

Opinion No 7/2010
of the Group of Experts on Trafficking in Human
Beings of the European Commission

Proposal for a European Strategy and Priority Actions
on combating and preventing trafficking in human
beings (THB) and protecting the rights of trafficked
and exploited persons

The Group of Experts on Trafficking in Human Beings of the European Commission, having taken into consideration the following:

- the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2010) 95 final, 29.3.2010);
- the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311, 9.12.2005, p. 1);
- the Commission Working Document 657/2008, which evaluates the Plan and indicates priority areas for anti-trafficking action;
- the Report of the Experts Group on Trafficking in Human Beings of 22 December 2004 and its recommendations;

- the Action-Oriented Paper on Strengthening the EU external dimension of action against trafficking in human beings — Towards global EU action against trafficking in human beings (11450/5/09/REV5);
- the Stockholm Programme for action in the field of justice and home affairs and the Action Plan implementing it (2010/C115/01);
- the informal network of National Rapporteurs established recently¹;
- the establishment of the position of the Anti-Trafficking Coordinator, (COM/2010/10265), who is to provide the overall strategic policy direction in the field of trafficking in human beings, including with a view to improving coordination and coherence between EU institutions and EU agencies as well as with Member States and international actors. He/she will contribute to the development of existing or new EU policies relevant to the fight against trafficking in human beings in particular in relation to non-member countries and ensure that all appropriate means for EU action against trafficking are adequately used and mobilised (bringing together prevention, law enforcement, and victim protection) while ensuring coherence with migration and asylum policies;
- the Commission's plans to draw up an integrated strategy on fighting trafficking in human beings, and on measures to protect and assist victims,

Has adopted the following Opinion on the proposal for a European Strategy and Priority Actions on combating and preventing trafficking in human beings (THB) and protecting the rights of trafficked and exploited persons:

Preamble

¹ Council Conclusions on establishing an informal network of National Rapporteurs or equivalent mechanisms on THB (4 June 2009).

(a) According to the international and European documents and instruments listed above, and as specifically stated in the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2010) 95 final, 29.3.2010), ‘trafficking in human beings is a serious crime, a gross violation of fundamental rights’; the Directive ‘adopts an integrated and holistic approach to the fight against trafficking in human beings. More rigorous prevention, prosecution and protection of victims’ rights, are major objectives.

Therefore, the Group of Experts underlines that while specific measures are needed to prevent trafficking in human beings, protect and assist people who have been trafficked, prosecute traffickers, and also address the root causes of the phenomenon, they are unlikely to be effective unless they are underpinned by solid and coherent foundations. These foundations are represented by the guiding principles identified by the Experts Group and presented in its Report of 22 December 2004, and they are complementary and interdependent:

- Ensure that each country has an appropriate legal framework and an appropriate definition of trafficking in human beings and also a National Coordination Body and a National Referral Mechanism through which state actors fulfil their obligations to protect and promote the human rights of trafficked persons;
- Make human rights a paramount issue;
- Take a holistic, coordinated and integrated approach;
- Make government policies linked to migration, the economy and the informalisation of the workplace consistent with efforts to stop trafficking in human beings;

- Respect the rights of children and affirm the State's duty to protect them and promote their best interests in anti-trafficking actions;
- Promote research on trafficking in human beings and monitor and evaluate the impact of all anti-trafficking measures.

(b) The Group of Experts on Trafficking in Human Beings of the European Commission has examined the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311, 9.12.2005, p. 1) in the light of the above developments. While acknowledging that welcome developments have taken place, the Group expresses its dissatisfaction at the results achieved so far.

(c) The aim of this Opinion is to offer a new strategic framework for tackling trafficking in human beings (THB), ensuring further and more focused implementation of the strategy, and considering the need for a more concrete approach, based on priority areas and concrete measures.

In the opinion of the Group, some main concerns emerge, namely:

- The lack of real and effective measures and procedures for the identification of trafficked persons, thereby denying them access to their rights;
- The fact that unconditional assistance, albeit now covered by Article 10(2) of the proposal for a Directive (COM(2010) 95 final, 29.3.2010), and proven to be a fundamental tool for granting victims' rights and also enhancing investigation and prosecution, is not provided in most Member States;
- The fact that the granting of residence permits to trafficked persons is, by virtue of Directive 2004/81/EC of 29 April 2004 on the residence permit issued to victims of trafficking in human beings, linked in most Member States directly to cooperation with the competent authorities in judicial proceedings, regardless of the consequences such cooperation might have on

the trafficked person (e.g. re-victimization, risk of reprisals on the person and on his/her relatives);

- The lack of adequate assistance, protection and compensation for victims;
- The low number of criminal prosecutions for THB;
- The inadequacies of the monitoring mechanisms in place at both national and EU level for evaluating the effectiveness and impact of anti-trafficking policies and measures;
- The inappropriate or insufficient implementation of measures addressing the root causes of trafficking and exploitation of human beings;
- The insufficiently effective and structured coordination of policies addressing THB at EU level, at national level in Member States and externally.

In the light of these concerns, the Group proposes a more concrete approach, designing a Strategy based on priority actions in key areas.

The Group's recommendations are articulated at two levels:

- General priorities for a Strategy of coordinated EU policies and action;
- Specific priorities for a Strategy of coordinated EU policies and action.

1. General priorities for a Strategy of coordinated EU policies and action

1.1. As recognised in the Stockholm Programme, THB affects a wide spectrum of human endeavour and EU areas of responsibility, including asylum, labour, employment, migration, social security, health, education and development.

Nevertheless, there is a risk that THB is identified as an isolated issue, a ‘specialised’ area, and therefore removed from the general concern of human protection within the EU framework of responsibility.

Therefore, a shift of policy is needed towards addressing THB across a wider spectrum of responsibility, and coordination of relevant policies across the EU is of critical importance. The current Plan lacks true ‘ownership’. As such nobody is in fact responsible for monitoring and reporting on the actions envisaged in the Plan.

In the development of the new Strategy the EU should also strive to adopt a participatory approach and plan on including consultation with anti-trafficking stakeholders, especially with NGOs. Furthermore the new Strategy needs to be driven by a mechanism which can coordinate action/response across a number of Directorates-General and relate directly with Member States, non-member countries and relevant EU agencies including Europol, Frontex, the Fundamental Rights Agency, Eurojust, relevant international organisations and NGOs and their networks, and monitor the implementation of the EU anti-trafficking policy. Such a mechanism should be headed by the Anti-Trafficking Coordinator.

1.2. Existing policies endorse a multidisciplinary and holistic approach to address THB, as reflected in the proposal for a Directive on THB (COM2010) 95 final, 29.3.2010).

To this end, a system of coordination should:

- Promote coherent policies across the spectrum of EU endeavour and ensure that actions implement those policies, and
- Monitor the impact and effectiveness of the actions taken that affect/reduce THB and protect victims.

1.3. A coordinating mechanism needs to be able to compel action or responses from the relevant policy areas. Therefore, concrete tools are needed. The Anti-Trafficking Coordinator is a crucial position, potentially able to ensure, through identified leadership, an effective coordination mechanism, provided he/she is supported in terms of political mandate and with adequate resources and staff.

Regular meetings between EU institutions on THB would be a welcome way to improve cooperation regarding their plans, priorities and initiatives. The Anti-Trafficking Coordinator would have an important role in triggering such meetings.

An initial step in coordination would be to clearly identify the relevant existing policies and principles addressing THB. Such an effort would bring together the existing policies and legislation of the EU and enable the cross-cutting issues, including labour, asylum and migration, to be identified as issues that relate to THB and therefore need close screening.

The new strategy needs to move the issue of THB to a higher level so that the responsibility to address it concerns many EU institutions and a coherent approach can be promoted both at legislative level and in the implementation of concrete measures and project funding.

1.4. Evaluation of policy implementation

In the fight against trafficking and in the efforts to protect trafficked persons' rights, coordination and evaluation of policy implementation is of fundamental importance. As a consequence, the following measures are necessary:

- Ensure that each Member State adopts a National Anti-Trafficking Action Plan, to be drawn up, coordinated and evaluated by a National Coordination Mechanism, which should comprise all relevant Ministries and representatives of all relevant actors, including NGOs;

- Ensure that the implementation of EU policy at national level is assessed via an independent National Rapporteur or equivalent mechanism;
- Enhance the work of the established informal network of National Rapporteurs or equivalent mechanisms by sharing a situation analysis on THB trends, on a yearly basis. This should be regularly communicated to the Anti-Trafficking Coordinator and the European Commission.

Furthermore, the National Coordination mechanisms should communicate their national priorities each year to the European Commission and the Anti-Trafficking Coordinator. The aim is to facilitate the identification of common priorities at EU level.

1.5. Coordination of programmes and funding

It is necessary to strengthen and coordinate European Commission funding programmes and priorities among the various Directorates-General and ensure that an overview exists of all THB initiatives funded by the Commission. This should also build on a systematic evaluation of Commission-funded anti-trafficking projects that have been implemented against the objectives of EU anti-trafficking policies. Results and outputs of projects should be widely disseminated, including through the EU website.

1.6. Data collection, research and policy definition

Shared knowledge is of fundamental importance in order to plan and revise policies and action. Therefore some specific issues must be tackled.

- Define parameters for collecting data on THB, using comparable indicators, based on the conclusions of the projects funded by the EU and other relevant information, involving the National Rapporteurs or equivalent mechanisms and their informal network. This would promote a clearer view of the dimension of the phenomenon across the Member States and also provide qualitative information about the different

forms and sectors of exploitation and methods of recruitment that would help identify those areas where more specific action is needed.

- Promote studies and structured analysis and the consequent identification of possible actions aimed at tackling the root causes of trafficking and exploitation.

In particular, the analysis should focus on the causal relationships between THB and the structure of the labour market, migration policies and social inclusion opportunities.

- Develop evidence-based awareness of and build capacity for tackling THB for labour exploitation and other forms of exploitation, such as begging and unlawful activities, in particular involving children.

From the data available it is clear that forms of exploitation other than sexual exploitation need to be addressed.

- Carry out appropriate risk and criminal analysis in order to make robust inspections, resulting in criminal investigations of the various types of THB.

The Group stresses that data collection procedures must not violate national and European data protection provisions. All data collection mechanisms must protect the rights of the trafficked persons as data subjects.

2. Specific priorities for a Strategy of coordinated EU policies and action

The Group reaffirms that only a comprehensive and holistic approach can successfully combat trafficking in human beings. The following priority areas therefore highlight and analyse strategies that the Group considers essential, but they do not replace the need to follow a holistic approach.

Moreover, the Group stresses the importance and validity of the recommendations issued by the first Experts Group in their report published in December 2004. In the

following chapter, some of those recommendations are highlighted under the respective actions.

2.1. Prevention

Introduction

Prevention is recognised as an essential element of anti-trafficking policies, anchored in the Palermo Protocol, the Council of Europe Convention on Action against Trafficking in Human Beings and the original EU Action Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, which highlighted the need for the Member States to work towards increasing knowledge and understanding of trafficking in human beings; addressing the root causes of trafficking; working in countries of origin, transit and destination in a mutually cooperative way; developing expertise on the issue of demand; and addressing demand.

