

**REPORT ON
CIVIL SOCIETY MEETING, WARSAW, 24th April 2007**

**“THE NRM APPROACH TO TRAFFICKING AND ITS APPLICATION TO
TRAFFICKING FOR LABOUR EXPLOITATION”**

Background

The OSCE participating States have undertaken to abide by a large number of commitments on trafficking. In 2003 Ministers committed to ‘strive to render assistance and protection to victims of trafficking...and establish effective and inclusive national referral mechanisms....’ In 2004 the OSCE/ODIHR developed a handbook on national referral mechanisms (NRMs),¹ providing guidance on the aims and content of an NRM and firmly placing protection of the human rights of trafficked persons at the centre.

The NRM model was developed to address the identification and protection of trafficking victims for different forms of exploitation. However recent OSCE conferences and events have shown that few victims of labour exploitation are being identified and protected, even where NRM-compatible models have been adopted. It has also been observed that civil society organisations active in tackling labour exploitation, and which can play an important role in the identification and protection of trafficking victims in a NRM, are often not integrated in the process of identification and referral but are focused on different goals.

The ODIHR has also been invited to take part in activities to further develop the NRM model in the EU region. The EU Action Plan on trafficking includes reference to the OSCE NRM model recommending that the ‘*EU [to] consider further developing the OSCE manual (the National Referral Mechanism Manual) and [to] propose recommendations and amendments to the Presidency and Commission with a view to presenting a coherent set of amendments from the perspective of the EU at a future revision of that manual or as necessary as a standalone EU document.*’²

In order to better understand why victims of labour trafficking are not being identified and protected, what goals civil society organisations, including trade unions, set themselves in tackling labour exploitation and the measures needed to ensure that the NRM approach contributes to addressing labour exploitation, the ODIHR held a meeting

¹ ‘*National Referral Mechanisms: Joining Efforts to Protect the Rights of Trafficked Persons. A Practical Handbook*’, OSCE/ODIHR 2004

² *EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings* (2005/c 311/01)

of civil society organisations, including trade unions in Warsaw on 24th April 2007. The meeting brought together representatives from migrants rights organizations and trade unions from Belgium, Germany, Italy, the Netherlands, Poland, Spain and the United Kingdom to review the NRM approach to trafficking and its application to labour trafficking. This meeting represented a first step towards a better understanding of how current OSCE commitments on trafficking, in particular the NRM approach, address the problem of trafficking for labour exploitation. The ODIHR plans to follow this meeting with further activity to raise awareness of good practices in addressing trafficking for labour exploitation and explore new approaches.

Introductory remarks

The ODIHR opened the meeting with a brief explanation of the role of NRMs in anti-trafficking work. The NRM concept essentially concerns the process of identifying and referring victims of trafficking for assistance. It focuses on protecting the rights of trafficking victims, who are also victims of crime. The NRM is based on the premise that where trafficking victims rights are properly respected victims may be more willing and able to cooperate with law enforcement. This in turn will assist in prosecuting the perpetrators of trafficking which should contribute to a diminution in trafficking. Although the NRM focuses on protecting the human rights of trafficking victims, it links the protection of rights to the contribution this will make to pursuing criminal sanctions against traffickers/exploiters.

Trafficking is also perpetrated for the purposes of labour exploitation. Currently civil society organisations specialised on trafficking have little experience working on trafficking for labour exploitation. Instead, amongst civil society organisations, labour exploitation is being addressed by migrants' rights organisations and trade unions. The agenda set by such organisations, that also take a rights-based approach in their work, is very different to the 'NRM' agenda. On a general reading of their materials there is little (if ever any) reference to 'identifying and referring' victims of labour exploitation to secure criminal sanctions against exploiters or traffickers. Enforcement of criminal sanctions is one component in a much broader agenda mainly focused on improving conditions in employment sectors vulnerable to exploitation and ensuring respect for the labour rights of all workers.

The ODIHR noted that the NRM model, developed in the ODIHR's Handbook, is based on practice and recommendations to address trafficking for sexual exploitation drawing on the contributions of many specialised civil society organisations and law enforcement authorities working on sex trafficking. The handbook deals in detail with issues of identifying and protecting trafficking victims, but does not address measures needed to improve conditions in the workplace to prevent exploitation.³ The NRM model is nevertheless considered applicable to labour trafficking but its 'rights-based' focus differs substantially to that of the relevant civil society organisations concerned with this issue.

