

Submission for the upcoming thematic report on pushback practices and their impact on the human rights of migrants

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La Strada International – European NGO Platform against trafficking in human beings unites 29¹ European counter trafficking NGOs in 23 European - EU and non-EU - countries, operating independently and from a grass root level. The overall aim of La Strada International is to prevent trafficking in human beings and to protect the rights of trafficked persons through promoting their universal rights, including the right to choose to emigrate and work abroad and to be protected from violence and abuse. La Strada International member organisations provide advocacy, awareness and direct support to trafficked persons and vulnerable groups, which are in particular (undocumented) migrant workers. Cooperation focusses on monitoring, advocacy, awareness and prevention, data provision, research and referral and direct support to trafficked persons. La Strada International is member of GAATW, PICUM, ICRSE and HRDN.

La Strada International welcomes the decision of the UN Special Rapporteur on the Human Rights of Migrants to explore ways and means to address the human rights impact of pushbacks of migrants on land and at sea for his forthcoming report to the 47th session of the Human Rights Council. In this submission we focus in particular on the impact of pushbacks of migrants on the identification of human trafficking and the access to rights of potential trafficking victims among vulnerable migrants.

Practices and policies of pushbacks are an increasing phenomenon at Europe's borders and these actions relating to refusal of entry into a country of persons seeking protection is in clear violation of the rights of asylum-seekers, refugees and other migrants, including those that may be victims of severe forms of exploitation, including human trafficking. Not only should fair migration policies be promoted, migrants should also be enabled to seek asylum and protection against non-refoulement which are at the core of international refugee and human rights law.

¹ La Strada International comprises 26 member organisations and 3 associate members. www.lastradainternational.org

Many people who fall prey to trafficking are migrants, including refugees and asylum seekers, who have decided to leave their country for various reasons, such as conflict, natural disaster, persecution or extreme poverty. They have left behind their social protection network, and are particularly vulnerable to trafficking and exploitation.² It is well acknowledged that lack of migration possibilities creates more vulnerability and that pushbacks can lead to direct persecution or inhuman or degrading treatment in the country migrants are returned to, or from which they cannot escape. Vulnerable migrants, whose situations provide clear indications for human trafficking practices, still often risk to be returned to countries, where they earlier faced severe exploitation and abuse.

Repeatedly La Strada International has called for asylum, residence and enhanced migration pathways including better protection of migrants to prevent human trafficking, while raising concern about the lack of adequate identification, protection and support including residence for victims of human trafficking and those who face other forms of severe labour exploitation. Unfortunately, current European anti trafficking legislation does not sufficiently protect the rights of victim of trafficking and other forms of exploitation – as many remain unidentified and face arrest, detention and or deportation - while current EU Migration polices, including the new EU Pact on Migration and Asylum, are expected to increase the risks of exploitation and human trafficking, as well as increase violations of exploited and trafficked persons' rights.³

The measures described in this Pact and in other EU polices – including the proposal for a new EU pre-entry screening procedure to identify people and decide which subsequent procedure is applicable - are not expected to enhance identifications of vulnerability but instead to increase detention and facilitate immediate return of those that have been denied asylum, while removing essential legal safeguards and support, in conflict with international human rights obligations.

The prevention and combating of human trafficking and other international crimes has often been used to ‘justify’ measures to prevent irregular migration, impose rigid visa policy, increase border controls and obstruct family reunification and push-back activities. However, restrictive policies and push-backs contradict their proclaimed purpose, as they create situations in which human rights

² Statement to mark World Day Against Trafficking in Persons, UN human rights expert, Maria Grazia Giammarinaro, States must treat refugees and migrants as rights holders and act to prevent trafficking and exploitation, 30 July 2018.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23413&LangID=E>

³ La Strada International statement: New EU Migration Pact increases risks of human trafficking, 18 October 2020

<https://lastradainternational.org/lisidocs/3374-La%20Strada%20International%20Statement%20-%20EU%20Anti-Trafficking%20Day%2018%20October%202020%20-%20def.pdf>

violations are more likely to occur. Increasingly restrictive border control policies and the lack of legal alternatives for onward movement play into the hands of unscrupulous migrant smugglers, who use this opportunity to also perpetrate trafficking and other forms of exploitation, taking advantage of people's vulnerable situation'.⁴ State policies that increase border control and surveillance, and reduce opportunities for safe and regular migration, have created a market for irregular migration, including human trafficking and other abuses, due to increased reliance on smugglers. Meanwhile the number of identified victims of human trafficking in Europe remains low. If compared with the high estimations of the crime by international organisations only a small percentage of the estimated amount of victims is actually identified.