Emphasis on trafficking as a cross-cutting issue has implications for various branches of society. Hence, effective prevention action must be comprehensive and coordinated with all sectors whose actions are essential in preventing and combating trafficking. Prevention should not be isolated and needs to be linked to both assistance and law enforcement measures.

Awareness raising and education have often been seen as the foundations of prevention activities. However, the *new generation* prevention strategies should go beyond these and branch out into other areas that impact on whether people are vulnerable to trafficking — such as development aid or labour migration management.

The main responsibility for prevention lies with governments at local, national and international level, which should create the conditions and frameworks for sustainable crime prevention, including mechanisms for impact assessment and review. Prevention strategies should be based on existing experience and accurate information and should be integrated into all relevant policies and programmes. Above all, they should focus on all forms of trafficking and in particular various forms of labour exploitation, in both the formal and informal sectors.

Prevention of trafficking as well as anti-trafficking law enforcement, prosecution and judiciary elements should be integrated in all relevant EU and Member State cooperation programmes with countries of origin and potential countries of origin.

Priority goals should be to combat the root causes in both countries of origin and countries of destination. Impact assessments should be a structural element of all programmes in order to avoid adverse effects.

Main concerns

A number of prevention campaigns have been carried out in Europe in the past ten years. The impact of these activities is very difficult to measure. However, many of the professionals and international organisations involved tend to agree that these campaigns failed to achieve the desired aims as their focus was predominantly on the symptoms of trafficking as opposed to addressing the root causes of the problem.

One of the main criticisms voiced is that too many resources were invested in producing awareness-raising materials that had little effect in practice, as they were produced in isolation without being accompanied with further measures in the countries of both origin and destination that address root causes and underlying structural factors. Moreover, they failed in addressing people to claim rights and make informed decisions, and in providing concrete alternative courses of action to minimize risks. In addition, there has been limited effort to systematically evaluate the actual impact of prevention programs and in particular of awareness raising programmes in producing changes in behaviour and attitudes and reducing the likelihood of THB.

For example, a UNICEF report published in 2006 revealed that prevention strategies against child trafficking were generally ineffective. ‘The report found that awareness-raising campaigns are often way off the mark, are unfocused and not systematic. Some carry stereotypical images of men lurking in the shadows when traffickers are often family or friends; others ignore trafficking for purposes other than sexual exploitation, for example, domestic work, begging or stealing; most messages are tailored to adults instead of children and therefore provide little or no information on how children might protect themselves, who to turn to, or where to go for help.’²

² *Action to prevent child trafficking in South Eastern Europe — a preliminary assessment.* Unicef, 2006.

Nonetheless, awareness raising remains an important element of prevention strategies — and should focus primarily on provision of correct information to would-be migrants. That way, the trafficker's misinformation can be targeted.

Recalling the Report of the Experts Group on Trafficking in Human Beings of 22 December 2004, elements of awareness-raising campaigns in countries of origin should include:

- information on safe migration and existing possibilities for labour migration, including information on relevant laws and policies in countries of destination, the rights of migrants and possibilities for getting help in case of problems. Such information should be available in the language of the countries concerned and be displayed in the consular and visa sections of the State diplomatic missions. Copies should be enclosed with any postal visa applications;
- specific activities to make children and young people aware of the risks of trafficking as an essential part of their education, coupled with an education that promotes equality between men and women and focuses on human rights, self-empowerment and dignity.

New generation prevention strategies

A number of recommendations were drawn up to help the *new generation of prevention actions* learn from the lessons of the ten years of first-generation prevention measures. The overall perspective is to shift to more targeted responses that function in a proactive and re-active manner at the same time, hence moving from sole focus on the symptoms to dealing with the underlying causes of trafficking.

- The ILO suggests that prevention should be seen from the perspective of migration, socio-economic rights and the labour market.
- Unicef recommends: consulting children themselves on these issues; training professionals who interface with children in their obligations; tailoring messages that clearly point to avenues of help for children; providing support to families in stress to keep the family together; creative schools programmes to prevent children dropping out; life skills education to give children the means — knowledge and skills — to protect themselves.

- Recommendations from a multi-stakeholder prevention workshop convened in Thailand in 2006:
 1. Collect data, including key field information from victims to ascertain who the audience for prevention is. Identify the most urgent hubs and hotspots.
 2. Prevent exploitation where it happens, through enhancing safe legal migration channels and providing information to migrants who might be potential victims of trafficking at points of origin and destination.
 3. Trafficking occurs against a background of social tolerance and exploitation. Address attitudes of the communities and the social contexts that permit exploitative treatment of migrants.
 4. Reduce the profits of traffickers by enforcing robust measures to confiscate assets and also to influence consumer and corporate behaviour.
 5. Traffickers and exploitative employers are opportunistic, creative and flexible. Any effective prevention strategy needs to be too.

- A seminar organised by the Council of Europe in Strasbourg in June 2007, focusing on the issue of misuse of the internet for recruiting victims, highlighted the need to use IT in an innovative and flexible way to channel preventative messages utilising the gateways where traffickers recruit on-line. To that end it is important to gather information about recruitment via the internet from the key countries of origin.

The *new generation prevention strategy* combines a focus on the immediate problem, i.e. the situation of exploitation and reactive measures, with a focus on the root causes, i.e. both proactive and reactive measures. It should be an end-to-end comprehensive concept that brings together prevention, prosecution and protection aspects that relate to, impact on and reinforce prevention endeavours. Innovation in methods and measures applied flexibility in adjusting those measures to changes in trends and patterns based on research and information from trafficked persons and the use of modern information technologies make such a strategy more effective in preventing exploitation through trafficking from occurring. Impact assessment tools and mechanisms to evaluate effectiveness should be an intrinsic part of such a strategy.

Prevention to be informed through targeted research

Research is essential for devising effective prevention methods. Measures range from short-term (especially information and awareness-raising) to long-term procedures (social and economic initiatives). The target groups of prevention activities should also include professionals who come in touch with (potentially) trafficked people.

The root causes that lie behind people's vulnerabilities need to be thoroughly assessed and described. In particular, the aspect of demand for cheap labour needs to be further examined to inform strategies to address vulnerabilities to labour exploitation.

The findings of research by the **ILO**³ constitute a valuable source to help with conceptualisation and analysis of demand:

Direct analysis of demand⁴ has shown that the demand for cheap labour and services is sometimes met by exploited labour. Pearson suggests that a deeper perspective looks at all factors at the destination, i.e. recruiters, employers, as well as unmentioned individuals in the background, namely consumers. The first analytical question would thus be what enables this kind of exploitation to take place?

Pearson defines demand as a desire or preference of people for a particular kind of goods or service. There are three levels of demand in the context of trafficking:

- Employer demand (employers, owners, managers or subcontractors);
- Consumer demand (clients (sex industry), corporate buyers (manufacturing), household members (domestic work));
- Third parties involved in the process (recruiters, agents, transporters and those who participate knowingly in human trafficking at any stage of the process).

The demand is expressed in practice at any of these levels or a combination of them. In order to be able to reduce such demand, we need to gather knowledge and gain understanding of all three levels and find an answer to the question why the demand is met by trafficked persons. Looking at all these factors together then points to demand-side or destination factors, which mean both the demand per se plus the environment that creates or influences demand: the economic, cultural, social, legal and policy factors affecting employers, consumers and third parties.

While it is clear that economic profit is one of the main reasons why traffickers engage in the exploitation of women, men and children, it is not the sole reason. They are only able to exploit people because they can get away with such activities, preying on the

³ Elaine Pearson, *Human trafficking: redefining demand*. ILO Bangkok, 2005.

⁴ Carried out by the ILO-IPEC.

disadvantaged and vulnerable situation of migrants. Studies have shown that some employers prefer migrant workers because they are less willing to speak out for labour rights while accepting low wages in a demanding work environment.

Prevention is an issue not only for countries of origin but also for countries of destination.

Root causes of trafficking exist at both ends and should be addressed in places of both origin and destination (be it in cases of cross-border trafficking or internal trafficking).

Further insight into the nature of trafficking in the country of destination can be obtained from those who have actually been trafficked. Additional information that can be gathered to inform prevention (as well as assistance) could include:

- How is trafficking experienced by those exploited?
- What is the involvement of the exploiters and other intermediaries who profit from trafficking?
- What is the role of the consumer of the services and/or products?

This kind of information complements knowledge of the demand side. Clarifying the nature of the hazards faced by migrant workers could also contribute towards greater compliance with the Council of Europe requirement to create channels for safe and legal migration.

Actions to be taken

A comprehensive prevention strategy should be conceptualised simultaneously at three levels (primary, secondary and tertiary) in order to effectively target issues surrounding supply and demand at all stages in the country of origin as well as in the country of destination. A prevention strategy addressing the supply side can follow a generic scheme of a comprehensive strategy.

Primary stage

The focus here is on trying to develop general awareness and to stimulate a wider public discourse on the risks and issues associated with trafficking. Primary stage campaigns should be undertaken in the countries of origin, where the recruiters are active, but with different messages and audiences. They should also be undertaken at destination with the aim to promote a culture of tolerance and respect for human rights, and a commitment of the wide public to the eradication of slavery as unacceptable violation of fundamental rights and dignity.

The key messages and most effective channels for dissemination of these messages would be best identified in conjunction with anti-trafficking organisations in the country of origin. It is necessary to find out what has been done in the country previously to avoid duplication. Local organisations are important partners for cooperation as to devising the target groups and the most appropriate ways of reaching them. It is important that the target groups are provided with new and precise information on rights and obligations that can then be passed on to at-risk groups.

Secondary stage

This stage aims to focus on more specific groups at risk of being trafficked. To properly address at-risk groups a comprehensive understanding is needed of the deep complexity of the particular society in question. Local bodies, embassies and organisations providing development aid in a particular country are natural partners for communication on that issue, something that is essential to maximise effectiveness of this stage. Put more simply, there is no 'one size fits all' solution for at-risk groups. A further element of secondary stage work is not just information but also skills dissemination. Hence programmes that focus on empowerment and skills enhancement of individuals at risk of trafficking are a key element of this stage.

There may already be such programmes running in the countries of origin, which can be further extended and supported through the provision of precise information. For instance, vulnerability reduction/poverty reduction programmes enable communities to be more self-reliant. However, they tend not to be focused on or take into account protection against and reduction of the risk of trafficking. If a trafficking prevention element is incorporated into these existing programmes, they can be more effective in a synergistic way.

Tertiary stage

The focus of the tertiary stage of a prevention strategy is dealing with the issue once it has already occurred. There is therefore a strong overlap at this point with protection programmes. More specifically, the tertiary stage of a prevention programme is focused on prevention of re-trafficking. Critical to the success of such efforts is proper identification of the victims of trafficking, referring them to appropriate services and care. This includes the provision of a period of reflection, appropriate housing, information and counselling, medical and legal assistance and employment and training

opportunities. Similar services should also be available in the country of origin if the trafficked person is repatriated.