³ It is recognised that such a discussion in the context of trafficking for sexual exploitation would have been controversial in the OSCE context, which includes countries for which sex work is not work but exploitation, alongside those countries which recognise it as work.

The ODIHR also observed that the functioning of NRMs in the sex trafficking context can still be improved. Through its activities and research on NRM models in a number of countries, the ODIHR was finding that the identification and protection of trafficked persons was often inconsistent. In many cases victims of trafficking were not being identified even when they claimed to have been trafficked and exploited, but instead were being dealt with as immigration offenders. Often questions of who qualified as a victim with entitlements to protection and assistance were being made by law enforcement on the basis of whether sufficient information was available to locate and prosecute a perpetrator. In addition, victims were often reluctant to be identified or cooperate with law enforcement for numerous reasons. The ODIHR recognised the need to continue to assist States in addressing these problems in the context of improving NRMs but at the same time it sought to support complementary approaches to protecting trafficked persons and vulnerable groups and preventing trafficking.

The meeting aimed to exchange experiences on the working of NRMs through a discussion of:

- (i) The NRM model and its application to trafficking for labour exploitation. This discussion was partly based on consideration of a text of draft recommendations on identification and protection of trafficked persons developed by the ODIHR in preparation for an EU meeting in May on the same topic (attached as annexe);
- (ii) other measures especially important in addressing trafficking for labour exploitation;

Discussion

1. The NRM model in practice and its application to labour exploitation.

A number of issues with the NRM model were highlighted by participants in discussion:

Issues of 'victimhood'

A number of participants noted the unwillingness of exploited persons, in particular migrants, in both the sex industry and labour sectors, to perceive themselves as 'victims' with special assistance needs, which in many respects is central to the NRM model. For many people even a forced labour situation is seen as temporary and partly attributed to their lack of knowledge in navigating the labour market. After one bad experience, exploited persons may reasonably believe that they will obtain a better working situation for themselves at a later stage. Some participants indicated from their research that exploited persons often did manage to escape extremely abusive working arrangements and improve their circumstances with time. For instance, it was noted that domestic workers, although highly isolated in the workplace, still had contacts with a social network which could be relied on over a period of time to exit an exploitative situation (with possible interim help with accommodation) and to find better employment. In such

cases it would be unlikely that persons would allow for their identification and referral (if they could avoid it) since this would only delay the process of obtaining a better working situation.

Participants also noted that exploited persons often ‘colluded’ with their employer in their illegality, for instance accepting the ‘cover’ of the person exploiting them from the immigration authorities, who may have grounds to prosecute and/or expel them for unauthorised entry or residence. Such ‘relationships’ confused attempts to identify individuals as victims of trafficking or to ensure their self-identification.

Stigma was also recognised as an obstacle to self-identification as a victim of exploitation, including for men. Trafficking in human beings is also largely associated with sex trafficking, and trafficking victims are reluctant to admit trafficking for fear of being labelled prostitutes.

Participants also noted that the NRM approach, which focuses on the identification of a ‘victim’, might not win the support of other key actors working to tackle labour exploitation. Organisations focusing on labour rights issues would not be occupied with locating and rescuing individual ‘victims’ of exploitation when exploitation may be systemic to certain employment sectors. Instead working to improve conditions generally in the workplace would be given priority. It was recommended that organisations evaluate how their responses to trafficking, that may be overly focused on individual ‘victims’ rather than labour rights issues, might pose challenges for partnerships with actors concerned with addressing labour exploitation.

The discussions indicated how difficult the process of ‘identification’ may be in reality when people are willing to tolerate exploitation/forced labour, because they may perceive it as a ‘stepping stone’ to a better future and may also compare it more favourably to experiences at home. In this context the problem of consent to labour trafficking was also raised. To establish someone’s non-consent to exploitation, it was recommended that objective indicators be used such as the seizure of identity documents or use of threats by the employer/exploiter of denunciation of the victim. Such indicators would facilitate the imposition of sanctions against an exploiter, without necessitating the initial cooperation of the victim.

