this approach, primarily focused on the criminal justice response, the current identification model used worldwide depends mainly on police operations, aimed at identifying indicators of the crime of trafficking, which is a pre-condition to acknowledging a person’s victim status. This approach has been mostly applied in the field of trafficking for sexual exploitation, whilst other forms of exploitation were overlooked. In many countries anti-trafficking laws have been used to repress prostitution and resulted in further violations of human rights including restriction of persons’ freedom of movement and migration.

Further, the decision-making process on victim identification in most countries is entirely in the hands of immigration and law enforcement authorities. As a consequence, trafficked persons are often denied assistance and residence status, even though they have been subject to severe exploitation,

¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children supplementing the United Nations Convention against Transnational Organized Crime

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when competent authorities have not identified a trafficking case and have not started criminal proceedings; many member states have made assistance conditional on the initiation or prolongation of a criminal proceeding, and on cooperation of the victims with law enforcement and prosecutorial authorities: this is all at odds with a human rights-based approach.

The non-punishment of victims for illicit activities they were involved in as a direct consequence of their trafficking situation, is not provided for by the Palermo Protocol, with the consequence that the vast majority of States have not included such a provision in their national legislation. As a consequence, many victims including children, are still treated as criminals or as irregular migrants and consequently risk to be detained or deported, This happens even when clear indications of trafficking are discovered.

The focus of the negotiators of the Palermo Protocol was mainly on the repression of international criminal networks and on migration control, rather than on the systemic nature of exploitation in the context of trafficking. Although forced labour is mentioned in the definition of trafficking among its illicit purposes, little attention was paid to the labour dimension of trafficking, which would have required a different approach and specific provisions.

Since the adoption of the Palermo Protocol, many initiatives have been undertaken aimed at promoting human rights-based anti-trafficking action. The Council of Europe Convention on Action against Trafficking in Human Beings, which is a human rights instrument, was adopted in 2005 and its monitoring body, GRETA, has since then regularly evaluated the CoE States Parties. Important soft law instruments have been adopted, directly or indirectly dealing with trafficking, including the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, the related OSCE commitments, and many General Recommendations of the CEDAW Committee including the upcoming GR on trafficking in women and girls in the context of global migration.

The case law of regional Human Rights Courts established a wide range of States obligations in the field of prevention and protection of victims' rights. In particular, the landmark judgement by the European Court of Human Rights in *Rantsev v. Cyprus and Russia* case established extensive States obligations in the field of prevention. The Inter-American Court of Human Rights in the *Fazenda Brasil Verde* case stated that, to act with due diligence, States must have a legal framework for protection and a comprehensive prevention strategy.

In the same direction, the ILO adopted in 2014 the Forced Labour Protocol supplementing the 1930 Forced Labour Convention n. 29. Importantly, the Forced Labour Protocol does not limit its binding provisions to the obligation of criminalizing and prosecuting forced labour, but includes prevention measures, provides victims with protection and access to remedies including compensation, irrespective of their presence or legal status in the territory, and protects victims from punishment for unlawful activities that they were compelled to commit.

Since the US Presidential Statement of 2015, the UN Security Council has adopted Resolutions on trafficking, mostly inspired by a security approach, and addressing trafficking in the context of terrorist organizations such as ISIL/Da'esh and Boko Haram. Such resolutions, however, pay little attention to the human rights dimension of anti-trafficking action. On the other hand, the Security

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Council has not established a clear link between its anti-trafficking and Women Peace and Security agendas.

Recent antislavery legislation in California, UK, Canada and Australia has had the merit of underlining the role of businesses on the prevention and fight against modern slavery and trafficking. However, criticism has been raised regarding weaknesses and ineffectiveness of the reporting obligations. The most recent and advanced legislation in this field is the French law on “*devoir de vigilance*” which requires further action aimed at not only reporting but also identifying and addressing risks, and adopting a vigilance plan to minimize them. The law holds companies liable for damages if they have not complied with such requirements.

