

Side Event Report
“Human Rights Protection in the Return of Trafficked Persons to Countries of Origin”

Human Dimension Implementation Meeting
1 October 2009, Warsaw

Background

The return of victims of trafficking to countries of origin is of increasing significance. Media reports and policy developments in recent months have highlighted the increasing dependence on the removal of migrants from OSCE participating States in economically depressed times. The adoption of the EU Directive on Return, the establishment of an EU Return Fund and the upcoming Stockholm Programme are also likely lead to more removals of undocumented migrants in the European Union. Trafficking victims often form part of the population of undocumented migrants, are not always identified as trafficking victims and therefore are not protected from expulsion. At the same time, those who are identified and provided with residence entitlements are invariably obliged to return to their countries of origin at the end of any criminal proceedings. The ODIHR commissioned a number of research papers in European Union countries on the return of trafficked persons and undocumented migrants to countries of origin to examine the overall compliance of the return process with human rights. The papers, commissioned for the UK, Spain, Germany and Italy have indicated that none of the countries examined have clear procedures to ensure that the return of trafficking victims is conducted with due regard for the rights and safety of the persons involved, in accordance with international law and OSCE commitments. These issues are only systematically considered in countries where the person had applied for asylum or humanitarian protection to prevent return. At the same time the studies have shown that many victims of trafficking remain unidentified and classed as undocumented migrants. There is an urgent need for States to provide victims with opportunities to claim their status whilst in the process of immigration removal, including by providing access to information and legal assistance.

The side event provided an opportunity to share the findings from the research papers, which possibly exemplified the situation in many other OSCE countries that are returning undocumented migrants and trafficking victims to countries of origin.

Panellists at the side event discussed who qualified as victims of trafficking and were entitled to residence permits in their respective countries, the safety and dignity of return, as required by international law and the steps needed to ensure that the return process was more rights-based.

Panel Participants

- Tana de Zulueta, author of Italian research paper on return of trafficking victims to countries of origin;
- Rachel Witkin, author of UK research paper on return of trafficking victims to countries of origin;
- Gentiana Susaj, author of Spanish research paper on return of trafficking victims to countries of origin;
- Monica Cissek-Evans, presenting findings of German research paper on return of trafficking victims to countries of origin

Overview of presentations

Tana de Zulueta explained that a toll free phone number for victims of trafficking in Italy is open 24/7 through which victims can be identified. Many victims were identified by their clients that call and refer the victims to service providers linked to this number. Potential victims can also be contacted/identified through various outreach activities implemented by different stakeholders and then referred to organisations that run shelters. These activities and services though are mainly for victims of sex trafficking. In terms of the relevant law, the identification, protection and, eventually, the repatriation of victims of trafficking is governed by Article 18 of the Italian Alien Law. The Italian legislation addresses all forms of exploitation, including for the purpose of labour exploitation. However victims of trafficking for the purpose of labour exploitation are generally undetected and therefore not provided with residence entitlements. In 2008, from 1000 identified victims of trafficking in human beings, only 76 were victims of labour exploitation. Bearing in mind the number of migrant workers in agriculture and construction in Italy and the lack of trained front-line officials to identify victims of labour trafficking, it is clear that large numbers go undetected. A recent report on the situation in Italian detention centres conducted by a UN official also supports this finding. The report pointed to a lack of access to legal assistance for those detained and inadequate access for civil society. There were also no screening procedures in place that would ensure the identification of victims of trafficking. The Anti-Mafia Prosecutor's Office in its 2008 annual report has also argued that the relatively small number of trafficking cases, particularly in areas such as Sicily, reflect the problem in applying the Italian Alien Law and article 18.

With respect to whether the return is safe and dignified, it was noted that IOM Italy has the main role in the return of victims of trafficking to their countries of origin. The number of victims that have been returned through the IOM's voluntary return programme however is low. In the period from 2001 – 2008 only 622 victims were repatriated. The victims could withdraw from the return programme at any stage without needing to justify the reasons for their withdrawal. Since the IOM return programme is not independently monitored, there are no guarantees that the returns are conducted with due regard to the victims' safety and dignity.

There is no clear data on the return of irregular migrants, including on procedural safeguards or on the return of specific and vulnerable groups. Therefore there are no clear answers on the safety and dignity for those people while in the process of return.

Rachel Witkin explained that the Council of Europe Convention on Action against Trafficking in Human Beings entered into force in the UK in April 2009. In line with its new obligations the UK has adopted an identification system for victims of trafficking, a 'National Referral Mechanism' (NRM) which provides for a 45 days recovery and reflection period and renewable 1 year residence permits for cases which are recognised within the terms of the Convention. Within the 'NRM', the decision as to whether a person has been trafficked is made by the 'Competent Authorities', being either the UK Human Trafficking Centre (UKHTC: police) or the UK Border Agency (UKBA: immigration authorities). The UKHTC records that 347 victims of trafficking have been positively identified under this system from 1 April to 30 September 2009, although the total number of referrals is not provided. There are concerns however about the quality of decisions being made on individual cases but there is no statutory right of appeal against negative decisions (only judicial review in administrative court).

