

The Vienna Forum to fight Human Trafficking
13-15 February 2008, Austria Center Vienna
Background Paper

007 Workshop: From Protection to Prosecution – A Strategic Approach

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BACKGROUND PAPER

WORKSHOP 007

**FROM PROTECTION TO PROSECUTION- A STRATEGIC APPROACH
A Victim Centred Approach as a Key to Increasing the Effectiveness of
Criminal Justice Responses to Human Trafficking**

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INTRODUCTION

Human trafficking is a high profit, low risk crime for traffickers. The crime of human trafficking is a criminal offence in many states although it is often the case that criminal investigations do not result in a conviction or, if a conviction is reached, it is usually lenient and does not reflect the severity of the crime.¹ Successful prosecutions with maximum enforcement of the law can act to prevent and deter human trafficking. In order to achieve successful prosecutions, evidence and testimony from the trafficked victim/s is often necessary during the criminal justice proceedings. However, victims of trafficking are exposed to intimidations and various other risks and are often afraid of cooperating with criminal justice. Responding to human trafficking therefore requires a balanced approach that is based on enforcing the law against the traffickers and protecting the human rights of trafficked victims. Protection and support measures for trafficked victims are not only necessary to respond to the violations of the victims rights, but also to support the law enforcement response to human trafficking. Adequate laws should be in place to punish the traffickers and victim protection and support measures should be implemented under national policy responses to human trafficking to respond to the exploitation suffered by trafficked victims.

According to the UN High Commissioner for Human Rights under the *Recommended Principles and Guidelines on Human Rights and Human Trafficking*, responding to and upholding the human rights of trafficked persons should be at the centre of all efforts responding to human trafficking.² Providing trafficked victims with protection and support acknowledges and responds to the human rights abuse that they have suffered as a result of being trafficked and ensures that they will not be treated as criminals themselves. It allows victims the chance to recover from their trafficking ordeal and reduces the risk of re-trafficking. Through the provision of protection and support, trafficked victims can gain the confidence and security to provide evidence against their traffickers during the criminal investigation. Evidence has shown that trafficked victims are more likely to cooperate in the criminal investigation if they have access to protection and support services.³ Valuable evidence provided by trafficked victims is extremely valuable to any prosecution case and can result in the maximum enforcement of the law against the traffickers. Without evidence given by the victim, the elements of the trafficking crime are extremely hard to prove in human trafficking cases and it is probable that traffickers will receive a relatively light punishment in relation to the severity of the crime they have committed. Therefore, without evidence

¹ Kristiina Kangaspunta, et al., Chapter Four, 'Challenges of UN GIFT', *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, p. 6.

² Mike Dottridge, Chapter Three, 'Action Responses to Trafficking in Persons: International Norms Translated into Action at the National and Regional Level', *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, p. 99.

³ The Italian policy response to human trafficking has protection and support of trafficked victims at its centre. Measures for the protection and support of trafficked victims is included under national legislation under Article 18 of Legislative Decree 268/98 1998. As a result, successful prosecution rates in Italy are high in relation to the number of trafficked victims who have access to the protection and support services. The number of trafficked victims who have recovered from their trafficking ordeal is also high in comparison to other European states. See Joint Committee of Human Rights 26th Report of Session 2005-06, 'Human Trafficking', October 9, 2006 pp. 61-64. Available at, <http://www.statewatch.org/news/2006/oct/jt-hr-cttee-trafficking-report.pdf>

and testimony from trafficked victims, it is difficult to successfully prosecute the traffickers and implement the full force of the law against them. Comprehensive national criminal justice responses to human trafficking that include measures of law enforcement and victim protection, are key to successful prosecution cases and therefore to human trafficking prevention.

THE INTERNATIONAL FRAMEWORK: THE UNITED NATIONS PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

Measures for the protection of and assistance to trafficked persons are included under Articles 6-8 of the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children* (UN Protocol) of 2000.⁴ These measures include medical, psychological and material assistance, access to safe housing, provision of counselling and information in regards to legal rights, employment, educational and training opportunities, compensation, residence permits and repatriation assistance.

Article 5 requires States to criminalize trafficking in persons:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in Article 3 (use of terms) of this Protocol, when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.⁵

The implementation of the legislative framework provided by the Protocol is mandatory for all Member States who ratify the Protocol. The majority of UN Member States have now ratified the Protocol.⁶

The Protocol's requirements are a minimum standard. Domestic measures may be broader in scope or more severe than those required by the Protocol, as long as all obligations specified in the Protocol haven been fulfilled.