Despite difficulties with the identification of victims of trafficking, it was also recognised that where victims of trafficking have been granted entitlements in law or practice then there needs to be a transparent process of identification to determine who is entitled to these protections. The Council of Europe Convention on Action to Combat Trafficking, although not yet in force, also includes detailed provisions on the process of identifying victims and entitlements for assistance and temporary residency. It was also noted that entitlements would provide incentives for victims to come forward and denounce exploitation, which might address many of the difficulties with identification raised in the discussion. At the same time those coming into contact with possible victims, such as labour inspectors, trade unions and NGOs needed to be aware of the entitlements so as to be able to inform and assist exploited persons. Often this was not the case.

In conclusion identifying victims of trafficking is difficult when States are not providing victims with a status that provides them with solutions. This difficulty could of course be partially remedied if the status of victim translated into concrete remedies. The State needs to consider the costs of providing proper incentives for victims to come forward to denounce exploitative conditions, thereby facilitating enforcement action against exploiters, against the costs to society of widespread exploitation. At the same time providing ‘incentives’ for victims to come forward is only part of the solution since many potential victims may still be unwilling to self-identify or difficult to identify. For such cases other measures have to be pursued to prevent trafficking and protect rights.

The criminal justice process

Participants noted that many exploited persons do not trust or are afraid of the police or other organizations purporting to assist them. They would therefore not be willing to provide statements to the police or testify in court against those exploiting them. It was noted that less than 5% of sex trafficking victims in the Netherlands want to press charges against their traffickers. Those who do obtain a temporary permit, specifically a ‘B9’ permit. (It should be noted that this was also associated with the fact that victims had to return to their countries of origin after proceedings completed.) This leads to the denial of full assistance to 95% of victims (as those who do not wish to assist the police will not receive further assistance) and possibly their continued exploitation or expulsion from the country.

The NRM model is designed to assist trafficking victims on the understanding that proper assistance will lead to victims being more able and willing to provide evidence to law enforcement about their trafficking. However despite assistance it is clear that many victims will still not collaborate with law enforcement and their reasons for refusal are not easily overcome. Where the prosecution of traffickers is still highly dependent on victim testimony then there will be little progress made in sanctioning traffickers and exploiters.

On the other hand participants also noted that victims who do decide to press charges against their traffickers/exploiters often do so hoping they can secure their indefinite stay in the country of destination. But in many cases trafficking crimes are difficult to prove and often criminal charges are changed to reflect crimes which are easier to prove, such as smuggling. In such cases victims will not qualify for the trafficking entitlements and are returned to countries of origin. Such patterns discourage other possible victims from cooperating with law enforcement in future.

Participants also noted that migrants in an irregular immigration situation are often not deemed credible witnesses in criminal cases. Often their illegal entry or residence stands against them. (This is also the case in other legal proceedings such as employment proceedings.) This further compounds a distrust of criminal justice by victims and inhibits their access to justice.

Participants also noted that the proper functioning of an NRM was dependent on the knowledge and goodwill (and responsibility) of law enforcement to take seriously someone's claims to having been trafficked. Participants felt that sometimes police had expelled trafficked persons (where they were in an irregular immigration situation) to be spared the trouble of launching time-consuming and difficult investigations.

Some participants objected to the dominance of the criminal justice focus in tackling trafficking which depended heavily on the intervention of the State rather than the empowerment of the individual. This approach had not been seen to be effective. It had also left less time and resources for pursuing potentially more effective approaches aimed to empower individuals.

In conclusion the discussion indicated that much more attention needed to be paid in anti-trafficking to approaches that were not solely dependent on the imposition of criminal sanctions, which in turn are often dependent on victim testimony. At the same time efforts to encourage victims' access to justice should be supported so that reported crimes are taken seriously and prejudices against the credibility of persons based on immigration status are addressed. Efforts should also be intensified to empower individuals in exploitative situations to take action on their own behalf through a combination of awareness raising activities (both for the individuals concerned and officials and others likely to encounter them) on their rights, the provision of concrete remedies and the development of a culture intolerant of exploitation and supportive of those exploited.

Assistance

The NRM and OSCE Action Plan include a number of recommendations on medical, psychological, social, financial, legal assistance, education and employment opportunities. Participants considered that important needs in terms of assistance for exploited migrants, exiting abusive situations, were housing and financial support. Access to health services was also essential and guarantees needed that when persons accessed health services they would not be denounced to authorities if their migration status is irregular. (Legal assistance needs are raised below).