Access to support, assistance and information is lacking for trafficked people. This is particularly so for victims of labour trafficking as there are few organisations providing direct services to victims and some restrict their intake on the basis of limited criteria (such as providing assistance for victims of sexual exploitation only) and are overstretched. Although there is a pool of expert lawyers who specialise on trafficking cases in the UK, many trafficked people will not have access to quality legal advice. Recent cuts in legal aid funding have forced reputable law firms to reduce their legal aid capacity or cease it altogether. It is difficult for vulnerable victims who lack this support to come forward to the authorities and present their case: many will not know their rights or will be afraid of enforced return or legal action against them. In the experience of practitioners, those without strong advocates/reputable organisations to assist them, are least likely to be identified as trafficking victims by the authorities.

In cases where trafficking victims also have asylum claims, the asylum and NRM procedures are run together and decisions are issued by the UK Border Agency at the same time. This has resulted in serious problems for trafficked people who are applying for asylum. Some with strong claims for Refugee Status or Humanitarian protection are being denied the opportunity to take their case to appeal when they have been issued with a 12 month residence permit under the NRM system (as one can only appeal a negative asylum decision under UK law, if one is granted more than 12 months leave to remain). At the same time, the purpose of the recovery and reflection period is being undermined as the substantive asylum interview, in which much information about one's trafficking experience is shared, is conducted at an early stage of recovery. Also a negative NRM decision will directly influence any asylum outcome. If this parallel system is not revised, it will negate rather than strengthen protection from enforced return in many cases.

Many trafficked adults and unaccompanied children/young people enter into asylum procedures in the UK without having been considered under the NRM. Some are applying for asylum on the basis of their trafficking background. However, others

may be claiming asylum under coercion from traffickers or are too afraid or unable to present their full trafficking history. There are two major areas of concern in relation to return in this regard. Firstly the transfer of possible victims of trafficking who are claiming asylum into fast track detention is problematic. Fast tracked cases are considered and decided in a matter of days with a 95-100% rate of refusal with many detainees being unable to secure representation for an appeal. Policies to protect trafficked people from entering fast track detention are not strong enough and there are no adequate procedures to identify and assist victims at their initial asylum screening interview. Some trafficked people are fortunate enough to come into contact with lawyers or NGOs who can secure their release from fast track detention – but it is likely that many others pass through the fast track system and are removed from the UK without being identified.

Under the Dublin II Regulation, adults and children are being returned to so-called ‘safe’ EU third countries without their substantive claim for asylum being considered in the UK. As the ‘Dublin arrangements’ apply to asylum applicants who have travelled through other EU countries, many fit the profiles of potential victims of trafficking. There are no adequate procedures for identification of victims, monitoring of their safety or meaningful access to varying EU asylum systems on return. There is particular concern for children and young people who are known to have been returned in this way from the UK and who have consequently disappeared or are extremely vulnerable to the risk of trafficking/re-trafficking.

The UK is failing to safeguard trafficked people from prosecution which may ultimately lead to their enforced return. Advances have been made in the form of Crown Prosecution protocols to protect certain victims of trafficking from prosecution. However trafficked people continue to be prosecuted and imprisoned in the UK for crimes they have committed in the course of, or as a consequence of, their trafficking situation.

One reason for this is lack of access to legal advice which is informed or pro-active about their rights. A criminal lawyer who works on trafficking cases was consulted for this research. He believes that a significant number of people who are held in UK prisons that he visits in the course of his work have been prosecuted without having been recognised as victims of trafficking. Applications to discontinue prosecution, which could be made on their behalf, are simply not being made.

It is also known that even people who have been recognised by a Judge in court as having been trafficked, have nonetheless been prosecuted and sentenced to terms of imprisonment. Conviction and imprisonment can result in recommended or automatic deportation at the end of the prison sentence. Statutory safeguards against automatic deportation for victims of trafficking will not protect those who have not been officially identified. Many who end up in prison do not have access to specialised legal advice which could assist with their identification. There is also the problem of conflict of interest for the authorities when a person serving a criminal sentence applies for recognition as a trafficked person in need of protection. This would be solved by independent trafficking experts being directly involved in identification decisions.