⁴ The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, 2000. Available at, <http://untreaty.un.org/English/notpubl/18-12-a.E.doc>

⁵ UN Protocol, Article 5, 'Criminalisation'.

⁶ As of January 7, 2008, 117 Member States have ratified the UN Protocol.

See, <http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html>

In the field of victims support and protection, the *Council of Europe Convention on Action Against Trafficking in Human Beings* (COE Convention) represents a good example that goes beyond the Protocol while being in line with the Protocol. The CoE Convention is the most recent international instrument against human trafficking. It presents minimum standard measures for victim protection and support to be implemented under national legislation for those Council of Europe Member States who sign the Convention. The protection and support measures offered by the COE Convention are not conditional on a victim's willingness to cooperate with the authorities in their criminal investigation. The minimum standard measures for victim protection and support under the COE Convention include; a reflection period for all trafficked victims (30 day minimum), residence permits where necessary, appropriate and secure accommodation, psychological and material assistance, access to emergency medical treatment, translation and interpretation services if needed, counseling and information in relation to legal rights, judicial proceedings and services that are available to the victim, assistance to ensure that the rights and interests of the trafficked victim are presented and considered at appropriate stages of the criminal justice proceedings against their offenders (traffickers), compensation and access to education (for trafficked children).⁷ As of January 9, 2008, the COE Convention has 27 signatories and 10 ratifications.⁸

NATIONAL LEGISLATION AND INSTITUTIONAL FRAMEWORK

Legislation on human trafficking should criminalize human trafficking in line with the definition of trafficking offered under the UN Protocol, Article 3 (in order to distinguish it from smuggling and other organised immigration crime) and include penalties against the traffickers. The regulatory framework, moreover, should comprise measures for the protection and support of trafficked victims and . Many Member States have implemented a legislative response to human trafficking that is law enforcement based, targeting the traffickers. Not as many have implemented legislation and regulations concerning the protection and support of trafficked victims. Including victim protection and support measures under national legislation and regulations brings many benefits to prosecution cases, the enforcement of the law against the traffickers and to the trafficked victims. When trafficked victims are provided with access to protection and support services, the likelihood that they will cooperate with law enforcement officers in their criminal investigations increases. Implementing protection and support for trafficked victims also works to recognise and respond to the exploitation suffered by them so that they may recover from their trafficking ordeal. In addition, developing and implementing national legislative and regulatory measures of victim protection and support can prevent the victim from

⁷ The Council of Europe Convention on Action Against Trafficking in Human Beings, Chapter Three 'Measures to protect and promote the rights of victims, guaranteeing gender equality', Articles 10-17. Available at, http://www.coe.int/T/E/human_rights/trafficking/PDF_Conv_197_Trafficking_E.pdf

⁸ The Council of Europe
<http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=197&CM=8&DF=1/9/2008&CL=ENG>

being treated as a criminal (of illegal immigration for example). If such measures are included under the national legal and regulatory framework, all identified victims of trafficking should be allowed to access protection and support services provided that the services are available and have the capacity to support the number of trafficked victims who arrive in the country of transit or destination. Legislation and regulations provide a reference point for those who enforce the law. By including victim protection and support measures under national legislation and regulations, law enforcement authorities will be able to respond to the human rights aspect of human trafficking in an appropriate manner. When victims are protected and supported the effect increases the chances of successful prosecutions against the traffickers.

THE VICTIM-CENTERED APPROACH AS PART OF A COMPREHENSIVE CRIMINAL JUSTICE RESPONSE TO HUMAN TRAFFICKING

A comprehensive criminal justice response to human trafficking should include measures for the protection and support of trafficked victims alongside measures to prosecute human traffickers. The provision of protection and support measures should not be conditional on a trafficked victims' willingness to cooperate with law enforcement officers in their criminal investigations which underlines the human rights based approach to human trafficking. Ideally, a reflection period of 30 days minimum should be offered to all identified trafficked victims so that they are given time to make an informed decision as to whether they wish to cooperate with law enforcement authorities or not. Reflection periods therefore have the potential to create an environment that encourages victim cooperation in the prosecution case. Further, reflection periods also work to avoid the rapid deportation of the trafficked victim, allow the victim time to recover from their trafficking ordeal and reduces pressure on law enforcement authorities to put together a prosecution case. Including a reflection period under national human trafficking policy has been a contentious issue for some Member States in regards to concerns relating to illegal immigration. A reflection period has been viewed by some Member States as having the potential to act as a 'pull factor' for illegal immigration whereby it is feared that some illegal immigrants may make bogus claims of having been trafficked in order to receive the benefits of protection and support offered to genuine victims of trafficking. However, those Member States that have implemented victim protection and support policy measures under their national legislative responses to human trafficking have not reported such an abuse.