It was also noted that labour inspection and immigration control in the workplace are more frequently identifying exploitative practices but that the legal framework does not give the relevant officials a role in providing assistance to exploited migrants. Instead, their activity is increasingly leading to the denunciation of irregular migrants and their expulsion from the country. It is important that both agencies have duties to protect exploited persons and provide assistance.

Reflection delay and residence permits

The NRM also recommends that victims be offered a reflection delay and temporary residency. Participants noted that trafficked persons need to be informed about their rights to a reflection delay and possible residence permit where these rights exist. Also where exploited/trafficked persons are entitled to residence permits, it should be ensured

that these permits are convertible and renewable, in particular to allow one to change work sectors and employers.

Indicators of trafficking

It was noted that law enforcement in a number of Member States have developed ‘profiles’ or checklists for the identification of victims and perpetrators of trafficking, particularly in relation to trafficking for sexual exploitation. OSCE/ODIHR events on identification and protection have highlighted that the identification of victims by law enforcement is often arbitrary and politicised and that appropriate checklists might ensure consistency and transparency in identification. It was noted that indicators of trafficking victims or trafficking situations are not necessary in all cases, but they can serve as benchmarks. The discrepancy between given working conditions and minimum labour standards should be a key indicator of an exploitative situation. Immigration and employment status should be irrelevant, especially since there are many ‘legal’ migrants in exploitative work situations.

It was also suggested that ‘self-identification’ by a victim be one of the indicators of trafficking or that this create a presumption that someone is trafficked/exploited which would need to be rebutted by the authorities. This would guard against situations where someone claims to be trafficked, but in the absence of corroborating information (which it is accepted may be difficult to obtain at an early stage) the authorities are unprepared to give the person the benefit of the doubt and access to a reflection period.

Models of identification

The NRM model promotes ‘self-identification’ of victims through the extension of information and support services to victims, including through outreach activities, to empower them to exit abusive situations and seek redress. Participants queried the effectiveness of hotlines in this regard and considered whether NGOs should invest resources elsewhere. Experience in the UK showed that hotlines were not very effective. Consultancy or advice organizations, as well as churches, could provide more useful sources of support. It was also noted that efforts should also be made to educate/raise awareness of other civil society organisations who work with vulnerable groups such as migrant communities.

The need to refer directly to the role of trade unions and labour inspectors in workplace inspection and the identification of victims was emphasised. At the same time immigration controls should be alert to indicators of labour exploitation and immigration officers be given a role in the identification and protection of victims, as noted before.

Multi-agency co-operation

Multi-agency cooperation, a central pillar of an NRM, was considered useful insofar as it leads to better protection for exploited persons. However it is also essential that data-protection rules are respected and that information is not shared between State agencies without the consent of the person involved. Sometimes the outcome of multi-agency

cooperation could be more harmful, such as where information-sharing between agencies leads to the expulsion of a victim without adequate protection.

The agencies that should cooperate should be defined, alongside their roles and responsibility. These might include the police, labour agencies, immigration officials, public service providers, the judiciary, trade unions, migrants rights organisations, consular offices of embassies amongst others.

2. Additional measures to be taken in addressing trafficking for labour exploitation

Definitions and conceptual issues

Before considering the types of measures that organisations considered important in addressing trafficking for labour exploitation, a discussion of definitions was called for. Trafficking in some countries is seen as a transnational immigration problem. Therefore responses to it often focused on the immigration-related aspects of the crime rather than the exploitation resulting from it. However some countries do not focus on this. In Belgium for instance one did not have to be a migrant to be a victim of trafficking. At the same time discussions of trafficking, in the sense of the organised movement of persons, were seen by some to have been exaggerated. The real problems were instead the widespread exploitation/forced labour in particular of migrants. Such forced labour was not necessarily the product of trafficking, where trafficking was conceptualised as the migration related process.

Since the immigration-related aspects of trafficking, if any, often had little to do with harms experienced by exploited persons, participants urged that action against trafficking focus on sites where harm is experienced. This would mean focusing attention on the situation of exploitation or forced labour. Participants considered that one way of supporting this approach would be by paying attention to problems of internal trafficking and the trafficking/exploitation of legal migrants or nationals alongside irregular migrants in anti-trafficking.

Difficulties were also acknowledged with regards the definition of ‘exploitation’ particularly where there might not be a defined minimum wage in a country. It was noted that in Germany exploitation had been defined as a situation where one is paid one third less than the going rate. Further attention needs to be paid to definitions of exploitation.