Further to this, the risk status of the trafficked person needs to be assessed. During this assessment the following factors need to be considered: the level of physical and psychological threat they are under or likely to come under; their level of social exclusion; their work prospects; their economic situation, particularly their situation of debt bondage; their level of life skills. In other words, given the level of services provision that a victim of trafficking has received, what are their chances of being re-trafficked? In all such cases the burden of proof should be on the authorities rather than on the individual.

Tertiary prevention should be taken care of by actors that provide protection and assistance to trafficked persons, namely NGOs and the police, in both countries of destination and countries of origin. This stage should in particular be taken into account when developing a national referral mechanism.

In summary, in countries/places of origin the focus should be on:

- development and solutions to the lack of opportunities;
- linking anti-trafficking elements to, or including them in, development aid and poverty reduction programmes where the same countries/regions are targeted.

In countries/places of destination, the focus should be on:

- the demand for cheap and unprotected labour in countries of destination;
- lack of access to rights (such as to compensation);
- linking prevention and assistance programmes with the aim of reducing vulnerability to re-trafficking.

Addressing demand-side/destination factors will mean:

- examining the demand plus the environment that creates or influences demand: the economic, cultural, social, legal and policy factors affecting employers, consumers and third parties;
- among other things, conducting an in-depth appraisal of labour protection laws and any labour protection programmes that address directly the issue of

exploitation, in order for migrant workers to have a chance of working without exploitation abroad;

- assessing who profits from exploitation;
- mainstreaming anti-trafficking measures in anti-corruption strategies.

Impact of other policies on vulnerability to trafficking

The EU and its Member States should review and modify policies that may compel people to resort to irregular and vulnerable labour migration. This process should include examining the effects, in particular on women, of repressive and/or discriminatory nationality, migration and labour migration laws. The exclusion from basic rights and protection of precisely those sectors in which predominantly women work constitutes a discriminatory practice.⁵

Restrictive migration policies, i.e. the lack of legal labour migration possibilities in a context of abundant demand for cheap and exploitable labour in destination countries as well as the corresponding supply of cheap labour are among the root causes of human trafficking, which a preventive approach must address.

Labour market regulation measures (such as the regulation of employment agencies) or the adoption of regular labour employment measures (including the review of measures that have been identified as conducive to exploitation, e.g. tying of work permits to a particular employer) are fundamental elements of a preventative strategy targeting trafficking for labour exploitation.

Member States should consider increasing the opportunities for legal, gainful and non-exploitative labour migration for workers with wide ranges of skills, while implementing gender-sensitive national programmes based on international standards.⁶

With regard to vulnerabilities related to gender, ethnicity, nationality and class, Member States should reduce vulnerability to trafficking by adopting measures to:

- ensure that appropriate legal documentation for birth, citizenship and marriage is provided and made available to all persons;

⁵ Recommendation No 43, Report of the Experts Group on Trafficking in Human Beings of 22 December 2004.

⁶ Recommendation No 44, Report of the Experts Group on Trafficking in Human Beings of 22 December 2004.

- combat violence and discrimination against women, e.g. by encouraging gender sensitisation and equal respectful relationships between the sexes;
- ensure women equal access to and control over economic and financial resources, including the promotion of flexible financing and access to credit, for instance micro-credit with low interest for socially vulnerable women;
- combat all forms of discrimination against minorities, including the development of programmes that offer livelihood options, basic education, literacy, and reduce barriers to entrepreneurship.

With regard to children, both countries of origin and countries of destination involved in trafficking in human beings should ensure that specific consideration is given to the root causes that affect children, such as the lack of access to school, the abandonment of children by their families, their living conditions, etc.

2.2. Identification, protection, assistance and social inclusion

Introduction and main concerns

Procedures to identify and mechanisms to protect, assist and socially include trafficked persons in EU Member States are still a major concern of the Group. Therefore, it re-confirms the validity of the first Experts Groups report from 2004 and its Explanatory Papers. Special attention should be drawn to the following Explanatory Papers: National Referral Mechanisms (No 5), Identification of trafficked persons: Channels for identification (No 9), Reflection period and residence status (No 10), and Social assistance and the development of standards (No 11).

Actions to be taken

In addition, the following actions should be taken into consideration in order to protect the human rights of trafficked persons:

There is a need to revise Directive 2004/81/EC of 29 April 2004 on the residence permit issued to victims of trafficking in human beings, as advocated in the Group's Opinion No 4/2009, in order to enhance the protection and assistance afforded to trafficked persons.

It is necessary to promote actions aimed at establishing or strengthening national mechanisms for identifying victims of trafficking and referring them to the appropriate services. Such mechanisms should make use of formal agreements between all relevant actors at national and local level, such as police, border police, the judiciary, NGOs, labour inspectorates, trade unions, employers' associations, to create a multidisciplinary and multi-agency mechanism for identification and referral. National Referral Mechanisms should be based on a human rights-centred and gender-, age- and culture-sensitive approach, with the awareness that the full practical implementation of such an approach also enhances the effectiveness of the law enforcement agencies' and judiciary's efforts in fighting trafficking and exploitation.

It is worth quoting recommendation No 89 of the Report of the Experts Group on Trafficking in Human Beings of 22 December 2004: 'In order to effectively address trafficking and to prevent re-trafficking, as well as meeting States' obligations under international human rights law Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to testify against their traffickers'.

The following provisions of the proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA (COM(2010) 95 final, 29.3.2010) are of crucial importance and their implementation should be ensured:

- Recital 7: 'Victims of trafficking in human beings should ... be protected from prosecution or punishment for criminal activities ... that they have been compelled to commit as a direct consequence of being subject to trafficking' (see Article 7);
- Recital 11: '... assistance and support should be available to victims before, during and for an appropriate time after criminal proceedings. In order for the assistance and support to be effective, it is necessary that it is provided on an informed and consensual basis ... The practical implementation of such measures should, on the basis of an individual assessment carried out in accordance with

national procedures, take into account the conditions and needs of the person concerned. A person should be provided with assistance and support as soon as there is an indication that he or she might have been trafficked and irrespective of his/her willingness to act as a witness' (see Article 10);

- Article 10(3): 'Member States shall take the necessary measures to ensure that assistance and support for a victim are not made conditional on the victim's willingness to act as a witness';
- Recital 12: '... victims of trafficking in human beings should be given access to legal counselling and to legal representation, including for the purpose of claiming compensation'.

In order to ensure that such provisions are effectively implemented, National Referral Mechanisms⁷ should provide a whole set of services ensuring:

- outreach, (early) identification and referral to assistance services;
- protection and assistance;
- social inclusion and access to the labour market.

The Group of Experts calls on the European Commission to encourage the Member States to develop and implement their national referral mechanisms as recommended by the OSCE.

As stated in recommendation No 91 of the Report of the Experts Group on Trafficking in Human Beings of 22 December 2004 'In order to establish contacts with presumed trafficked persons and to build the necessary confidence and trust, outreach work, drop-in centres and hotlines should be developed', in an attempt to address all forms and sectors of exploitation.

In recommendation No 99 it stresses that 'Member States should establish appropriate structures for providing assistance and protection to trafficked persons. This should include at the minimum safe and appropriate accommodation, counselling, health care,

⁷ The Group of Experts refers to the OSCE definition: a national referral mechanism is a cooperative framework within which participating States fulfil their obligations to protect and promote the human rights of the victims of THB in coordination and strategic partnership with civil society and other actors working in this field.

free legal assistance, education, vocational and employment opportunities. All services must be provided on a voluntary and confidential basis, in a non-discriminatory and non-judgmental manner and in compliance with a number of basic principles derived from international human rights norms, in particular the respect for privacy, confidentiality, self-determination and freedom of movement.’

Furthermore, the actions aimed at ensuring identification, protection, assistance and social inclusion should include:

- devising and implementing permanent and regular multi-agency training at the level of Member States and non-member countries;
- improving child protection systems, including a network of national contact points, aimed at effectively exploring whether there are reasons to suspect that trafficking has occurred and at providing specific and child-tailored assistance with special emphasis on unaccompanied and separated children;
- facilitating access to justice for all victims of trafficking including through provision of free legal counselling and free legal representation to have access to effective remedies, including the possibility of pursuing compensation claims regardless of immigration status.

Also, where voluntary assisted return is requested by a victim, the National Referral Mechanism should ensure risk assessment and safe and sustainable return procedures and prospects, applicable to non-EU nationals as well as to EU country nationals.

It is also necessary to develop or strengthen effective cooperation between governmental and non-governmental actors, as well as among themselves:

- Implement an EU directory on service providers. Such a Directory would be an important tool for use in Member States for the protection of victims. But it must be a ‘living’ document, capable of being regularly updated, and strategically disseminated.

- Support and provide sufficient and sustained funding for NGOs that provide assistance to trafficked persons.
- Support efforts made by NGOs and other service providers to establish structured national and transnational networks between service providers.

2.3. Law enforcement

Introduction

In the ‘Law enforcement strategies’ chapter of its 2004 Report, the Experts Group on Trafficking in Human Beings underlined that an integrated approach to trafficking in human beings comprises effective prosecution aimed at adequate punishment of the perpetrators. It includes criminal law provisions that have a deterrent effect, appropriate proceedings, as well as instruments depriving the offence of any economic advantage.⁸ The Report made a number of recommendations. In the first place, it highlighted the need for prioritisation, specialisation, coordination and cooperation. Secondly it recommended linking anti-corruption strategies to policies to prevent and combat trafficking. Thirdly it stressed the importance of linking offences of money laundering to human trafficking, and of confiscating the proceeds of crime, including such confiscation for the benefit of victims. Finally it recommended the adoption of appropriate restitution and compensation procedures for the victims of trafficking.

The EU Action Plan⁹ of 2005 took these recommendations on board. It stated that human trafficking must be addressed as a clear law enforcement priority, and turned into a ‘high risk-low reward’ activity for traffickers. The EU was urged to step up its efforts to ensure that trafficking in human beings does not generate any economic advantage. Where profits are made, they should be seized and confiscated. The Plan called on law enforcement agencies to work more with Europol, with increased exchanges of information, joint operations and joint investigation teams. It promoted consultation with Eurojust as a way to facilitate the prosecution of traffickers.

⁸ Chapter 6.

⁹ EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings (OJ C 311, 9.12.2005).

In an Evaluation¹⁰ of the Plan, published in 2008, it was noted that the adoption of anti-trafficking legislation had proceeded rapidly across Member States, and that law enforcement and judicial cooperation had increased at international level. However, there were gaps in national implementation and coordination mechanisms, and monitoring systems were still weak. In relation to law enforcement, an area highlighted for improvement was the coordination of investigations and prosecutions. Weak points identified were victims' police protection, compensation, and police risk assessment before return.

A recent Report by the International Centre for Migration Policy Development¹¹ confirms that the implementation of Member State legislation is weak. It calls for the capacities of law enforcement agencies to be strengthened to effectively enforce laws addressing trafficking in human beings and related fields. It recommends focusing on identification procedures, asset seizure and victim compensation, with deeper cooperation between law enforcement and judicial authorities.