Next to identification of human trafficking cases, States have an obligation to prevent human trafficking and should establish – in addition to international protection schemes – individualised procedures and appropriate indicators to identify migrants' vulnerabilities to trafficking and exploitation, and provide them with tailored solutions to prevent further harm, including residence.

A recent study conducted by six of our members organisations in the framework of the project REsidency Status: STrengthening the protection of trafficked persons (REST)⁵ revealed the lack of access to protection and residence, both temporary and long term residence for victims of trafficking. The researchers identified that victims of trafficking are often not encouraged or informed about the fact that they can apply also for refugee protection, when identified as potentially trafficked and referred via national anti-trafficking referral mechanisms. Moreover asylum and trafficking procedures in place in European countries do often not align.

The awareness and understanding of the potential for long-term protection of trafficked persons – that the refugee legal regime and the non-refoulement obligations provide – need to be strengthened. The reasoning here is to ensure a coherent and synergic application of the anti-trafficking, asylum and human rights law towards the protection of trafficked persons. When the asylum applicants are trafficked persons, it is necessary to guarantee their rights both as victims of trafficking and as

⁴ Trafficking along Migration Routes to Europe Bridging the Gap between Migration, Asylum and Anti-Trafficking Briefing Paper Principal authors: Roberto Forin, International Centre for Migration Policy Development (ICMPD) and Claire Healy (ICMPD). La Strada International was part of the project team, https://www.icmpd.org/fileadmin/1_2018/THB/II-Briefing_Paper.pdf

⁵ The REST project is coordinated by LSI's member LEFÖ-IBF and implemented in cooperation with LSI member organisations located in five other European countries: Comité Contre l'esclavage Moderne (CCEM) in France, Proyecto Esperanza in Spain, CoMensha in the Netherlands, La Strada Moldova in Moldova and Astra in Serbia. The research is partly founded by the Council of Europe. REST seeks to strengthen the right to residence and protection of third-country nationals trafficked in Europe, by focusing on the gaps and challenges in their actual access to rights and services.

vulnerable asylum applicants.⁶ A promising practice in Spain allows both the asylum procedure and the process of victim identification and assistance to run parallel, but this is often not the case in other European countries.

During the recent years of growing mixed migration flows in Europe, the nexus between asylum and trafficking has become more apparent and we have noted an increased vulnerability to exploitation and abuse of migrants in need of protection, including refugees and asylum seekers from 3rd countries. Early identification among migrants and refugees is often not mandatory or not part of formal procedures, neither linked with existing National Referral Mechanisms (NRM) or National Action Plans on trafficking in human beings of European countries. Only few countries seem to have specific indicators in place related with vulnerabilities of this target group and hence many are not identified as presumed victims of human trafficking.

The NGOs working in the project REST reported however over the past five years an increasing number of asylum seekers who were trafficked. In Spain, this group accounted for 39% of total trafficking survivors assisted by Proyecto Esperanza in the period 2013-2019. In France, 20% of the new beneficiaries supported by CCEM in 2019 had lodged an asylum application, comparing with no case of any beneficiary involved in the asylum system in 2013. In Austria, 28% of trafficked persons assisted by LEFO-IBF were involved in asylum procedures in 2019, and 6% out of the total were beneficiaries of international protection.