Measures to address labour exploitation

A number of organisations participating in the meeting had submitted comments to the EU on proposals to tackle ‘illegal employment’ and exploitative working conditions in the context of the development of an EU Directive on employer sanctions.⁴ Many of those comments were supported by participants in particular the need:

⁴ See ‘Joint Comments of ETUC, PICUM and SOLIDAR on Expected Commission Proposals to fight ‘illegal’ employment and exploitative working conditions’, Brussels 2007.

- to recognise the human rights of all individuals residing in their territory, regardless of immigration status, including fundamental rights at work and rights to organise, as acknowledged in the European Charter;
- that to stem ‘irregular flows’ of people there is a need to broaden legal channels for entry;
- that situations of unauthorised employment (which may also lead to exploitation) also occur due to poor and bureaucratic state systems administering increasingly complex immigration statuses and that administrative simplification is needed;
- to strengthen the role of labour inspection in its primary duty of protecting workers and not enforcing immigration law by de-linking immigration status with workplace inspection to ensure workers can safely file a complaint against an abusive employer without being threatened with expulsion;
- to invest in training and awareness-raising to inform labour inspectors and workers and those offering them assistance (such as trade unions, NGOs and local authorities) about the possibilities of filing an official complaint;
- to establish independent complaint procedures where workers can report exploitative working and living conditions in a confidential manner, such as an Ombudsman;
- to grant legal status to workers who wish to denounce exploitation and sue their employers for unpaid wages without being expelled in advance;⁵
- to insert labour standards and rights into Common Agricultural Policy agreements so that violations of labour standards could be used to halt payments to producers who violate labour law or exploit workers;⁶
- to ensure that retailers and other main contractors are responsible for the whole supply chain by introducing forms of joint and multiple liability for wages and working conditions as an effective way of making employers and their organisations accountable to workers (such as introducing notions of those ‘that know’ or ‘could have known’ that the products or services they are buying from their agencies or subcontractors have a price that indicates they are far below official market prices and wages);⁷
- to introduce simplified procedures when an exploitative work situation is detected that the employer has not paid proper wages or contributed to tax and social security funds and setting payment of, for instance, six months wages as the sanction which would put the burden of proof on the employer;
- to introduce certification, fair trade marks and social labelling to contribute to the reduction of recourse to labour exploitation;

⁵ Reference was made to the Italian government’s legislation to this effect, extending provisions currently granted to the victims of sex trafficking to undocumented migrants who report exploitation. The bill (no.1201/2006) still to be approved by Parliament (although it has now obtained Senate approval), grants undocumented migrants a residence permit if the authorities find that they are being ‘severely exploited’.

⁶ In this regard reference was made to a bill put forward by the Italian government which bans employers who are found to be exploiting labourers from receiving regional, national or EU subsidies in the light of the Puglia case.

⁷ See also Picum’s policy briefing paper on ‘Decent Work for Undocumented Migrants’, April 2007, which cites the introduction of a ‘Social Responsibility of Employers’ article in Portuguese immigration law. This article obliges all employers, sub-contractors and foremen to respect legal obligations inherent in an employment relationship, such as the payment of salaries and social insurance. If workers rights are violated, irrespective of immigration status, the law provides for the person who contracted the worker to be held responsible. If this person cannot be located, then responsibility is placed on the person who contracted that sub-contractor, until responsibility is placed on the main employer if necessary.

- to ensure that civil society (NGOs, trade unions etc.) are not penalised or criminalised for providing assistance to exploited workers;
- to promote ratification of the relevant international instruments reiterating the rights applicable to migrant workers including the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families.

A number of these suggestions were discussed in further detail:

(i) *Raising awareness of rights*

It is often difficult to provide information about rights to exploited persons. Many of the service providers have difficulties in accessing irregular migrants and migrants tended to trust their own networks for information and assistance rather than ‘outside’ institutions. Information about service providers will eventually spread through the community, especially where for instance successful claims for labour rights have been made. To provide information on rights it is therefore important to work through communities or migrants networks.

Information should refer to rights in countries of destination, how to claim rights and the organizations that can provide assistance (not only the anti-trafficking NGOs, but also the migrants NGOs, diasporas, trade unions). Language classes for undocumented migrants incorporating rights information were seen as an effective way of raising awareness of rights.