The Lisbon Treaty adopted in 2007¹² offers the opportunity for such reinforcement of law enforcement capacities across Member States. The Treaty provides for EU-wide recognition of judgments and judicial decisions, and increased cooperation in proceedings in criminal matters through the mutual admissibility of evidence between Member States. THB is identified (Article 83) as a particularly serious crime with a cross-border dimension, which the Council and Parliament may address by means of directives to approximate the criminal laws and procedures of Member States. The roles of Europol and Eurojust are recognised as mechanisms to support and facilitate coordination and cooperation in criminal matters between Member States.

The Stockholm Programme¹³ and its implementing Action Plan¹⁴ address THB under the title 'Ensuring the security of Europe'. The establishment of an EU Anti-Trafficking

¹⁰ COM(2008) 657.

¹¹ Legislation and the situation concerning trafficking in human beings for the purposes of sexual exploitation in EU Member States. ICMPD, 2009.

¹² OJ C 306, 17.12.2007.

¹³ The Stockholm Programme — An open and secure Europe serving and protecting the citizens. Council of the EU, Brussels, December 2009.

Coordinator within the Commission is proposed, as well as a new Directive on combating THB. The importance of the roles of Europol and Eurojust, as well as Frontex, is again emphasised.

The common problem that THB represents not only for the EU Member States but also for non-member countries, requiring a transnational proactive and coherent approach, is recognised through the Council Strategy for the external dimension of justice and home affairs.¹⁵ The external dimension of THB has therefore been identified as an area for policy development. An EU Anti-Trafficking Coordinator, the strengthening of transnational investigation mechanisms and the strengthening of transnational law enforcement mechanisms and communication are key elements of the strategy for a partnership approach to combating trafficking in human beings.¹⁶

The new Directive¹⁷ heralded in the Stockholm Programme, on preventing and combating trafficking in human beings and protecting victims, is in the final stages of adoption by the Council and the European Parliament. The Directive contains substantial criminal law provisions, extensions of jurisdiction, enhanced investigation tools, and provisions for the protection of victims in criminal proceedings. Measures that go further than the replaced Framework Decision include a requirement that Member States provide appropriate training for those investigating and prosecuting trafficking offences, and have effective investigative tools available. Measures to assist and protect victims within the criminal justice processes are also proposed, whether or not the victim is willing to act as a witness.

A number of countries in the Schengen area have already begun practically implementing enhanced cooperation in police matters. An experimental evaluation of anti-trafficking systems took place in October 2009 when an expert group for the Schengen Evaluation Working Party visited France and Belgium to identify the structures, organisations and working methods used in those countries to prevent and combat THB. The good examples and best practices identified in the course of the

¹⁴ Action Plan implementing the Stockholm Programme: Delivering an area of freedom, security and justice for Europe's citizens, Brussels, April 2010.

¹⁵ A Strategy for the external dimension of JHA: global freedom, security and justice, Doc.15446/05.

¹⁶ Towards global EU action against trafficking in human beings, Brussels, October 2009.

¹⁷ COM(2010) 95. The new Directive replaces Framework Decision 2002/629/JHA.

evaluation have been adopted by the EU Council and will be shared with the other Schengen countries to enhance their anti-trafficking efforts.¹⁸

In the context of the developments outlined above, and the Commission's plan to develop an integrated global strategy against THB, as proposed in the Stockholm Programme, the Commission has requested the Group of Experts on Trafficking in Human Beings to make recommendations towards such a strategy, including on the issue of law enforcement.

Main concerns

Prioritisation of THB

Despite its high profile on the EU agenda, preventing and combating THB is not a demonstrable priority in many Member States. This has to be a reasonable assumption given that the topic and key objectives are still under discussion five years after the presentation of the EU Action Plan.

Currently, the actual scale and level of human trafficking within the European Union remains unknown and, to this date, it is not possible to measure the commitment of Member States or assess the weight they attach to addressing the problem of THB.

It is hoped that this state of affairs will be improved with the appointment of an EU Anti-Trafficking Coordinator, the implementation of a network of National Rapporteurs and the involvement of GRETA. Reporting by these entities to the Commission, the Council and Parliament on the action taken by Member States to tackle trafficking will provide a clearer indication of the progress made and a base for regular reporting.

An example of how THB can be prioritised in the Member States is the establishment of specialised units as a dedicated national or regional response to the investigation of trafficking. In the experience of the law enforcement members of the Group of Experts, such specialised units can be the most effective investigative tools available to EU law enforcement agencies.

¹⁸ Doc 16650/08 Rev1 Sch-Eval 106 COMIX 879.

Tailored to address the trafficking situation as it affects the particular country in which they operate, these units would draw their members nationally from across diverse agencies and disciplines and have the competency to deal with all forms of trafficking.

The establishment in each Member State of a dedicated and specialised counter-trafficking unit would focus the commitment of national governments to the issue and greatly energise Member States' national responses to the problem of THB.

Improving international law enforcement cooperation

THB is often controlled by professional criminals and organised criminal groups operating across state borders with impunity. In its report on setting priorities for the fight against organised crime¹⁹ the Council of the EU made clear that its focus would be on tackling 'the obstacles to dismantling organised crime groups stemming from their international dimension or influence'. These conclusions were based on Europol's 2009 Organised Crime Threat Assessment²⁰ and its 2008 Russian Organised Crime Threat Assessment²¹.

Tackling THB must not be seen solely as a domestic challenge for Member States: the investigation of THB needs to recognise the almost ever present international elements and Member State investigations and prosecutions should be seen as part of the international effort to combat trafficking specifically, and organised crime in general.

Fundamental to increasing the levels of investigations into the organised criminality that lies behind trafficking is the dissemination of information and intelligence amongst the law enforcement authorities of the Member States and with competent EU agencies such as Europol and Eurojust.

Whilst domestic or internal trafficking is increasing, trafficking in most cases is a cross-border crime with a high instance of exploitation of foreign nationals. Experience shows

¹⁹ 2946th Justice and Home Affairs Council Meeting, Luxembourg, 4 June 2009.

²⁰ 10180/4/05 CRIMORG 56 ENFOPOL 75.

²¹ 15819/08 CRIMORG 197 ENFOPOL 244.

that opportunities to investigate trafficking networks with international links are often limited. Where an investigation reveals an international dimension, early action should be taken to ensure that the information and intelligence gathered is used to its fullest potential.²²

An enquiry which reveals international links should have an international investigation and prosecution as the main objective. In such circumstances an investigation involving two or more Member States should be supported by Europol and Eurojust.

The Stockholm Programme anticipates that Europol ‘should become a hub for information exchange between the law enforcement authorities of the Member States, a service provider and a platform for networks in the field of Police and Customs cooperation’. This aspiration needs to be made a reality through the concrete action of the law enforcement authorities of Member States.

National priorities and objectives will inevitably take precedence in consideration of the need to commit further resources to an issue that goes beyond national requirements. However, authorities need to consider the ‘bigger picture’ and the need to have an impact upon the organised criminality behind THB.

Trafficking investigations in the EU involving two or more Member States should involve the countries concerned and the initial or subsequent cross-border contact and cooperation can be progressed using Europol and Eurojust channels.

In the interests of tackling the complete spectrum of the crime, rather than merely its individual parts, Member States have to shift from viewing international cooperation as an option to recognising it as an obligation.

Increasing the levels of THB investigations

A report issued by the International Centre for Migration Policy Development (ICMPD) in April 2010 highlights that there is a considerable ‘drop-out’ rate between suspects

²² Europol should be fully taken into consideration.

investigated, perpetrators charged with an offence, and resulting convictions for an offence. The findings suggest that perpetrators of THB are prosecuted under other charges due to difficulties in gathering proof.²³ In the experience of the law enforcement members of the Expert Group, there are many criminal investigations in Member States with a substantive trafficking element that are not developed or conducted with a trafficking prosecution in mind, e.g. illegal migration, drug trafficking and drug production.

Investigations that are pursued with other criminal offences in mind are often undertaken because they may be easier to prosecute. Evidence gathering and the willingness of victims and witnesses may be relevant factors in the process but just as relevant is the fact that the crime of trafficking remains unclear for police and judicial agencies across the Member States. There is a need for greater awareness among such services about the crime of THB, its international dimensions and the link to organised crime.

Equally relevant is the fundamental issue of victim identification. In the absence of proactive or intelligence-led investigations that provide clear indications of trafficking-related activity, an identified victim of trafficking remains the best indicator of an offence. As the awareness surrounding victim identification remains fragmented and inconsistent across the EU, the risk is that trafficking investigations are not being initiated because the victim has not been identified as such.

This is a major issue for the EU. With the freedom of movement offered by the Schengen free travel zone, the opportunities for law enforcement authorities to intercept traffickers and trafficked persons in transit are very limited. When there is an opportunity, it has to be taken. When a trafficker and/or trafficked person have to present themselves at a border control, for example, the front-line officer should be aware of trafficking indicators and how to respond effectively.

An increased level of awareness of personnel across all EU law enforcement agencies is likely to improve the levels of victim identification and thereby lead to an increase in

²³ Chapter 3 and p. 74.

trafficking investigations. Understanding of the mechanisms and existing tools available for crime prevention and victim identification in cases of THB would also enhance investigations.

Many trafficking cases are not properly followed up because the national systems preempt an international investigation by prosecuting too early at local level. All THB cases need to be investigated as possible aspects of organised criminal activity. Such investigations should therefore be conducted as proactive intelligence-led police operations. Local, regional and national investigators should be alert to the possibility of developing inquiries into international investigations facilitated by Europol and Eurojust.

Considerable expertise is now available from these EU agencies, in respect of the implementation of Joint Investigation Teams (JITs) involving several Member States. Whereas national investigations have tended to focus on the lower-level perpetrators, such as pimps and brothel owners, and local regional investigations, JIT-led investigations, on the other hand, provide a platform to target 'higher echelon' criminality, with the objective of prosecuting key perpetrators and the organisations that drive THB. JITs are a good example of targeted cross-border investigations, and whilst there is not enough experience to evaluate them yet, the feedback from those Member States that have been involved is positive.

The Council of the EU has identified the use of JITs as a priority measure to counter THB. A JIT-led enquiry should be seen by the Member States as a useful investigative tool.

An equally useful tool, in many cases where criminal profit is identified or suspected, is the financial investigation. Given that the motive of organised crime involvement in THB is profit, the potential to target the profits and assets of traffickers is a powerful tool. Financial investigations should be considered in all cases and undertaken when identified as relevant.

Risk assessment is another tool that should be used consistently in criminal investigations for THB. Properly done, a risk assessment allows the investigators to

evaluate the appropriate tools needed for an investigation, and to give direction for the collection of intelligence and evidence. An assessment will also highlight to investigators the seriousness and complexity of the crime under review, and allow them to identify an investigation strategy.