Many of these assisted trafficked persons do not receive asylum or any other form of protection or residence, but are forced to return or deported to other EU countries or their countries of origin, when they have not been able or willing to cooperate with the authorities or not been formally identified as trafficked persons – often depending on a successful legal procedure. La Strada International members also note growing numbers of victims of trafficking subjected to Dublin procedures. Often persons with a Dublin claim are not offered their legal right to a reflection and recovery period and are increasingly often told to report the crime of trafficking in the country of first arrival, in cases that exploitation occurred elsewhere. Often they also risk detention for shorter or long term periods.

Detention is very problematic as it leads to the revictimisation of the person at the hands of the State. Not only does this indicate a failure to implement the obligations on the identification and assistance of trafficked persons, but it also breaches the non-punishment provision established under the CoE

⁶ LEFO IBF RESidency STatus: Strengthening the protection of trafficked persons, Policy Paper, Vienna, Jan 2021
<https://lastradainternational.org/lisidocs/3385-REST%20Policy%20Paper%20January%202021.pdf>

and EU antitrafficking law. According the CoE Convention on Action against Trafficking in Human Beings⁷, the principle of non-refoulement should also apply in case of indirect removal to an intermediary country including a Member State of the Council of Europe, which is the case with Dublin returns. National practices indicate, though, a lack of engagement in a comprehensive risk assessment to ensure compliance with this principle.

Yet, a Dublin transfer may result in bringing the individual back into the hands of the criminals that recruited and exploited them in the first place. Further, the fact that victims have not received assistance, lack a safety net and are not adequately referred for protection heighten the risks. In line with the REST project findings, La Strada International believes that - depending on individual circumstances - a victim's trafficking experience may be relevant for consideration or entitlement to refugee status or other forms of complementary protection, either based on the 1951 Refugee Convention or the non-refoulement obligations under international law, EU law and the ECHR. The CoE Anti-Trafficking Convention postulates that granting a residence permit to a victim "shall be without prejudice to their right to seek and enjoy asylum".⁸ The EU Anti-Trafficking Directive also makes a direct link to foster referral of victims to asylum procedures. It requires States to inform, where relevant, a presumed victim about the possibility of being granted international protection. However, there is still a long way to go to achieve a consistent application of international and European refugee law and human rights law relevant to the situation and needs of trafficked persons seeking asylum.

Recommendations

- Human rights violations at the borders should be well monitored on their impact on vulnerable migrants. Allegations of pushbacks should be adequately and promptly investigated and clear accountability mechanisms should be in place.
- NGOs should be granted more access to border areas, and to provide assistance at places where human rights violations are reported and to monitor and report on fundamental rights violations, next to providing information to migrants.
- Access to basic services, such as accommodation and healthcare, should be provided to all migrants, including asylum applicants, people who have not applied for asylum and people whose asylum application has been refused.

⁷ Council of Europe Convention on Action against Trafficking in Human Beings, CET 197 - <https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168008371d>

⁸ Idem

- Migrants should have sufficient access to legal aid, as well as accessible and comprehensible information regarding their legal rights, in cases of violation of their rights. States should acknowledge migrants as legal subjects, with rights and obligations, in all circumstances.
- State authorities should take all necessary steps to officially identify and investigate cases of trafficking that occurred in countries of origin or during the migrants' journey, also by strengthening international cooperation on criminal investigations.
- Protection, including a reflection and recovery period, should be provided to presumed victims of trafficking regardless of whether it is possible for law enforcement to investigate the case.
- All persons should be enabled to report the crime of human trafficking in any European country and receive access to a protection and support.
- State authorities and other anti-trafficking and migration actors should enhance their understanding of the difference between migrant smuggling and human trafficking
- States should ensure that a proper risk assessment is conducted prior to issuing a return decision, including a decision on relocation, to ensure compliance with non-refoulement obligations.
- More policy coherence and consistency is needed both at EU and national European level to ensure that migration policies more align with human rights instruments, including anti-trafficking policies
- States should significantly expand legal pathways, including refugee resettlement, family reunification, and migration for regular, gainful and non-exploitative employment for workers of all skills.
- Detention of irregular migrants, including potential victims of trafficking should be prevented at all times.

La Strada International