Participants also pointed to the need to build solidarity within migrant communities to encourage them to take action on behalf of themselves as well as to organise across communities. Medical facilities were noted as offering a focal point for organising individuals.

Migrants NGOs and trade unions need in some cases to be sensitised to the role they can play in assisting trafficking/exploited persons. Some commented that trade unions are not willing to engage in these issues at the local level and therefore there was still a need to work with them and encourage their involvement.

It was also noted that often officials are not aware of the entitlements available to workers. There was therefore a need to inform them of the laws so that they could apply them properly. Also immigration lawyers will often work with exploited migrants but are not sensitive to the possible employment or other claims of their clients. More communication between different professionals therefore needs to be established.

Some service providers noted that certain nationalities of workers are more adept at claiming their rights than others. One participant commented that Brazilian construction workers in Belgium are proactive which was seen to be partly due to the visa-free regime for Brazilians which facilitated their entry and exit in and from Belgium. Other communities of migrants would differently tolerate abusive working conditions,

sometimes dependent on how much it had cost them to travel to the destination country. These differences would need to be taken into account when developing service provision and ensuring incentives for persons to come forward to denounce exploitative practices.

(ii) *Legal status to pursue labour rights*

It was noted that victims of trafficking may be accorded compensation in criminal proceedings. This process however would often only award moral damages (which would often be little) and not unpaid wages. It was considered important that victims of labour exploitation be entitled to pursue their labour and social rights after conclusion of possible criminal proceedings or when the trafficking process had been discontinued due to possibly a lack of evidence. In particular it would be important that persons are not expelled before these processes are finalised and that legal assistance is extended or alternatively that legal representation can be secured in the absence of the victim.

Successful labour processes were also seen as instrumental in ensuring greater recourse to mediation with exploiters/employers. Where employers understood that legal action against them might succeed, they were far more receptive to alternative forms of dispute resolution. In some countries the fact that immigration status was held against migrants in employment processes, such as the UK, meant that exploiters were immune to this kind of justice and therefore alternative forms of dispute resolution were also potentially less effective.

(iii) *Structural factors contributing to trafficking*

Participants commented that the welfare considerations of victims alone were an insufficient basis for states to act to address trafficking. To galvanize action, the wider implications of failing to address trafficking had to be presented alongside human rights considerations. In the UK, the Trades Union Congress had produced a report on the effect of 30 years of de-regulation of the UK labour market. It indicated the emergence of extreme vulnerability amongst numerous groups, including nationals and migrant workers, subject to labour exploitation, abuse and criminality.⁸ In the long term such vulnerability is predicted to undermine the productivity of the UK. If taken seriously, steps will need to be taken to address the systemic features that have led to such vulnerability. Respect of labour standards was seen to be central to an effective response and a failure to respect standards for all workers would lead to continued unfair competition between employers.

It was highlighted that the discussion on demand factors in trafficking, at the 2006 OSCE Human Dimension Implementation Meeting had focused states on the structural and systemic issues underpinning trafficking and that this discussion should be continued. The meeting had focused on the demand for cheap and unprotected labour and services in destination countries. For the unscrupulous employer/exploiter the fact that someone could not walk away and demand his/her wages and entitlements were central to the demand for that persons labour or services. Whether that person was technically

⁸ 'The Hidden One-in-Five – Winning a Fair Deal for Britain's Vulnerable Workers.' Policy Studies Institute, UK, September 2006

‘trafficked’ was irrelevant; the interest lay in the fact that such persons were essentially unprotected by the State and therefore vulnerable to exploitation. In particular ‘demand’ for exploitable labour was seen to be shaped by certain policy developments which fostered a climate in which precarious work flourished; characterised by low pay, long hours, temporariness, insecurity and inapplicable (or difficult to implement) labour standards.

Annexe

ODIHR draft Recommendations on establishing EU standards on identification and protection of trafficked persons (updating the OSCE/ODIHR's National Referral Mechanism approach) prepared for EC meeting May 2007

Focus on identification

Suggested issues for inclusion:

1. Recommendation on unconditional assistance: The Human rights approach promoted by the NRM emphasises unconditional assistance to victims of trafficking. This is based on States' obligations under international human rights law that trafficked victims, as victims of human rights violations, have a right to protection, assistance and redress irrespective of their interest in or use to the criminal justice process. The OSCE Action plan recommends unconditional assistance,⁹ the EU experts report makes a similar recommendation¹⁰ and the Council of Europe Convention also requires unconditional assistance (article 12).