Collection of information and intelligence

The collection, development and exchange of information and intelligence and the use of such ‘data’ in intelligence reporting (situation reports, threat assessments, profiling, etc.) is a fundamental element of policing and crime investigation.

Intelligence collection needs to be a thorough and continuous information-gathering and research process and the European Criminal Intelligence Model (ECIM) provides a sound methodology for this process at both national and international levels.

Accurate intelligence provides a platform to scope and analyse crime, to identify knowledge gaps, to develop effective and sustainable policies and to inform policy makers. Without this, the level and scale of the crime and the impact of any response to the crime cannot be accurately measured.²⁴

The collection of data must be accompanied by regular reporting. The development of a common methodology for reporting by law enforcement authorities of Member States on the nature and extent of their trafficking problem and the effectiveness of their responses would be helpful. It is noted that the Council has called for work to be done on data collection, so as to make ‘comparable national statistical data ... available’.²⁵

The National Rapporteur, or equivalent mechanism in the Member State, has a clear role in gathering relevant information and statistical data. National data-producing

²⁴ The ICMPD Report (see above) points to the scarcity of disaggregated data on different types of perpetrators across Member States (p. 39). For example, only Germany provides data on perpetrators for all different types of trafficking. Inconsistencies in reporting the extent of trafficking are also identified in the report. In Spain, for example, data on cases were only available for the year 2007. In that year, there were 1 870 persons suspected of offences relating to THB, according to one source, compared to 102 trafficking cases prosecuted, according to another source (p. 45).

²⁵ 2946th Justice and Home Affairs Council Meeting, Luxembourg, 4 June 2009.

bodies such as law enforcement authorities need to be actively engaged in their own information and intelligence gathering, for both current and future domestic use, and to assist other Member States and relevant EU organisations.

As a minimum, intelligence and information on a trafficking inquiry that has links to two or more countries, whether inside or outside the EU, should be shared with the other countries identified. This information can be shared at bilateral level but given the specific role of Europol, ideally any sharing or dissemination of criminal intelligence within the EU should be conducted via Europol channels. Judicial issues should be progressed through Eurojust.

Of utmost relevance to a harmonised approach to data collection and information exchange is the EU Information Management Strategy²⁶ and the European Information Exchange Model²⁷. While these initiatives are not specific to combating THB, they provide an important platform on which to share information relevant to law enforcement across borders. The Information Management Strategy has ‘the potential of enhanced information exchange and closer cooperation ... to increase efficiency in the fight against cross border crime’ and is being implemented with a view to ensuring EU internal security.

Actions to be taken

As set out in detail in the previous paragraphs, the following actions should be undertaken:

- Prioritisation of THB throughout all EU institutions and Member States;
- Increasing the levels of THB investigations;
- Collection of information and intelligence.

²⁶ 2979th Justice and Home Affairs Council Meeting, Brussels, 30 November 2009.

²⁷ Doc. 5046/10 JAI 5 CATS 4.

2.4. External relations

Introduction

When analysing EU external policy initiatives regarding the fight against THB, it can be concluded that some of them address THB directly and others do so indirectly by addressing the root causes of trafficking. What they did not do — until the adoption of the Action-Oriented Paper last year under the Swedish Presidency — is address the problem in a structured way.

One example of a key external relations instrument with indirect implications for the external dimension of the fight against trafficking is the European Neighbourhood Policy (ENP), launched in 2004. It was further boosted by the Lisbon Treaty, which recognises its importance by committing the EU to the development of a special relationship with neighbouring countries, aiming at establishing an area of prosperity and good neighbourliness (Article 8 TEU).

On improving governance, the ENP expresses the joint commitment of the EU and its partners to the shared values of democracy, the rule of law and human rights. Furthermore, the EU is committed to improving mobility and contacts between people throughout the neighbourhood. The concept of mobility encompasses not only the visa regime but also mobility partnerships to promote legal migration, facilitating legitimate cross-border travel, the fight against irregular migration and harnessing the positive impact of migration for the economic development of the EU's partners.

All these aspects have important implications for cooperation with countries in the neighbourhood in the fight against THB, and especially on a project basis numerous initiatives were taken.

The fight against trafficking has been a constant element also in relations with other groups of countries. The 2009 Prague Declaration on building migration partnerships, which brought together some 50 ministers from the whole of Europe and the CIS,

stresses the need to fight trafficking, protect the rights of the victims and avoid labour exploitation of migrants.

The Asia-Europe Meeting (ASEM) has also been a vital forum for dialogue since 1996. The ASEM Initiative to Combat Trafficking in Women and Children was presented at the ASEM Foreign Ministers meeting in Beijing already in 2001.

Moreover, the EU and the Association of South East Asian Nations (ASEAN) share a commitment to regional integration as a means of fostering regional stability, building prosperity and addressing global challenges. The Nuremberg Declaration on an EU-ASEAN enhanced partnership includes a chapter dedicated to the promotion of closer cooperation in addressing THB within the political and security area.

The EU dialogue with Latin American and Caribbean countries (EU-LAC), established in 1999 in Rio de Janeiro, places particular emphasis on migration issues and especially on THB. Several experts' meetings and summits have taken place since then, in order to develop a structured and comprehensive dialogue on these issues.

With regard to Africa, the Ouagadougou Action Plan to combat trafficking in human beings, especially women and children, was adopted by the Ministerial Conference on Migration and Development held in Tripoli in 2006. It is a very broad document that sets out a number of general principles and obligations for the States concerned on prevention and awareness raising, victim protection and assistance, legislative frameworks, policy development and law enforcement, as well as on cooperation and coordination.

In Brussels in September 2010 it was decided that within the EU-Africa Thematic Partnership on Migration, Mobility and Employment — a follow-up initiative to the Tripoli conference — the African Union Commission (AUC), in partnership with the European Commission, will assist regional economic communities in developing and implementing regional action plans to strengthen protection against and prevention and prosecution of trafficking in human beings, in line with the Ouagadougou Action Plan and AU.COMMIT.

The Action-Oriented Paper

The framework for a more structured approach with regard to cooperation with non-member countries in the area of justice and home affairs has been evolving since in 2005 the Council endorsed a Strategy for the external dimension of justice and home affairs: global freedom, security and justice. This strategy calls for action-orientated papers (AOPs) covering specific priority countries, regions and themes.

As THB is identified as a common problem for the EU and non-member countries, the AOP on strengthening the EU external dimension on action against THB, towards global EU action against THB, was developed and adopted in 2009 under the Swedish Presidency with the aim of promoting a proactive, coordinated and coherent EU approach in this field. This approach strengthens the Union's role and capacity to act in cooperation and partnership with non-member countries, regions and organisations to fight trafficking in human beings.

While welcoming the efforts of the AOP to adopt an integrated, holistic and multidisciplinary approach, the Group of Experts emphasises the necessity of ensuring the primacy of the human rights of trafficked persons and other affected groups in any anti-trafficking policy and action, including the measures proposed by the AOP.

It underlines the need to consider THB as an area of cooperation on its own merit, broadening the scope of action into policy areas other than JHA, including external relations, development cooperation, social affairs and employment, migration policy, gender equality, capacity building and non-discrimination.

The AOP is also an important element of a broader EU strategy that has to be endorsed by the EU in the fight against THB, within the new framework of the Lisbon Treaty, the Stockholm Programme and the Action Plan implementing the Stockholm Programme.

Actions in two main policy areas are identified in the AOP:

1. Enhancing cooperation and coordination of EU anti-trafficking action with non-member countries;
2. Developing partnerships between the EU, non-member countries, regions and organisations at international level in addressing the threat of THB.

As a living document designed to be updated and complemented according to the results achieved and also being able to react to new developments in the field of THB, the AOP can be a very useful tool to address the external dimension of the phenomenon.

Main concerns

Ensure proper follow-up to the political statements

Proper preparation and follow-up is needed in order to ensure that all the political declarations and action plans are indeed having a tangible impact on the fight against trafficking and improving the lives of the thousands of victims and respecting and promoting their rights.

The implications of the political commitments need to be identified for the regions and specific areas of origin of trafficked persons and, according to their characteristics, specific actions for each region or area need to be developed, involving not only the national and international authorities and organisations, but also local authorities and NGOs working in the field.

Cooperation and funding programmes should be based on the political commitments made. Relevant staff in the EU Member States and in the EU institutions (country desks for example) should receive such statements proactively, and should be requested to take a comprehensive view. This could ensure not merely that the topic is approached via ‘traditional’ cooperation instruments in the area of migration and human rights, but also that in other areas of cooperation, such as health care and education, issues related to THB are taken into account.

Migration

THB is obviously linked to migration and migration policies, and indeed restrictive entry policies are among the root causes of THB. However, overemphasising THB in migration dialogues and mobility partnerships may lead to a situation where THB is seen purely as a migration issue. Indeed, the fight against THB could be interpreted by some partner countries as another component of a restrictive entry policy. Therefore, while recognising the importance of including THB in the dialogues, this should be done with a view to ensuring a human rights based approach. THB should also be included in other relevant dialogues between the EU and other regions.

It also important to recognise that the commitment made by EU Member States in the European Pact on Migration and Asylum to create and define legal channels for migration still needs to be fulfilled. An effective legal migration policy is bound to have an effect on trafficking in human beings as it would leave them less vulnerable and therefore less exposed to exploitation. In fulfilling this objective is imperative to ensure that such measures do not harm the rights of trafficked persons and other affected groups.

Evaluate mobility partnerships

Mobility partnerships are developing into an important instrument for cooperation between individual non-member countries and the EU. On the one hand, these partnerships should allow for more legal mobility between the country concerned and the EU, whereas at the same time the fight against irregular movements from the country will be stepped up, in particular in relation to the return of own and third country nationals to the partner country. With the partnerships with Moldova and Cape Verde now entering their third year of implementation, and several other just signed or being discussed, the way the partnerships address issues of importance to the fight against THB needs to be thoroughly evaluated in order to ensure no harm to the rights of trafficked persons and that possible shortcomings are addressed before new partnerships are signed.

Review of EU return policies

The 2008 European Pact on Migration and the 2009 Stockholm Programme emphasise the importance of the fight against irregular migration especially via repatriation of

irregular migrants. This approach is understandable from a migration management perspective. However, there are international standards related to the return of trafficked persons. They require that it should be with due regard to the rights (including the rights not to be subjected to inhuman or degrading treatment, the right to the protection of private and family life and the protection of identity)²⁸, safety and dignity of that person, for the status of any legal proceedings related to the fact that the person is a victim, and should preferably be voluntary. The Group of Experts therefore calls for a review of existing policies and practices in EU Member States, including an impact assessment of the Return Directive. This review should focus especially on the screening process before the return is implemented and the procedures in place to guarantee the rights of victims of trafficking.

When implementing their return policy Member States must fully comply with legal instruments and standards on international protection, and also ensure that these instruments are complied with.

It also important that, before enforcing any return measure concerning a trafficked person, an individual risk assessment is carried out in order to ensure that there is no real risk on return, including reprisals, risk of violence, intimidation, and stigmatization and that support and assistance to ensure social inclusion is provided.