A comprehensive victim protection and support policy should include those elements that are outlined in the UN Protocol and COE Convention. In support of the human rights based approach to human trafficking, victim protection and support policy measures should be available to all identified trafficked persons on an unconditional basis and should be specifically designed to meet their needs. Victim protection and support service providers should have the capacity to accommodate the estimated number of trafficked victims arriving in the country of transit or destination. Providing such services to trafficked victims will give them the confidence and security to

cooperate in the prosecution case. In addition other measures should be incorporated in the interests of the trafficked victim and good law enforcement practice. They include identification systems of trafficked victims and national referral mechanisms to victim protection and support services.

NGOs and other organisations with the professional capacity to support trafficked victims are often designated and funded by national governments as service providers of protection and support for trafficked victims. The role of NGOs in relation to the criminal investigation should be clearly defined and co-ordinated through such instruments as Memorandums of Understanding, National Referral Mechanisms and/or National Action Plans.

Criminal justice practitioners, and particularly law enforcement officers, should be aware of human trafficking legislation and victim protection and support services that are available in their jurisdictions. Law enforcement officers are often a first point of contact for trafficked victims and are therefore the ones most likely to make referrals to protection and support services. Pro-active investigations have the interests of the trafficked victim as the priority. Good practice criminal justice procedures can be achieved through education and training of law enforcement officers and criminal justice practitioners. Good practice responses for pro-active investigations include identifying trafficked victims and making referrals to protection and support services, knowledge of the law on human trafficking, gathering intelligence relevant to the prosecution case, interviewing trafficked persons and treating them appropriately as victims, specialised criminal court procedures for the prosecution, and engaging in continual risk assessment of the trafficked victim. Those who enforce the law should be aware of the distinction between human trafficking, people smuggling and other forms of illegal immigration. In addition proper data collection systems can also be a valuable tool for human trafficking investigations as a resource for storing evidence, intelligence and information on particular trafficking cases or more generally for trafficking cases across the board. Data bases are an excellent resource for securing and storing solid evidence and can act as a point of reference for each individual trafficking investigation.

Awareness raising can also be extended wider to the general public. Initiatives like Crime Stoppers which are large scale awareness raising efforts aiming to gather anonymous information are a good way to raise public awareness of human trafficking and contribute to the gathering of intelligence and information on human trafficking investigations.

Inter-agency coordination at a national level is paramount to a successful criminal investigation. Coordination of the roles of each agency involved in the human trafficking investigation can be defined under such instruments as National Referral Mechanisms, a Memorandum of Understanding or a National Action Plan. Agencies that are likely to be involved in human trafficking prosecution cases include police, immigration authorities, specialised NGOs, social services, interpreters and translators, judges, defence and prosecution lawyers. Coordinating roles for the prosecution case avoids confusion and overlap of information and activity, leaves little room for gaps in the response to the trafficking case and ensures that trafficked victims have access to protection and support services. For coordination of inter-agency roles to be most

effective, adequate resource capacities for responding to human trafficking must be available and in place.

If certain elements of the comprehensive criminal justice response to human trafficking are missing from the national policy response, it can have a detrimental impact on the prosecution case and on the well being of trafficked victims. Without a comprehensive response, prosecution cases may not be successful, whereby minimum penalties are imposed against the traffickers. Trafficked victims may not have the confidence and security to provide valuable evidence to law enforcement authorities or testify in court if they are not protected and supported before, during and after the criminal investigation. If no maximum penalties are handed down to the traffickers, law enforcement against human trafficking does not take full effect and has limited capacity to act as a deterrent against others involved in the criminal activity of human trafficking. A comprehensive criminal justice response to trafficking should support the full implementation of the law against the traffickers and offer trafficked victims protection and support in recognition of the exploitation they have suffered and to help them recover from their trafficking ordeal.

The absence of comprehensive measures for the protection and support of trafficked victims under national human trafficking policy is also to the detriment of trafficked victims. Detrimental effects to the victim include a strong risk that victims may be re-trafficked, that they will have difficulty reintegrating back into society and with their family in their country of origin, that they will be suffering from extreme trauma and that they will not be able to get closure from their trafficking ordeal as no sense of justice would have been served if a prosecution case is not developed against their traffickers.

This paper has been prepared to provide some broad background material for the workshop. Please note that fuller materials, including speaker summaries and workshop conclusions, will be included in the official report of the Vienna Forum.

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