Member States should ensure that trafficked persons have access to adequate remedies, including assistance, protection and compensation, regardless of their willingness or capacity to cooperate with law enforcement or testify against their traffickers

2. Recommendation on non-criminalisation of trafficked victims for immigration related offences, illegal activity such as prostitution or possession of fraudulent documents: The possible punishment of trafficked persons deters victims from 'self-identifying' in Member States and is incompatible with notions of protection and assistance due to victims. In the context of trafficking for labour exploitation there have been calls by trade unions and migrants rights organisations for the protection and anonymity of 'undocumented migrants' who denounce forced labour/exploitation.¹¹ Protection in these cases might not only include non-punishment for immigration offences but also issuance of residency entitlements to prevent expulsion to countries of origin. A new draft law along these lines has recently been discussed in Italy for instance.¹² The OSCE Action plan recommends non-punishment,¹³ the COE Convention includes a non-punishment

⁹ OSCE Action Plan chapter V, s.4

¹⁰ EU Experts report recommendation 89 at 101

¹¹ See Anti-Slavery International report on forced labour in the UK calling for protection for 'whistle-blowers' ie those who come forward to the authorities to denounce exploitation. Also see recommendations from TUC report on exploitation of migrants in UK: 'Overworked, underpaid and over here' at <http://www.tuc.org.uk/international/tuc-6850-f0.cfm>

¹² See Draft law against exploitation of irregular migrants (initiated by Council of Ministers on 17th November 2006) which extends article 18 to undocumented workers subject to severe forms of exploitation at the workplace to allow them to leave the criminal environment and avoid expulsion.

¹³ OSCE Action Plan, chapter III s.1.8

provision (article 26) and the EU experts report also makes a similar recommendation.¹⁴

Member States should take appropriate measures to ensure that trafficked persons, including children, are not detained, charged or prosecuted for violations of immigration law or for activities they are involved in as a direct consequence of their situation as trafficked persons but are ensured their protection, including protection from expulsion, and anonymity.

3. Recommendation on the need for a reflection delay/temporary residency: The NRM, like the COE convention, emphasises identification as part of a process of assistance and protection.¹⁵ This in turn requires a reflection delay/temporary residency – where immigration status is in issue – to prevent expulsion and possible reprisals from traffickers or re-trafficking and to allow the person to make an informed decision about his or her options such as whether to assist with criminal proceedings, pursue compensation claims or enter a social assistance programme. Once there are grounds to believe that a person is a victim and the person is in breach of immigration control, he or she should benefit from a recovery and reflection period during which time assistance is provided. See EU experts report recommendation 94, article 13 COE Convention.

Member States should provide in its internal law a recovery and reflection period of at least 3 months during which presumed trafficked persons are afforded legal status and protection from detention and deportation measures and access to support services.

4. Recommendation on indicators of trafficking: Law enforcement in a number of Member States have developed ‘profiles’ or checklists for the identification of victims and perpetrators of trafficking, particularly in relation to trafficking for sexual exploitation. OSCE/ODIHR events on identification and protection have highlighted that the identification of victims by law enforcement is often arbitrary and politicised and that appropriate checklists might ensure consistency and transparency in identification. The EU experts has cautioned that although useful, these checklists should only assist in the identification and should not represent the sole means by which victims are identified. It is also recognised that victims of labour exploitation are not being identified in a number of Member States.¹⁶ There is a need to ensure the identification and protection of victims of labour exploitation too and appropriate indicators might help in this regard. The ILO’s indicators on situations of forced labour which focus on indicators of an exploitative situation rather than the process of migration might be used as a

¹⁴ EU experts report recommendation 107 at 114

¹⁵ See NRM Handbook 88-89 and OSCE Action plan chapter V, s.8

¹⁶ See Trafficking for Forced labour in Europe, Anti-Slavery International 2006.

starting point for indicators. It should also be noted that Anti-Slavery International recently developed guidelines for identification too.¹⁷

Member States should ensure that checklists developed to assist in the identification of presumed trafficked victims of either sexual or labour exploitation include considerations of threats or physical harm, restriction of movement, abusive working or living conditions, withholding of wages or debt bondage, retention of identity documents and threats of denunciation to the authorities where the person is in an irregular immigration status.