With respect to whether the return is safe and dignified, it was noted that assisted voluntary return for victims of trafficking who have been officially recognised by the UK authorities is carried out by IOM UK. To date only 20 victims of trafficking have been returned in this way. Independent monitoring of the safety, assistance provided, and long term sustainability of returns is needed: IOM assistance is minimal and contact is dropped with returnees after one year. At the current time IOM is revising its guidelines, but it is not clear as to whether programmes for the return of victims of trafficking will be developed further. Assisted voluntary return for victims of trafficking is not available to those who have not been formally identified or those who are EU nationals, where it would also be useful.

The UK Government has a very strong policy emphasis on setting high targets for the swift removal of irregular migrants, irregular workers and ‘foreign national criminals’. People who may have a legal right to protection from return, including unidentified victims of trafficking, are often primarily identified within these categories and face removal from the UK without access to independent legal advice. This advice, alongside screening for victims of trafficking, should therefore be systematic for all irregular migrants who face enforced return, at the point of entry into immigration detention or prison, and prior to their departure.

The UK Human Trafficking Centre is now the official authority for compiling statistics on victims of trafficking who are referred to the UK authorities. However the information provided is not sufficiently detailed or wide enough to assist efforts for ensuring victim protection. Administrative removals, deportations, voluntary departures and removals to ‘safe’ third countries should be separately recorded and an independent monitoring system introduced.

Gentiana Susaj explained that Spanish legislation does not have an adequate definition of trafficking in line with the Palermo Protocol. The current legislation covers smuggling of migrants for the purpose of sexual exploitation and provides no options for identification of those who have legally entered Spain, or those exploited for labour purposes as victims of trafficking. Victims of trafficking that do not fall within the Spanish definition and who are subject to immigration control, may be placed in detention centres prior to return and may be subject to re-entry bans if issued with an expulsion or devolution order, even when the actual return to the country of origin is voluntary. Victims (falling within the limits of the definition) may obtain a one-year renewable residence permit, if they denounce their traffickers and provide essential information in judicial proceedings. Victims, who are scared of doing so or have other reasonable grounds for not testifying or filing a complaint, do not have access to residence permits and are not counted as victims of trafficking. There is no provision for reflection delay under Spanish law. This is illustrated by a case of a 19-year-old woman for whom there were strong indications that she was a victim of trafficking. She requested time to think and refused to cooperate with the police while in the police commissariat. The authorities therefore initiated an expulsion procedure against her.

Other forms of protection can be requested by seeking asylum or other forms of protection.

Under the current identification system, NGOs have no formal role in the identification of victims, but authorities can refer victims to specialized services run by NGOs. NGOs provide assistance to victims even if there is no formal identification by law enforcement and independently of whether the victims wish to cooperate during the pre-trial procedure. The NGOs apply the international definition of trafficking in their work.

Regarding children victims of trafficking, there are procedural gaps in the child protection system that do not ensure identification and adequate protection of children victims of trafficking.

With respect to safety and dignity of the return, there are two removal procedures in Spain: mandatory and voluntary. Both procedures may be applied to victims of trafficking who have been formally identified or with strong elements of trafficking in their background. There are no established procedures for conducting risk assessments and therefore no guarantees that the return of trafficked persons is done in safety and dignity with due consideration for rights to non-refoulement and the risk of re-trafficking. In this regard, it was noted that readmission agreements lack procedural safeguards to ensure that victims of trafficking are not repatriated to situations of risk of harm.

Sometimes NGOs do conduct risk assessments in the context of voluntary repatriation programmes. These NGOs do not have clear and established criteria on the conduct of risk assessments, including on the evaluation of the risks of re-trafficking, risk of harm, discrimination, stigmatization and social exclusion. Risk assessments however are systematically conducted in asylum claims and the number of such cases is increasing.

Monica Cissek-Evans explained that victims of trafficking in Germany are identified through police raids, out-reach work, by clients or friends or through screening processes conducted by NGOs in immigration detention centres. The counselling centres can provisionally identify victims, but formal identification is only conducted by the immigration authorities who are in charge of granting reflection periods and issuing residence permits to victims of trafficking.

The cooperation between the Ministry of Interior and counselling centres is regulated by Memorandums of Understanding. The role of counselling centres under these MoUs is to provide psychosocial assistance to victims of trafficking.

The authorities who identify victims of trafficking lack specific knowledge on the issue of trafficking and rarely identify victims of labour exploitation. Their predominant interest is to fight 'illegal migration'.

Under the German Residence Act, victims of trafficking are granted a four week reflection period to consider whether or not to cooperate with law enforcement. Following which they may be granted temporary residence permits if they cooperate with law enforcement and are considered important witnesses with substantive information for a criminal investigation.

