

Topic 3. International Trafficking in Women and Children

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Conclusions and Recommendations

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Migration

It is recognized that migration arises primarily from the disparity in wealth between developed and less developed countries. Consequently, citizens from these less developed countries are more vulnerable to become victims of smuggling and trafficking. The restriction on legal migration creates a market for services that facilitate illegal migration and thus increases the risk for people to be trafficked. Therefore, legal possibilities of immigration should be organized by countries of destination and receiving countries. In setting legal criteria for legal forms of migration, receiving countries should create neutral guidelines that are applied in a non-discriminatory fashion for all migrants, regardless of the migrants' race, religion, gender, political affiliation, social class, economic resources and educational privilege.

It is recognized that trafficking in persons is an infringement upon fundamental human rights (such as human dignity, a person's right to freedom, slavery, servitude and forced labour), as they have been embedded in international law and that the effects of trafficking are devastating for the victims.

Strategies to combat trafficking in persons

It is recognized that there is a need for multidisciplinary (legal and non-legal), structural and short-term integrated strategies to combat trafficking in persons.

Structural strategies

Structural strategies to prevent trafficking include emphasis on promoting cooperation development aimed at enhancing economic opportunities in less developed countries, the pooling of information among countries of origin, transit and destination, dissemination of correct information to countries of origin and transit by informative programs or information campaigns relating to the actual opportunities in terms of residence and living and working conditions and the risk of being abused by smugglers and traffickers.

In the context of the pooling of information among countries of origin, transit and destination, the importance is stressed of setting up organized, binding ways to systematically gather and exchange reliable and comparable data and statistics relating to migration, smuggling and trafficking. The important work already done in this context by various organizations such as IOM, ILO, Interpol, CIREFI and Europol is recognized.

Short-term strategies

Short-term strategies should reflect an integrated, multidisciplinary, approach, both at national and international level, taking into account the differences of regional manifestations of trafficking in persons. Such an approach should not only focus on criminal law, but needs to include a preventive dimension, aimed by the means of administrative law, including immigration and asylum law, and labour and social security law.

Administrative law

If specific legislation is passed to allow victims of trafficking to remain in a country's territory, this should not preclude their right to apply for asylum in accordance with the 1951 Geneva Convention and the 1967 Protocol to the Status of Refugees and the principle of *non-refoulement*.

Labour and social security law

Working conditions and the legal status of employees reflected in the ILO legal instruments should be monitored and enforced, respectively through enhanced social inspection and legislation in order to prevent victimisation.

Criminal law

The conclusions and recommendations on criminal law issues are in regard to general principles of criminal law, substantive criminal law, procedural criminal law and international criminal law, in line with the IAPL tradition.

General principles of criminal law

As for general principles of criminal law, it is emphasized that criminal law should remain the *ultima ratio*.

Substantive criminal law

1. Incriminations

The importance is stressed in the area of substantive criminal law to clearly distinguish between smuggling of and trafficking in persons, which for the first time has been clearly reflected at UN level by the adoption in December 2000 of two separate Protocols to the UN Convention against Transnational Organized Crime.

a. Trafficking

It is noted that there is broad international consensus as to the definition of trafficking in persons as exemplified in Article 3 of the UN Trafficking Protocol.

The importance is stressed for countries in implementing the recent international legal instruments referred to above, to criminalize trafficking for the purpose of sexual exploitation, including exploitation in pornography, labour exploitation, organ transfer or removal and adoption, even where no organised criminal group is involved, no border is crossed, no profit motive is involved or the victim has legally entered, has legal residence in or is a national of the state where the trafficking occurs.

It is noted that for the sake of substantive criminal law, trafficking is a gender-neutral concept. It is recognized, however, that women are especially vulnerable to trafficking, among others as a result of the feminization of poverty, gender discrimination or lack of educational and professional opportunities in their countries of origin.

In order to enable law enforcement authorities to focus their attention on trafficking of persons for the purpose of sexual exploitation, it may be considered to be an option for some countries, respecting the fundamental principles of their own legal system and their own culture or religion, to decriminalize forms of non-coercive or non-abusive employment in or organisation of prostitution involving adults. To the extent necessary in order for those countries to be able to decriminalize the said forms of employment in or organisation of prostitution, an amendment of the 1950 UN Trafficking Convention should be considered, respecting the fact that a significant number of YP's disagree with one or both of the previous statements; it is recognized that a significant number of YP's from some countries, based upon legal, cultural, religious and/or moral considerations as well as those YP's who view prostitution to be an inherently abusive practice, reaffirm the 1950 UN Trafficking Convention and/or oppose to decriminalization of the organisation of prostitution.