5. Recommendation on the ‘models of identification’ used: The NRM and EU experts report accepts that various means are used to identify victims including law enforcement action (raids), outreach, hotlines. It notes that the majority of trafficked victims are not identified by law enforcement in fact but by civil society and citizens. It also notes that law enforcement raids often fail to protect trafficked persons but end in prosecuting them (immigration related offences or illegal activity), detaining them and expelling them to countries of origin without risk assessments.

The NRM offers little information on the best means of identifying and protecting victims of labour exploitation and in this regard needs updating. In some Member States law enforcement actions in different labour sectors have been for the purpose of immigration control or the sanctioning of employers for the use of irregular migrant labour. Migrants rights organisations and trade unions would argue that police raids to tackle labour exploitation have so far been counterproductive in terms of protection for the exploited. Some organisations argue for partnerships between civil society and state agencies with a labour protection mandate to gather intelligence, identify and support victims and deter future exploitation through the monitoring of working conditions and enforcement of civil and criminal sanctions where appropriate.¹⁸ This approach goes further than the NRM in terms of not only identifying and protecting victims but contributing to the prevention of future exploitation by improving working conditions in labour market sectors prone to exploitation (such as agriculture, food processing, domestic work).

Member States should support outreach, hotlines, drop-in centres and information materials to establish contacts with presumed trafficked persons and empower them to access assistance services. Anti-trafficking law enforcement operations should ensure that the protection of trafficked persons is central to their purpose and not immigration control. Partnerships between civil society and state agencies with a labour protection mandate should be supported to gather intelligence, provide support and intervene in labour sectors prone to exploitation through the application of criminal and civil sanctions to deter future abuse.

¹⁷ See ILO Human Trafficking and Forced Labour Exploitation: Guidelines for Legislators and Law Enforcement (2004) and Protocol for Identification and Assistance to Trafficked persons, Anti-Slavery International 2005.

¹⁸ Correspondence with Don Flynn of the migrants rights network ‘PICUM’ on the protection of victims of labour exploitation.

6. Recommendation on multi-agency identification and referral: The NRM and EU experts report recommend that multiple actors should be involved in the identification and referral of victims including civil society organisations. The COE Convention also refers to multiple authorities collaborating with each other so that victims can be identified (article 10) and encouraging cooperation with civil society to ‘achieve the purpose of this Convention’ (article 35). The NRM also recommends that the cooperation between law enforcement and civil society or service providers should be set out in cooperation agreements identifying the roles and responsibility of the individual actors to formalise understandings and ensure accountability.

Member States should ensure that all government actors likely to encounter trafficked persons are aware of their role and responsibility to identify and protect those persons. Member States should also support the conclusion of cooperation agreements between service providers and law enforcement defining their roles and responsibilities in multi-agency identification and referral. Cooperation agreements should include provisions ensuring the prevention of the expulsion of a presumed trafficked person, the issuance of a reflection delay or temporary residency for the presumed trafficked person, the referral of a presumed trafficked person to appropriate support services amongst others.

7. Recommendation on kinds of assistance needed: A discussion of identification is not complete without consideration of the assistance and support for which identification is conducted. The NRM and OSCE Action Plan includes a number of recommendations on medical, psychological, social, financial, legal assistance, education and employment opportunities, some of which are reflected under Palermo and the COE Convention (article 12). The EU expert report also includes numerous recommendations on assistance provision focusing on both short-term and long-term assistance provision.¹⁹

The NRM was not developed with the kinds of assistance provision needed in the context of labour exploitation and in this regard the NRM requires updating. OSCE/ODIHR activities have indicated that possibly legal assistance to access civil complaint mechanisms, including access to labour courts, would be especially important to victims of labour exploitation alongside residency entitlements to remain in the country to pursue complaint mechanisms.

Member States should establish appropriate structures for providing assistance and protection to trafficked persons. This should include safe and appropriate accommodation, counselling, health care, legal assistance, education, vocational and employment opportunities. Member States need to ensure that trafficked persons are provided with free legal assistance and a stay of deportation to enable them to claim compensation and/or their employment rights in civil and criminal proceedings.

¹⁹ EU experts report recommendations 99 - 103