It is also recommended to establish a screening mechanism of all migrants who are in a return procedure, including in detention centres in order to facilitate the identification and protection of presumed trafficked persons.

Regarding trafficking victims that are also migrants there is a need to ensure that any action taken will not, in practice, contribute to fostering discrimination.

Actions such as the Swift Action Teams (SATs), envisaged in the AOP, although prompted by a genuine intention, can easily turn into discretionary and arbitrary measures hindering the human rights of trafficked persons and affected groups as well

²⁸ See Explanatory Report to the Council of Europe Convention on Action Against THB, para 202.

as contributing to fostering stigmatisation of migrants, and enhancing stereotypes concerning them, something that must be avoided.

Actions to be taken

The priority actions are to map/identify the regions and specific areas of origin of trafficked persons and, according to their characteristics, draw up specific action plans for each region or area, involving not only the national and international authorities and organisations, but also local authorities and NGOs working in the field, in order to support them in preventing THB; and also to draw up a template outlining the actions taken, including those taken on the basis of cooperation arrangements, so as to have a complete overview of the current situation.

Based on the findings of the above action, a set of technical assistance programmes can be developed in order to enhance the capacity of the origin and transit countries dealing with THB cases. These programmes include voluntary return, transnational referral mechanisms and institutionalised alternatives to return procedures, such as social inclusion programmes in countries of destination and non-member countries.

2.5. Labour exploitation

Introduction

Trafficking in persons for labour exploitation is a serious global problem and one which is becoming increasingly more visible in the European Union. Yet awareness of trafficking for labour exploitation is scarce and the problem often remains inadequately addressed (compared to trafficking for the purpose of sexual exploitation).

The European Commission has repeatedly acknowledged and pointed to the significant gap between the different systems of national legislation on human trafficking in EU Member States and the everyday practice of full and effective implementation of

legislation in those same Member States. Especially large variances in the interpretation of and fight against trafficking for labour exploitation create an attractive situation for criminals.

In 2009 Europol reported that trafficking for the purpose of labour exploitation is increasing, mainly in the sectors of construction, drug production and begging; additionally they indicated that trafficking in children destined for informal labour — including domestic slavery — or sexual exploitation is also rising.²⁹

Findings from ILO global and national studies in several EU countries³⁰ also confirm that the number of labour trafficking cases identified by the authorities is growing and involves regular and irregular migrants, as well as other vulnerable groups on the labour market.³¹

Investigations and NGO information at national level also confirm this situation. For example, the Romanian National Agency against Trafficking in Persons recorded that in 2007 49% of all identified victims were trafficked for forced labour.³² In the Netherlands the reports of the Dutch National Rapporteur have in recent years paid growing attention to labour trafficking and highlighted some of the issues that hinder the detection of this form of trafficking, the identification and protection of victims and the prosecution of traffickers. Similar findings were reported from Belgium and the United Kingdom.

Trafficking for the purpose of labour exploitation occurs in various sectors of the formal and informal economy, and especially in sectors that employ seasonal, temporary and subcontracted labour, are often labour intensive and have a high turnover. These include both small businesses and major enterprises in the following sectors: agriculture, construction, hospitality, catering, food processing, packaging, textile and garments

²⁹ Europol, OCTA 2009, p. 23.

³⁰ ILO, Trafficking for labour and sexual exploitation in Germany, 2005; ILO, Human trafficking and forced labour. Case studies and responses from Portugal, 2008; ILO, *Forced labour: facts and figures. The cost of coercion: regional perspectives*, available at: http://www.oit.org/wcmsp5/groups/public/---dgreports/---dcomm/documents/publication/wcms_106245.pdf.

³¹ See for example ILO, Human trafficking and forced labour. Case studies and responses from Portugal, 2008.

³² ANITP, Report on trafficking in persons 2007, p. 31.

cleaning, domestic work, etc.³³ Trafficking for the purpose of labour exploitation is also reported for begging and criminal activity.

Vulnerability factors that put people at risk of exploitation are linked to a number of issues including residency status, access to the labour market, language and cultural barriers, lack of awareness of rights and lack of information on possible resources, ‘dependence on fellow-countrymen’ or other intermediaries. Furthermore, debt bondage has been found to be a significant factor contributing to people being trafficked and maintained in forced labour.³⁴

Similar contributing factors were found in the June 2010 report of the UK Anti-Trafficking Monitoring Group. The Group has also referred to the practice of tying a work permit to a particular employer as an important causal factor in a number of forced labour cases.

Main concerns

THB for the purpose of labour exploitation is not sufficiently addressed

The Commission Working Document ‘Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings’ indicates that the process of approximation of legislation to comply with the criminalisation requirements for THB for forced labour is ongoing in EU Member States, and that implementation is less advanced than in the field of sexual exploitation. The Commission concludes that trafficking in human beings for both sexual and labour exploitation is still a low-risk crime.³⁵

³³ Trafficking in human beings, Seventh Report of the Dutch National Rapporteur, 2009; Trafficking in human beings, Fifth Report of the Dutch National Rapporteur, 2007; Beate Andrees and Patrick Belser (ed.), *Forced labor: Coercion and exploitation in the private economy*, ILO, 2009; OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, *A Summary of challenges on addressing human trafficking for labour exploitation in the agricultural sector in the OSCE region*, 2009; OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, *Human trafficking for domestic servitude* (forthcoming).

³⁴ ‘Wrong kind of victim?’ Anti-Trafficking Monitoring Group, Anti-Slavery International, London, 2010.

³⁵ COM(2008) 657 final, Brussels, 17.10.2008.

Evidence from Member States confirms this scenario. For example, the Dutch National Rapporteur indicates that in practice cases of trafficking for labour exploitation are dealt with differently from sex trafficking, i.e. indications of forced labour are often not recognised, victims are not always identified as such and are consequently not informed of their rights, and in some instances they are placed in aliens detention.³⁶ The same was found in 2010 by the Anti-Trafficking Monitoring Group in the UK.

Challenges related to the definition and criminalisation of THB for the purpose of labour exploitation

The first internationally agreed legal definition of trafficking is provided by the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime (hereafter ‘Trafficking Protocol’). The Protocol obliges States parties to criminalise trafficking for the purpose of labour exploitation. It indicates that exploitation must include *as a minimum*: forced labour or services, slavery or similar practices and servitude. This trafficking definition has also been endorsed in the 2005 Council of Europe Convention on Action against Trafficking in Human Beings.

At EU level the Council Framework Decision of 19 July 2002 on combating trafficking in human beings³⁷ was the first important step towards approximating the criminal laws of the Member States. In 2006 the European Council adopted a decision on the conclusion, on behalf of the European Community, of the Trafficking Protocol.³⁸

The 2010 Commission proposal for a new Directive on THB³⁹ represents a very significant step forward in adopting a comprehensive anti-trafficking legal regime that covers prevention, prosecution, protection of victims, and monitoring, and that in several elements goes beyond the other international standards, such as the UN Palermo

³⁶ Trafficking in human beings, Seventh Report of the Dutch National Rapporteur, 2009, p. 478.

³⁷ OJ L 203, 1.8.2002.

³⁸ OJ L 262, 22.9.2006.

³⁹ European Commission, proposal for a Directive of the European Parliament and of the Council on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, Brussels, 29.3.2010, COM(2010) 95 final, 2010/0065 (COD).

Trafficking Protocol and the Council of Europe Convention.⁴⁰ The importance of the proposal lies *inter alia* in the extension of the definition of trafficking, which will include exploitation for the purposes of begging and criminal activities among the non-exhaustive list of forms of exploitation for which people are trafficked.

At national level one of the challenges Member States encounter in the approximation of national legislation involves clarifying some elements of the trafficking definition, such as the notion of forced labour. In this regard there are international law standards and court interpretations of these concepts to rely on, and they provide guidance for criminal law and sanctions.

ILO Conventions No 29 and 105 regarding Forced Labour and the Abolition of Forced Labour provide an international legal definition of forced labour as ‘all work and services exacted under menace of penalty for which a person has not offered himself/herself voluntarily’⁴¹. According to the ILO, menace of penalty does not always mean that some form of penal sanction is applied; subtle forms of menace exist, sometimes of a psychological nature; or they may take the form of a loss of rights or privileges.⁴²

While the ILO accepts that a menace of penalty per se can be of a psychological nature, it has not accepted that it applies to a broad situation of economic need. The need to keep a job to earn one’s living does not constitute a menace of penalty.

Trafficking for the purpose of labour exploitation, including forced labour, is a serious crime and a violation of basic human rights that stems from abusing (or exploiting) a person’s vulnerability. Abuse of a position of vulnerability occurs when a person (worker) has no real or perceived acceptable alternative but to submit to the abuse involved. In this context his or her consent to the exploitation, intended or actual, is irrelevant.

⁴⁰ See Opinion of the Group of Experts on Trafficking in Human Beings set up by the European Commission, on the Commission proposal for a Council Framework Decision on preventing trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA, COM(2009) 136 final, 29.4.2009.

⁴¹ ILO Convention No 29, Article 2(1).

⁴² ILO: Human trafficking and forced labour exploitation. Guidance for legislation and law enforcement, Geneva, 2005.

The ILO further notes that ‘where an employment relationship was originally the result of a freely concluded agreement, the worker’s right to free choice of employment remains inalienable, that is, a restriction on leaving a job, even when the worker freely agreed to enter into it, can be considered forced labour’.⁴³

The European Court of Human Rights also addressed the issue of consent in the context of forced labour services. ‘In the case *Van der Missele v. Belgium* ... the Court adopted an approach that examines the validity of a person’s consent to provide a service in light of all the circumstances of the case and argues that consent of the person concerned was not sufficient to rule out forced labour.’⁴⁴

Another challenging aspect of the trafficking definition and of its interpretation has to do with the emphasis that is attached to the recruitment aspect of trafficking, i.e. the way in which a person ends up in a forced labour situation. Such emphasis may result in attention being detracted from the key element of trafficking, i.e. the actual exploitation experienced by the trafficked worker. ‘Interpretations of the Trafficking Protocol that concentrate on the process of bringing a person into exploitation, rather than the final forced exploitation that they face, are in their nature flawed and limited ... From a human rights perspective, there is no reason to distinguish between forced labour and services involving ... “smuggled persons” or “victims of trafficking”’.⁴⁵

In 2010 the ECHR emphasised in its judgment in the *Rantsev* case that THB is prohibited by Article 4 of the ECHR without the need to define it either as slavery, servitude or forced labour. The Court further stated that THB may be very similar to slavery because traffickers exercise powers tantamount to ownership, and that ‘trafficking threatens the human dignity and fundamental freedoms of its victims and cannot be considered compatible with a democratic society and the values expounded in

⁴³ ILO Guidelines on human trafficking and forced labour exploitation, 2005; ILO, Eradication of forced labour, International Labour Conference, 2007, pp. 20-21.

⁴⁴ Council of Europe Explanatory Report CETS No 197, para 90; ECHR judgment of 23 November 1983, Series A, No 70, para 37.