Over the past two decades, many initiatives have been undertaken by the business community in compliance with the UN Guiding Principles on Business and Human Rights, to promote mechanisms addressing *inter alia* forced labour, slavery and trafficking in the supply chains, including through the establishment of multi-stakeholder or industry-based initiatives. However, such initiatives have been designed mainly as monitoring mechanisms aimed at identifying risks, but are largely ineffective when situations of exploitation are found, taking into account that the mere termination of contracts implies the loss of jobs and thus provokes further harm for workers. As a whole, such voluntary social compliance initiatives have not changed the business behaviour, which is still not paying much attention to labour protections, especially in supply chains, where low payment, insecure employment and exploitative practices are still prevalent.

Trade Unions or workers-led initiatives have proven more successful in establishing standards on fair recruitment, increased wages, safety, social protection and the elimination of gender-based violence, and sometimes forging a consumer-worker alliance powerful enough to reach the top of the supply chains and oblige parent companies to sign legally binding agreements, as in the case of the Fair Food Program established by the Immokalee Workers Coalition (IWC).

In conclusion, the landscape is today much more developed and complex compared to the way it was when the Palermo Protocol was adopted. In particular, regional and global instruments, soft law instruments, treaty-monitoring bodies documents, the regional human rights courts case law and Civil Society Organizations practices have paved the way to a more comprehensive and genuinely human rights based anti-trafficking action.

However, national legislation and policies remain strongly rooted in the original approach of the Palermo Protocol, with little attention paid to the human rights dimension. In particular, victim support activities remain linked with criminal proceedings and their outcomes in most countries, with the result that assistance is made conditional on victims’ cooperation in criminal proceedings. Moreover, states tend to consider anti-trafficking as part of their immigration control policy; as a consequence, anti-trafficking is often used to justify restrictive migration policies, which in turn increases the vulnerability of migrants to being trafficked and exploited.

Civil Society Organizations have established worldwide innovative practices, based on empowerment of trafficked persons through healthcare, psychological counselling, legal counselling and representation, education, training and help in finding jobs. Such activities have always struggled with

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the restrictions and inadequacies of national legal frameworks; they remain however the only genuinely human rights-based practices.

On the other hand, State-based activities have often caused further violations of trafficked persons' rights, including detention in "closed shelters", limitation of their personal freedoms, and inadequate services not offering long term sustainable solutions and thus leading to re-trafficking. In general terms, the most successful government policies have been designed and implemented in cooperation between State authorities and civil society organizations.

Over the past two decades, it has become more and more clear that trafficking, slavery, forced labour or other forms of exploitation are systemic components of economies and markets worldwide, and should be addressed primarily as a human rights and social justice issue.

Whilst government anti-trafficking action worldwide remains largely rooted in a criminal law model, addressing the labour dimension requires better and more effective action aimed at changing the business model, enforcing labour laws, and empowering workers in order to prevent and eradicate exploitation.

The COVID-19 pandemic has the potential to exacerbate the trend to rampant exploitation of the most vulnerable, especially if they become even more vulnerable as a consequence of unemployment, lack of social protections and supply chains disruption. It may also exacerbate feminization of poverty and gender discrimination, and fuel the worst forms of child labour, as in crisis situations children become the primary source of income for their families.

Therefore, it is now time - 20 years after its adoption - to go beyond the Palermo Protocol, in three directions:

The UN system, UN human rights procedures, academia, governments and civil society should:

- Act to re-orient the implementation of the Palermo Protocol through an integrated interpretation of binding and soft-law instruments adopted since 2000, and the case law of regional HR Courts;
- Advocate for deep changes in national anti-trafficking legislation and implementation regulations, that should be brought into compliance with human rights standards;
- Consider the possibility of adopting a new international instrument addressing exploitation from a human rights-based approach.

For this purpose, I would like to offer a twelve-point final recommendation.

- 1) The human rights of trafficked persons shall be at the centre of all efforts to prevent and combat trafficking and to protect, assist and provide redress to victims.