With respect to the safety and dignity of the return, following expiry of a reflection period or the criminal proceedings for which a residence permit has been issued, a victim will be issued with a departure order and expelled. There are no mechanisms to ensure the conduct of formal risk assessments, nor guarantees for victims' safety upon return. There is also insufficient time to establish cooperation with a country of origin that could protect and assist the victims upon return.

Discussion

La Strada International recalled that the La Strada network had been established to ensure good referral across countries. However it was questionable how far one could really talk about a rights based approach to tackling trafficking when countries were in fact obliged to fight the phenomenon through the criminal justice framework set by the Palermo Protocol. It was also noted that although anti-trafficking stakeholders take into consideration the issue of irregular migrants, the migration discussion does not reflect on anti-trafficking issues. It would be important that these two parallel discussions are brought together at policy making level. **Womens' Initiative Group Tashkent- Astana** also noted that in countries with high labour migration flows and no possibilities for legal employment, the issue of trafficking in human beings and migration are inter-related and need to be addressed in parallel. The **German Institute on Human Rights** highlighted the problem of 'non-removable people' whose identity cannot be confirmed by countries of origin and who cannot be granted refugee status, but could stay in a country of destination under Article 3, ECHR (freedom from torture, inhuman or degrading treatment or punishment) and Article 6. **ICMPD, Moldova** mentioned the difficulties with readmission agreements between countries of origin and destination. Under these agreements the countries of origin have no choice other than to accept the return of their nationals without the conduct of appropriate risk assessments in individual cases. **Migrant Rights International, Italy** noted difficulties facing Nigerian victims of trafficking in cases where they are not returned to Nigeria but finding employment in Italy was problematic.

Conclusions and Recommendations

The identification systems in place in different countries allow for the identification of a limited number of victims of trafficking. The identification of victims is dependent both on the definition of trafficking under the country's law and other factors: including how much evidence a victim can offer investigators, and whether the country is in practice tackling all forms of trafficking with operational staff tasked with identifying different kinds of trafficking situation and victims. The criminal law must cover all forms of trafficking and not exclude cases which do not involve immigration offences or which involve minors.

The OSCE participating States have committed to ensuring that the return of victims of trafficking to countries of origin is conducted with due regard for the victims' safety and dignity and is preferably voluntary. When using the term 'voluntary' one should also ask whether or not there is a choice for the person to remain in the country. If there is no choice, arguably one should not be calling the process a 'voluntary' return but rather a mandatory return. States therefore need to be offering victims of trafficking alternatives to return to fully satisfy the requirement of voluntary return. With respect to whether regard is given to the safety and dignity of

the victim, it was notable that no countries discussed had established a systematic or independent procedure to conduct risk assessments in cases of return. The discussion had also highlighted a number of important issues, such as the absence of screening procedures for irregular migrants in detention centres, to identify possible victims of trafficking; the application of re-entry bans that are in conflict with rights to freedom of movement and accelerated return procedures which prevent victims from establishing their claims alongside the implementation of readmission agreements which include no safeguards on behalf of victims of trafficking. These are all important issues for future attention.

Since the OSCE has committed to a rights-based approach to trafficking in human beings and the process of return is an important part of anti-trafficking responses in most States, it is imperative that States ensure human rights compliance in this process.

In particular it was recommended to:

- pay more attention to the identification of victims of trafficking for labour exploitation, including by developing ‘identification protocols’, which would avoid the return of these people as undocumented migrants and enable them to claim their status and receive adequate assistance;
- establish necessary structures for legal and psychosocial counselling free of charge;
- lower the threshold of evidence needed by victims when claiming their status;
- respect reflection and recovery periods during which time victims are not obliged to provide evidence;
- grant victims of trafficking more time to tell their stories possibly through the extension of recovery periods;
- ensure non-prosecution of offences committed by victims during trafficking;
- establish urgent systems of guardians and assistance to children;
- ensure that international organisations and NGOs have access to detention centres for the provision of legal counselling and to enable the screening of detainees leading to the possible identification and protection of victims of trafficking;
- establish minimum standards on legal assistance, to be provided to irregular migrants/victims of trafficking in human beings while in the process of return;
- avoid the fast track system for returns generally;
- develop guidance for the conduct of risk assessments and increase the accountability of the asylum and return procedure by conducting individual risk assessments to ensure respect of the principle of non-refoulement;
- reverse the burden of proof to oblige the State to prove that there are no risks to victims of trafficking upon return to countries of origin, instead of requiring victims to prove that there is a risk;
- establish clear guidelines on how to conduct safe and dignified returns, including with respect to minors;
- make a clear distinction in language between mandatory and voluntary returns;
- establish independent monitoring system of the process of return;

- task other agencies/organisations, such as independent NGOs, counselling centres, etc. to prepare the return of victims of trafficking and establish cooperation with countries of origin to ensure reintegration.