⁴⁵ *Report of the Expert Group on Trafficking in Human Beings*, European Commission, December 2004, p. 53.

the Convention.’⁴⁶ This clearly emphasises that trafficking in human beings is a serious violation of human rights.

Another challenge at national level is the distinction between forced labour and working conditions that are illegal and extremely poor and hazardous. In practice, it appears that there is frequently insufficient clarity in the application of the law concerning the types of abuse in relation to labour that qualify as trafficking for labour exploitation and those that qualify as poor working conditions.⁴⁷ However, what is significant is that, where there is a violation (relating either to the crime of trafficking or to labour laws), action should be taken not only from the perspective of remedying injustice, but also from the perspective of preventing trafficking for forced labour by ensuring that exploitation at any level is not permissible.

Some countries have attempted to resolve these problems by introducing into their legislation the notions of conditions contrary to human dignity (e.g. Belgium, France).

Others, such as the UK, legislate explicitly against forced labour⁴⁸ (as required by ILO Convention No 29) to ensure that all instances of forced labour (trafficked or not) are covered by the legislation.

Challenges and evidence-based concerns related to identification and assistance frameworks for trafficked persons

Practice at national level in EU Member States and information from NGOs and migrant’s rights organisations point to numerous challenges in the establishment and functioning of national systems for the identification, referral to support and assistance and protection of the rights of victims of trafficking for labour exploitation.

⁴⁶ For more details see Opinion No 6/2010 of the Group of Experts on Trafficking in Human Beings of the European Commission on the Decision of the European Court of Human Rights in the Case of *Rantsev v. Cyprus and Russia*. See also ECHR Application No 25965/04, 7 January 2010.

⁴⁷ Dutch National Rapporteur (2007), OSCE, Human trafficking for labour exploitation/forced and bonded labour: identification — prevention — prosecution; and prosecution of offenders, justice for victims, 2008.

⁴⁸ Section 73 of the Coroners and Justice Act 2009 created a stand-alone offence of forced labour and servitude.

With regard to victim identification, very few trafficked workers are identified and assisted. This is often related to the fact that in practice immigration laws tend to prevail over criminal and labour laws. In other words, there is a tendency to maintain a disproportionate focus on an individual's immigration status rather than on their exploitative situation. This may often result in judicial proceedings for labour trafficking not being initiated or pursued, and trafficked persons not being identified as such but often subjected to detention and expulsion as irregular migrants.⁴⁹

Furthermore, there are limited initiatives aimed at identifying trafficked workers through social services and outreach programmes targeting migrants and other vulnerable or marginalised populations. Indeed, in most European countries labour market actors, in particular labour inspectorates and trade unions, are not always aware of trafficking and are not involved in anti-trafficking action, nor do they usually have dedicated capacity and resources to detect indications of trafficking for labour exploitation.

In addition, victims of trafficking for labour exploitation hardly self-identify: isolated and unaware of their rights, they seldom seek assistance and redress as victims of crime.

With regard to support and assistance services for trafficked workers, it should be noted that the type and scope of such services is extremely limited and under-resourced in most EU Member States, and most national referral mechanisms and support services were designed to deal with victims of sexual exploitation. While many needs such as accommodation, safety, counselling and legal assistance may be similar, others will vary depending on the conditions of exploitation. Yet it is crucial to ensure that public and NGO service providers adopt an empowering and human rights-based approach that recognises and supports trafficked persons as rights holders.

⁴⁹ Trafficking in human beings, Seventh Report of the Dutch National Rapporteur, 2009; Trafficking in human beings, Fifth Report of the Dutch National Rapporteur, 2007; OSCE/ODIHR, ODIHR review on the protection of trafficked persons in England and Wales, 2009.

With regard to victims' access to justice and compensation, NGOs and trade unions have started developing partnerships to engage in advocacy campaigns aimed at raising workers' awareness of their rights, provide trafficked persons with legal representation before labour courts, supply counselling and support collective actions and bargaining to achieve better standards. Such initiatives should be further developed and supported.

A point of concern is the confusion regarding labour exploitation caused by the division between administrative law and criminal law. To see labour exploitation according to criminal law as combining several different misdemeanours within the systems of social security and labour law (e.g. working circumstances, working hours, minimum wages, and undeclared work) can be more appropriate than an approach mainly based on civil offences such as violence, threat or illegal stay, which in most cases did not happen from the start. This approach will be helpful not only in detecting the criminal patterns of labour exploitation, but also in identifying victims adequately and ensuring their position and rights, such as their access to support structures.

Challenges related to investigation, prosecution and access to justice

The concept of THB for labour exploitation is relatively new. Some countries have not criminalised the concept of trafficking for forced labour or have only recently done so. In some Member States police and prosecutorial authorities do not appear to be aware of legislation on trafficking for forced labour.⁵⁰

There have been limited criminal investigations of and prosecutions for trafficking and even fewer for labour exploitation in the EU. In addition, there are challenges in ensuring effective application of legislation, adequate penalties, and effective measures to protect victims.⁵¹ The joint UK-Romanian investigation into trafficking in children for begging and criminal activities is a rare example of effective international cooperation in this area.

⁵⁰ Dutch National Rapporteur (2007 and 2009); ODIHR (2009).

⁵¹ COM(2008) 657 final, 17.10.2008, Brussels.

In most EU Member States compensation to victims of trafficking for labour exploitation is rarely awarded, and, even when awarded, compensation orders are often not executed and actual payments not made to the victims.⁵²

The lack of access to free legal aid and basic support services (including the lack of information on rights, and challenges in the regularisation of status) hinders victims' possibilities to claim compensation for material and non-material damages in legal proceedings.

Many of the criminal cases of human trafficking for the purpose of labour exploitation throughout Europe are intertwined with generally acknowledged fraud schemes on the labour market. These are, for instance, the use of undeclared work, the use of forged identity documents, the trade in social security/tax numbers, cheating on the parish register, and the use of forged E-101 documents (on international secondments). Efforts to combat human trafficking for the purpose of labour exploitation will become significantly more effective when policies and approaches are developed to fight these types of fraud occurring in social security and tax systems.

Evidence-based concerns related to prevention

The existence of unregulated labour recruitment systems has contributed to creating opportunities to conceal, abuse and exploit vulnerable populations.⁵³

Immigration policies may often have unwanted effects that contribute to generating labour trafficking. There are few channels for legal and safe migration compared to the needs of the labour market. A number of visa and work permit schemes contribute to creating vulnerabilities to trafficking by generating vulnerability and dependency of workers on a single employment relationship, by impeding a change of employer in the event of abuse, etc.

⁵² OSCE ODIHR, Compensation for trafficked and exploited persons in the OSCE region, 2008.

⁵³ Beate Andrees and Patrick Belser (ed.) *Forced labor: Coercion and exploitation in the private economy*, ILO, 2009.

Much remains to be done to raise awareness of THB for labour exploitation among the general public and labour market actors.

Effective enforcement of labour standards (e.g. on health and safety and on minimum wages) appears to be challenging and calls for capacity building to prevent labour exploitation, detect indications of trafficking and identify victims. Training should target labour inspectors, law enforcement agents and members of the judiciary to enhance the capacity to tackle this form of trafficking.

As in the case of trafficking for sexual exploitation, it is necessary to promote a multidisciplinary approach and build partnerships among law enforcement agencies, labour inspectorates, trade unions, NGOs and the private sector to better prevent and address trafficking for labour exploitation.

In some European countries there are positive examples of cooperation between anti-trafficking NGOs and the private sector aimed at preventing THB, as well as good practices in the area of corporate social responsibility. Such initiatives should be further examined to identify good and promising practices that can be replicated in the EU.

Actions to be taken

As set out in detail in the previous paragraphs, the following actions should be undertaken:

- THB for the purpose of labour exploitation should be fully addressed;
- Agreements should be reached to define and criminalise all aspects of THB for the purpose of labour exploitation;
- Frameworks should be designed to provide procedures for identifying and providing assistance to trafficked persons;
- Action should be stepped up to investigate and prosecute cases of trafficking for the purpose of labour exploitation.
- Free legal counselling and free legal representation should be enhanced to ensure access to justice for trafficked persons;

- New approaches to prevention should be designed.

2.6. Internal trafficking

Introduction

The phenomenon of trafficking in human beings is well recognised; however, it is often perceived only as transnational. It is accepted that all victims of trafficking are vulnerable and that their human rights must be respected; this is equally applicable to victims of internal trafficking.

Internal trafficking can occur in a number of different situations:

1. Internal trafficking of nationals within their Member State⁵⁴.
2. Transnational trafficking into a Member State followed by trafficking within that state.
3. Smuggling into a member state followed by trafficking within that state.

It is important that awareness is raised of internal trafficking within EU Member States and that they consider whether the offence is recognised within their countries, that legislation is in place and there are appropriate victim care provisions. All traffickers must be identified and brought to justice. If the offence is not recognised it will not be investigated/prosecuted as it is mistakenly believed that trafficking is a transnational offence only. Victims of internal trafficking must be identified to ensure that they are afforded the victim care provisions they are entitled to.

The Group of Experts on Trafficking in Human Beings call on the EU Member States to take notice of the extensive problem of internal trafficking, bring the European Commission's attention to this phenomenon, and recommend appropriate measures to address the problem.

Defining internal trafficking

For the purposes of this Opinion internal trafficking in human beings should be understood as trafficking that occurs within the borders of a sovereign state, and is directed against either a national of this state, or a foreign citizen.

⁵⁴ From an EU perspective, trafficking of EU nationals within the EU is understood as internal trafficking.

For the purposes of this Opinion internal trafficking in human beings should be understood as trafficking that occurs within the borders of a EU Member State or the EU territory, and is directed against either an EU national, or a foreign citizen resident within the territory of the EU not primarily as consequence of a trafficking process.

Legal grounds for the criminalisation of internal trafficking

The criminalisation of internal trafficking is based in Article 34(2) of the UN Convention against Transnational Organised Crime, which provides that legislators must not incorporate elements concerning a transnational nature of the crime, or an organised criminal group presence, into domestic offence provisions. Together, the UN Convention on Transnational Organised Crime and its Protocols establish the principle that, while States parties should have to establish some degree of transnational nature of the offence or involvement of an organised criminal group with respect to most aspects of the Palermo Protocol, their prosecutors do not have to prove either in order to obtain a conviction for trafficking in persons, or any other offence established by the Convention or its Protocols. In the case of trafficking in persons, domestic offences should apply even where the crime is not transnational in nature and organised criminal groups are not involved.⁵⁵

Main concerns

Extent of the internal trafficking currently present in the EU Member States

The UNODC's 2009 analysis of the human trafficking situation in Europe⁵⁶ provides information about internal trafficking that is sufficient to assess the gravity and importance of the phenomenon for the EU Member States. This analysis, as the publisher states, presents an overview of the situation in Europe⁵⁷ and its evolution over

⁵⁵ See the Legislative guide for the implementation of the Organised Crime Convention, Part Two, Chapter I, at p. 259.