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- 2) States should demonstrate their political will and commitment, in concrete and effective ways, to prevent and eradicate exploitation in all its forms. Civil society organizations and survivors' advice should always be taken into consideration when designing and implementing policies aimed at preventing and combating trafficking, slavery, forced labour and exploitation.
- 3) States should consider prevention to be a political priority and take concrete actions, including by funding Civil society organizations, to address root causes of trafficking and exploitation including extreme poverty, gender discrimination, domestic and sexual violence, destitution in situations of conflicts, natural disasters and pandemics, as well as systemic injustice. Effective action should be undertaken regarding education about respectful relationships including from a gender perspective, and about the respect of migrants' and workers' rights, and aimed at eradicating corruption, racism and xenophobia, and discrimination on any grounds including gender, age, race or national origin, social and/or residence status, and creating a social and cultural environment that does not condone any kind of exploitation.
- 4) States should make profound changes to their migration policies, including by establishing significant channels for regular migration to allow people to come and work, abolishing any form of sponsorship that ties workers to a single employer, banning administrative detention for children, establishing a firewall between the access to social services and judicial proceedings, and migration checks, and fully complying with the principle of non-refoulement, also through conducting accurate risk assessment before any decision on return. Such policies should always include a gender and child-sensitive perspective.
- 5) States should establish an innovative methodology to provide early support, based on confidential interviews with people at risk, including migrants in places of first arrival, managed by trained staff, aimed at identifying (not elements of a crime but rather) personal and social vulnerabilities to trafficking and exploitation, based on an individual assessment and taking into consideration complex, gender-based and intersectional discrimination and marginalization factors. The decision about granting early support, and residence status if needed, should be made by interdisciplinary teams established by civil competent authorities. Moreover, States should ensure full integration between asylum procedures and referrals of trafficked and exploited persons to appropriate and specialized services. Civil Society Organizations should be funded to provide early support to migrants, asylum seekers, trafficked and exploited persons, irrespective of their residence status or formal vulnerability determination.
- 6) States should establish legislation on recruitment agencies and brokers, carry out regular checks, establish or strengthen regulatory mechanisms to oversee implementation of legislation, criminalize recruitment and gangmaster activities associated with severe exploitation, ask companies to use only well-regulated labour recruitment firms, and to fully cover recruitment costs.
- 7) States should strengthen legislation on labour rights and ensure their implementation including by enhancing and adequately funding labour inspections. In particular, States should adopt or strengthen regulations protecting domestic workers' rights. States should ensure that implementa-

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tion of labour regulations are always focused on workers' rights rather than on immigration enforcement, and establish a firewall between immigration checks and labour inspections. Moreover, States should ensure that companies that get government contracts and benefit from government procurement are able to demonstrate genuine results on labour rights protection including in their supply chains, such as obtaining evidence that their subcontractors and service providers pay fair wages and recruitment costs. States should exclude from procurement procedures companies that fail to meet their obligations.

- 8) States should establish legislation on mandatory human rights due diligence, requiring companies to disclose not only action undertaken to prevent and eradicate exploitation from their supply chains, but also concrete and verifiable results achieved. Companies should be obliged by law to identify risks and adopt plans to minimize them, and should be held liable for damages if they have not complied with such requirements.
- 9) Businesses have a due diligence obligation to comply with human rights standards. Companies, especially parent companies with large supply chains, should change their business model, and integrate the protection of labour standards into their ordinary business plans, including in their relationships with their suppliers and service providers. For this purpose, companies should establish monitoring mechanisms, plans to address risks, and grievance mechanisms to enable workers to report exploitation, to solve disputes, and to obtain unpaid or under-paid wages and compensation through speedy procedures.
- 10) States should introduce in their legislation a non-punishment provision to ensure that victims of trafficking, slavery and forced labour are not charged, detained or prosecuted for illicit activities in which they have been involved as a direct consequence of their situation of victims. Furthermore, States should decriminalize sexual services and all related behaviours not amounting to exploitation as defined by the Palermo Protocol, and irregular entry or irregular stay, where such behaviours currently constitute a crime.
- 11) States must ensure that trafficked and exploited persons can appeal decisions of competent authorities regarding denial of early support and residence permits, and facilitate their access to justice and remedies. According to the principle of due diligence, States must ensure that trafficked persons are entitled to claim the full spectrum of remedies for human rights violations, including restitution, compensation, rehabilitation, satisfaction and guarantee of non-repetition. The right to claim remedies including compensation should be ensured to all exploited persons, be it through criminal, civil, administrative or labour law proceedings, irrespective of their presence or legal status in the country, including by providing for free legal counselling and representation, speeding up related procedures, and establishing public funds for compensation. An individual independent guardian must be promptly appointed in the best interests of the child, when she/he is unaccompanied or separated from the family. Victims must be protected from secondary victimization; their rights such as the right to privacy must be respected at all times during judicial proceedings.

