

ALLIANCE AGAINST TRAFFICKING IN PERSONS

“An Agenda for Prevention: Non-Discrimination and Empowerment” (11-12 October 2012)

Panel 2: Exploring Non-Discrimination, Empowerment and the Law

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The Empowerment of Trafficked People: From Theory to Reality

Introduction

[1] Victims of trafficking are people, human beings who are potentially capable of great, and not so great, things. We need to remember this, because recognition of the humanity and autonomy of the person who has been trafficked lies at the core of the State’s obligations towards them. The law can, and does, play a role in helping victims of trafficking to rediscover their humanity, to understand that they can take control of, and direct, their own lives.

[2] International law provides a legal foundation for the empowerment of trafficked people. This paper seeks to clarify the existing obligations of States towards trafficked persons. The essential point is this: not only should a trafficked person be given a fish to survive for a day; they should be taught to fish so that they can become independent people in the long-term. This is what the law requires, based upon recognition of the fundamental dignity of the trafficked person.

The Law

[3] Failure by the State to provide appropriate assistance to trafficked people risks violation of the prohibition of discrimination under international human rights law. The prohibition of discrimination is widely recognised.¹ The Council of Europe Convention on Action against Trafficking in Human Beings (2005) requires, at Article 3:

“The implementation of the provisions of this Convention by Parties, in particular the enjoyment of measures to protect and promote the rights of victims, shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”²

[4] The prohibition of discrimination entails an obligation of the State to assist trafficked people. It is also at the core of the duty to empower trafficked people, to give them the tools to seize back control of their own lives. This requires more than simply freeing trafficked people from the tyranny of the brothel, the sweatshop or the farm. States must take full account of the particular circumstances of trafficked people, to enable them to obtain not only the medical, psychological and social assistance they need in the short to medium term, but also to regain control of their lives and their destinies for the future.

¹ Convention for the Protection of Human Rights and Fundamental Freedoms (1950), Article 14; International Covenant on Civil and Political Rights (1966), Article 26; International Covenant on Economic, Social and Cultural Rights (1966), Article 2(2). There are also extensive OSCE commitments on non-discrimination: for instance, OSCE Permanent Council, Decision No. 557/Rev. 1, *OSCE Action Plan to Combat Trafficking in Human Beings*, 7 July 2005, Preamble.

² CETS No.197.

The *Rantsev* case

[5] The nature of the duty towards trafficked people has had significant light shed on it by the decision of the European Court of Human Rights in *Rantsev v Cyprus and Russia*.³ This was the first decision of the Court to address human trafficking. Whilst trafficking is not prohibited by name in the convention (Article 4 prohibits slavery, servitude and forced labour), the Court was in no doubt that trafficking, which “threatens the human dignity and fundamental freedoms of its victims”, falls within the scope of Article 4.⁴

[5] The decision clarifies the scope of the State’s duty under Article 4. This includes taking general measures aimed at addressing trafficking as a crime.⁵ However more specific steps may be necessary, first to protect persons at risk of being trafficked but also to facilitate their recovery. As the court stressed, in a later decision:

“...the existence of domestic laws and accession to international treaties guaranteeing respect for fundamental rights in principle are not in themselves sufficient to ensure adequate protection against the risk of ill-treatment where ... reliable sources have reported practices resorted to *or tolerated* by the authorities which are manifestly contrary to the principles of the Convention.”⁶

[6] National legislation must ensure the practical and effective protection of the rights of potential victims of trafficking, including:

- Criminal law measures to punish traffickers
- Regulation of businesses used as a cover for human trafficking
- Adoption of immigration rules that address relevant concerns relating to encouragement, facilitation or tolerance of trafficking (for example, steps to identify unaccompanied minors who may be at risk).⁷

[7] Particular measures must be taken to protect victims and potential victims. Where the authorities are aware, or should be aware, that an individual is at real and immediate risk of being trafficked, they must take appropriate measures to protect that individual.⁸ This might entail taking the person at risk to a safe place, such as a shelter, where his/her immediate physical safety can be secured pending the next stage in assessing their needs.

[8] In addition to immediate protection needs that may have to be met, the State has a wider duty towards trafficked people, based on the prohibition of inhuman and degrading treatment as well as the obligation of non-discrimination. The kind of treatment to which people are subjected when trafficked is well known and well documented. There is physical, psychological and sexual abuse. Such abuse is so serious that, were it to be perpetrated by the State, it would often amount to inhuman and degrading treatment or punishment, or even torture in some cases, in violation of Article 3 of the European Convention on Human Rights.⁹

[9] Once a trafficked person becomes known to the State, that is once they have been freed from the control of their traffickers, certain State responsibilities are triggered. The State must ensure that trafficked people are not simply left to fend for themselves, that they are not left destitute.

³ Application No 25965/04, Judgment of 7 January 2010.

⁴ *Rantsev*, Para 282.

⁵ *Rantsev*, para 284.

⁶ *MSS v Belgium and Greece*, Application No 30696/09, 21 January 2011, para 353 (emphasis added).

⁷ *Rantsev*, para 284.

⁸ *Rantsev*, Para 286.

⁹ Article 3: “No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

[10] At this stage, most trafficked people will have little or no money, they may lack identity papers, they may require urgent and longer term medical treatment. They will need a place to live safely in the short and medium term, not only during any reflection period but afterwards.

[11] States are obliged not to submit anyone within their jurisdiction to inhuman or degrading treatment or punishment. To meet this duty, States must take steps to meet the short and longer term needs of victims, including:

- Access to necessary medical treatment
- Access to psychiatric treatment
- Access to counselling
- Access to safe accommodation
- Access to legal advice – with regard to legal proceedings in which they may be involved as well as a possible entitlement to international protection
- Possible referral to assistance and support with the aim of long-term social inclusion
- Where necessary, assistance should be in a language that the trafficked person can understand.

[12] Such needs do not have to be met directly by the State. Assistance may be provided by organisations with relevant expertise; nevertheless, the duty remains with the State to ensure that this is done. Significant obligations of States towards trafficked people are also stipulated in Chapter III of the Council of Europe Convention.

[13] The obligation of non-discrimination creates obligations for States: first, to prevent trafficking; second, to assist those who have been trafficked. States are not always obliged to treat everyone in the same way. A difference of treatment is discriminatory “if it ‘has no objective and reasonable justification’, that is, if it does not pursue a ‘legitimate aim’ or if there is not ‘a reasonable relationship of proportionality between the means employed and the aim sought to be realised’”.¹⁰

The failure to accord to trafficked people the assistance outlined above can amount to unlawful discrimination where this happens because of failure to take account of the victim’s sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

[14] Whilst people are not necessarily trafficked specifically because of their nationality, religion, race or ethnicity, in reality there is nevertheless an element of discrimination in the selection, or targeting, of those who are trafficked. Girls and women are trafficked in the sex trade because they are *female*. The State is not directly responsible, nor culpable, for this criminal act; however it becomes culpable if it fails to address the needs of the victims, which are to some extent directly linked to their gender.

[15] Where there is evidence that a particular group is being targeted for trafficking because of their gender and/or ethnicity (such as white girls in the north of England), the failure to address their protection needs can be discriminatory because it fails to give proper weight to the factors that make such persons vulnerable to being trafficked.

¹⁰ *Abdulaziz, Cabales and Balkandali v United Kingdom*, Judgment of 28 May 1985, Series A, No.94, para 72. This is cited with approval in the *Explanatory report of the Council of Europe Convention on action against trafficking in human beings*, CM(2005)32 Addendum 2 final, 3 May 2005, para64.