In the context of trafficking for the purpose of exploitation of persons below the age of eighteen in pornography, it is recognized that:

- the purpose of criminalizing child pornography is to prevent and punish sexual abuse of children;
- the purpose of criminalizing *pseudo* child pornography is to protect public morals or sexual morality and to prevent child sexual abuse to become socially acceptable; countries that have criminalized or consider to criminalize *pseudo*-child pornography should see to make it a lesser offence than child pornography involving actual abuse of a child;
- the ongoing efforts on the international level to set up an international reference database of child pornographic

images to be used in the investigation and prosecution of those involved in child pornography, should be supported;

-the draft Council of Europe Convention on Cyber-Crime, which has been negotiated together with non-European countries around the world is an authoritative document on the matter.

b. Smuggling

It is noted that there is broad international consensus as exemplified by the UN Smuggling Protocol that an essential constituent element of smuggling is that a profit motive is involved. The importance is stressed for countries in enacting and enforcing smuggling legislation to maintain a balance between security and freedom, and therefore not to incriminate, prosecute or punish persons facilitating illegal entry, stay or residence on the basis of mere humanitarian grounds.

2. Sanctions

In the context of combating trafficking and smuggling of persons, legislation should provide for the closure of places or businesses where victims of trafficking in persons have been exploited, for the confiscation of forged, falsified or stolen passports and other travel documents, and for the restriction or disqualification of the offender's right to exercise professions that are likely to stimulate or facilitate re-offending.

Procedural criminal law

Recalling Article 6 of the UN trafficking Protocol, it is stressed that it is critically important to create a proper procedural status for the victims of trafficking in persons, especially when co-operating with justice.

The rights of the victim during the criminal trial must be developed, NGO's should be given opportunity to participate in a criminal trial and to claim damages in the name and for the sake of the victim, working permits, financial support, shelters and extension of medical, psychological and social care should be provided.

Witness protection programs must be developed and implemented and there must be sensitizing, training and awareness raising among official authorities (such as police and immigration officials, prosecutors and judges) as well as social workers, doctors and lawyers.

If repatriation is desired by the victim, a reintegration premium for victims should be considered, the payment of which may be supervised by NGO's.

As addressed earlier, temporary or permanent residence permission must be provided for victims of trafficking regardless of their co-operation with justice.

International criminal law

1. Substantive international criminal law

It is recalled that the Rome Statute for the ICC recognizes that trafficking in persons, in as far it constitutes enslavement, rape, sexual slavery, forced prostitution or any other form of sexual exploitation of considerable gravity, in line with the conditions set out in Article 7 of the Statute, can be regarded as a crime against humanity.

2. Procedural international criminal law

a. Jurisdiction

In the context of extra-territorial jurisdiction, given the truly international character of trafficking in persons touching one of the core interests of the international community, states are called upon to consider the possibility of introducing universal jurisdiction under conditions, the basic condition being the presence of the suspect on their territory. Taking into consideration that such a jurisdiction can - until now - not be considered as an obligation under

international conventional law, states are urged to provide at least for extra-territorial jurisdiction for trafficking and smuggling offences committed for the benefit of legal persons established within a state's territory and by persons having permanent residence in their states. States are urged to find better methods/rules to solve conflicts of jurisdiction.

b. International cooperation in criminal matters

It is stressed that it is important to:

- insert provisions allowing for video (or telephone) conference hearing in order to collect evidence in trafficking cases in multi- and bilateral conventions as well as in national legislation;
- enhance international co-operation in the context of witness protection, including the possibility of relocating victims abroad;
- not to permit controlled deliveries of persons.

Carrier liability

It is stressed that carrier liability infringes upon the spirit of the 1951 Geneva Convention and that states should therefore not introduce carrier liability, so that refugees would not be prevented from travelling to seek asylum. If states nonetheless introduce carrier liability, the imposition of financial penalties upon carriers should not apply if the foreigner is admitted to the territory for asylum purposes.

Legal persons

The importance is stressed of introducing and enforcing criminal, civil or administrative liability for legal persons for (facilitating) smuggling or trafficking in persons.