⁵⁶ See Trafficking in persons, Analysis on Europe 2009, UN.GIFT, UNODC, official website at <http://www.unodc.org/>.

⁵⁷ *Supra* note 2, Trafficking in persons, Analysis on Europe 2009, UN.GIFT, UNODC, at p. 4. See also footnote 2:

‘To facilitate analysis of the data, five sub-regional groups were used in this study, namely:

- Central Europe, which includes the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovenia and Slovakia.

the previous nine years (2003-2008). The conclusions are based on information collected by the UNODC in the framework of the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), published in the *Global report on trafficking in persons* in February 2009.⁵⁸

The analysis states that human trafficking has been portrayed for decades as a phenomenon affecting foreigners. Data show, however, that domestic (internal) trafficking is an important component of contemporary human trafficking. The consequence is that many of the countermeasures implemented (such as customs efficiency, ethno-linguistic integration, victim identification in irregular migration cases, training of embassy and consulate personnel, awareness campaigns on work abroad) are not able to address this form of trafficking.⁵⁹

Further, the analysis shows that in Europe internal trafficking has been detected in at least 11 of the 38 countries considered in the study. In some countries, nationals are even the largest group of victims. This is the case for the **Netherlands, where Dutch victims far exceeded the number of other nationals**. Similarly, in 2007 **the number of victims of German nationality detected in Germany** was 184 out of a total of 689 victims, making them the largest group of detected victims in the country for that year. **In France, Italy and Romania nationals also accounted for a large part of the trafficking victim population.**⁶⁰

Most of these Dutch girls are exploited by their older ‘boyfriends’ who, having made their acquaintance in clubs or via the internet, and abusing their psychological power, charms and leverage, pretended to love these girls but finally coerced them into

• Northern Europe, which includes Denmark, Iceland, Finland, Norway and Sweden.
• South-East Europe, which includes Albania, Bosnia and Herzegovina, Bulgaria, Croatia, Montenegro, Romania, Serbia and Kosovo (Serbia), and the former Yugoslav Republic of Macedonia.
• Southern Europe, which includes Cyprus, Greece, Italy, Malta, Portugal, Spain and Turkey.
• Western Europe, which includes Austria, Belgium, France, Germany, Ireland, Luxembourg, the Netherlands, Switzerland and the UK.’

⁵⁸ *Supra* note 2, Trafficking in persons, Analysis on Europe 2009, UN.GIFT, UNODC, at p. 4.

Data on the trafficking situation in Europe were gathered from national authorities by the UNODC and the UN-affiliated European Institute for Crime Prevention and Control (HEUNI). The researchers contacted the relevant national governments to collect available data.

⁵⁹ *Supra* note 2, Trafficking in persons, Analysis on Europe 2009, UN.GIFT, UNODC, at pp. 9-10.

⁶⁰ *Id.*

prostitution; in other known cases they were brutally forced into prostitution from the very beginning.

The analysis also points out that, because nationals are not ‘expected’ to be victims of human trafficking, many criminal justice systems may tend to identify their own citizens not as victims of trafficking, but as victims of other crimes, such as sexual exploitation, kidnapping or forced labour. The difference in how the data are categorised may thus be masking similarities between countries’ domestic trafficking situations.⁶¹

A summary report of 2007 mapping the scale of internal trafficking in the UK, based on evidence gathered from a survey of Barnardo’s anti-sexual exploitation and missing services, reveals that the tactic of moving young people from one location to another in the UK through the method of internal trafficking appears to be a core technique adopted by many adults who seek to sexually exploit children. Much of this behaviour has to be seen within the context of the sexually exploitative relationships that young women in particular are subjected to by men who portray themselves as their ‘boyfriends’, but who exert significant power and control over them, and, often simultaneously, other young women. This form of child sexual exploitation has been previously researched and described fully elsewhere by Barnardo’s.

Criminal justice action against the perpetrators of internal trafficking continues to be absent or insufficient, despite the legal and policy reforms of recent years in the UK.⁶² Barnardo’s issued a new report in 2009 that highlights internal trafficking again. Internal trafficking has now been recognised within the UK, and criminal investigations, and prosecutions, have been commenced into the internal trafficking of UK females aged 14-16 who are being trafficked for sexual exploitation. Criminal investigations are also being undertaken in respect of males aged 18-25 who are being trafficked for labour exploitation.

⁶¹ *Id.*; for a more extensive discussion see Trafficking in persons, Analysis on Europe 2009, UN.GIFT, UNODC, at Human trafficking flows in Europe, Domestic trafficking: the unexpected victims, pp. 9-10.

⁶² See A summary report mapping the scale of internal trafficking in the UK based on a survey of Barnardo’s anti-sexual exploitation and missing services, 2007, Andrea Marie (Barnardo’s Research & Development) and Paula Skidmore (London Metropolitan University), at p. 10; for a more extensive discussion, see the whole report.

Inadequacy of the current response to internal trafficking in the EU Member States

- Legislative gaps with regard to criminalisation of internal trafficking in the EU Member States

While internal trafficking should be criminalised in accordance with the UN Convention against Transnational Organised Crime and the Palermo Protocol, not all EU Member States have corresponding criminal legislation. The lack of specific legislation results in complete impunity for trafficking networks operating domestically, or in their prosecution and punishment for lesser offences, such as pimping and smuggling.

For example, in Poland domestic trafficking for sexual exploitation and forced prostitution is not considered to be covered by the Palermo Protocol's definition of trafficking in human beings, and is punishable under the paragraph criminalising pimping, which prescribes 1-10 years imprisonment. In contrast, the punishment for transnational trafficking under the special anti-trafficking legislation is from 3 to 15 years imprisonment.

From a **UK perspective**, Section 4 Asylum and Immigration Act 2004 covers offences of trafficking for forced labour. This section is defective in that somebody can be prosecuted for trafficking within the country only if the victims have been trafficked into the country. Clearly, the legislators were not aware of the 'internal trafficking' concept and this is a loophole in the law.

Although internal trafficking has been criminalised under the **Swedish THB legislation** since 1 July 2004, only one case, involving a mentally handicapped Swedish woman domestically trafficked for sexual exploitation, has so far been prosecuted. The perpetrators were convicted for a lesser offence due to failure to establish special intent for exploitation.

In **Bulgaria**, under Article 159a of the Penal Code, internal trafficking has been criminalised since 2002. Pursuant to Article 159b (1) of the Penal Code, transnational commission of the crime is only an aggravating circumstance which leads to a higher

punishment. Despite clear criminalisation, the criminal justice data collecting system does not report cases of internal trafficking independently.

- **Lack of adequate identification procedures for victims of internal trafficking**

The absence of legislation criminalising internal trafficking results in a gap in identification procedures. Victims of internal trafficking remain undetected and thus unknown to the authorities and service providers. Furthermore, an identification procedure is often missing where criminalisation of internal trafficking is provided for. Victims of internal trafficking tend to be classified in categories that do not call for adequate assistance and protection.

For example, **in the UK** the Sexual Offences Act 2003 (sections 58-60) makes it an offence to intentionally arrange or facilitate the movement of a person either across international borders or within the UK for the purposes of committing an offence by: paying for the sexual services of a child (s. 49); causing or inciting child prostitution or pornography (s. 50); controlling a child prostitute or a child involved in pornography (s. 51); or arranging or facilitating child prostitution or pornography (s. 52). Despite the criminalisation of internal trafficking, the criminal justice system failed to identify as victims of trafficking 76 young British citizens who were domestically trafficked for the purposes of sexual exploitation. So far, not one of their traffickers has been convicted for internal trafficking in the UK. A summary report mapping the scale of internal trafficking in the UK based on a survey of Barnardo's anti-sexual exploitation and missing services reveals that these 76 young people were recently identified as having been internally trafficked in the past 4 years. Many of the services that responded to the Barnardo's survey believed that there were many more young people involved in internal trafficking, connected to their clients.⁶³

⁶³ See A summary report mapping the scale of internal trafficking in the UK based on a survey of Barnardo's anti-sexual exploitation and missing services, 2007, Andrea Marie (Barnardo's Research & Development) and Paula Skidmore (London Metropolitan University), at p. 10; for a more extensive discussion, see the whole report.

In Poland most of the cases of internal trafficking are for the purpose of sexual exploitation. Many of the cases concern minors. One of the main problems in prosecution of domestic trafficking cases is that the specific criminal legislation is perceived as an instrument for punishing international trafficking only.

- **Lack of assistance and protection for the victims of internal trafficking**

When not identified, victims of internal trafficking have no access to the support and safeguards intended for them. This is true even when the national legislation criminalises internal trafficking. On the other hand, misunderstanding of the international standards and domestic laws concerning internal trafficking criminalisation prevents governments and service providers from focusing on the specific needs of victims trafficked domestically. These needs are not usually accommodated by the support and protection intended to serve foreign citizens. There is no uniformity across EU Member States as regards their National Referral Mechanisms and therefore not all victims of internal trafficking are able to access victim care. For example, within the UK, France and Portugal reflection periods are applicable to victims of internal trafficking.

- **Lack of preventive measures directed to potential victims and users of internal trafficking**

Absence of or confusion about the criminalisation of internal trafficking removes from the governments' and service providers' agenda any consideration of measures to prevent citizens becoming vulnerable to this type of trafficking. This is also the case with measures to deter domestic potential users of services obtained through internal trafficking.

- **Lack of public awareness about internal trafficking**

When not criminalised, internal trafficking is unknown to the public as an unlawful activity that should be reported to the law enforcement agencies. Nor is the public prepared to treat the victims appropriately.

- **Lack of data and comprehensive information about internal trafficking**

When neither the government nor the public is sensitive to information and data specific to internal trafficking, the real extent of the phenomenon and the victims' specific needs remain unrevealed.

- **Lack of funds allocated to combating internal trafficking and providing victim assistance**

The absence of a realistic picture of the extent of internal trafficking, resulting from the lack of data and general information, prevents the State and private donors from considering the allocation of adequate funds to combating this criminal activity and assisting the victims. Moreover, due to frequent mistaken classification of the victims under other offences, funds are often allocated to programmes which do not serve victims of trafficking.

- **Lack of specific training of law enforcement officials, magistrates and service providers**

Not being criminalised, internal trafficking is not in the focus of the training intended to educate professionals involved in combating human trafficking. Similarly, no adequate training is provided to these professionals when criminalisation is not understood due to confusion or lack of clarity in the national laws.

Actions to be taken

Given the need to acknowledge the extensive internal trafficking that is occurring within the EU Member States, the following actions should be taken:

- Ensure that the existence of internal trafficking is highlighted, understood and addressed by the Member States;
- Establish the legal grounds for criminalisation, enabling investigations/prosecutions to be conducted;
- Assess the current situation concerning internal trafficking in the EU Member States;
- Gauge the adequacy/inadequacy of the EU response to internal trafficking and identify the gaps;

- Identify whether victim care measures are applicable to victims within EU Member States;
- Enable the collection of data to identify scale and scope;
- Raise awareness of the problem;
- Propose to the European Commission specific measures to adequately and efficiently combat internal trafficking.