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- 12) States should ensure funding for victim support, not limited to short-term assistance, but including long-term, sustainable measures aimed at promoting full social inclusion of trafficked and exploited persons, both in countries of destination and origin. Such measures should protect exploited persons from stigma and re-trafficking, and be of a transformative nature, based on education, training, skill acquisition and help to seek employment or establish a business, not based on traditional gender roles, taking into account interests and aspirations of the person concerned, and designed in the best interests of children.

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Endorsed by the following organisations:

1. La Strada International
2. On the Road
3. CoMensha (Netherlands)
4. KOK (Germany)
5. LEFÖ IBF (Austria)
6. Anti-Slavery International (United Kingdom)
7. Ban-Ying (Germany)
8. Proyecto Esperanza (Spain)
9. SICAR cat (Spain)
10. PICUM (Belgium)
11. Animus Association Foundation (Bulgaria)
12. Novi Put (Bosnia and Herzegovina)
13. Gender Perspectives/Social Changes (Belarus),
14. FLEX (United Kingdom)
15. FairWork (Netherlands)
16. Open Gate/Otverena Porta (La Strada) (North Macedonia),
17. Human Resource Development Foundation (Turkey)
17. ASTRA- Anti-Trafficking Action (Serbia)
18. La Strada Czech Republic
19. La Strada Foundation against trafficking in persons and slavery (Poland)
20. ADPARE (Romania)
21. Comité contre L'esclavage Moderne (CCEM) (France)
22. La Strada Ukraine
23. Migrant Rights Centre Ireland (MRCI)
24. FIZ (Switzerland)
25. La Strada Moldova
26. Hope Now (Denmark)
27. PAG-ASA (Belgium)
28. IMPACT Now – Center against Human Trafficking and Sexual Violence in conflict (Netherlands)
29. Global Alliance against Traffic in Women
30. Women's Initiatives
31. Saheli Sangh
32. Jagriti Mahila Maha Sangh (JMMS)
33. Sex Workers and Allies South Asia (SWASA)
34. Kerala Network of Sex Workers (KNSW)
35. Social Work Allies for Sustainable Approaches (SWASA Nepal)
36. Red Rope
37. Vikalp (Women's Group)
38. Muskan Sanstha Sangli
39. Muslim Women's collective, Maharashtra, India
40. Vidrohi Mahila Manch
41. Mitra (Collective of Children of Sex Workers), India
42. Veshya Anyaya Mukti Parishad (VAMP) Collective
43. National Workers Welfare Trust, Hyderabad, India
44. Standup Movement Lanka
45. Association for Emancipation, Solidarity and Equality of Women, Republic of North Macedonia
46. International Committee on the Rights of Sex Workers in Europe (ICRSE)
47. National Network of Sex Workers (NNSW), India
48. Sangama, India
49. SANGRAM Sanstha, Sangli, India
50. Empower Foundation, Thailand
51. International Women's Rights Action Watch Asia Pacific (IWRAP Asia Pacific)
52. POURAKHI Nepal
53. ODRI Intersectional Rights
54. Women Against Rape (WAR) Inc
55. NGO Women's Rights Center, Montenegro
56. MARUAH, Singapore
57. National Workers Welfare Trust
58. Latin American Women's Rights Service
59. LAWRS, United Kingdom
60. VIJ – FIZ, Germany
61. KISA - Action for Equality, Support, Anti-racism, Cyprus
62. STRASS-Syndicat du Travail Sexuel, France