

Paper for the Fifth Informal Thematic Session of the GCM: “Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims”

with a particular focus on trafficking in persons

Prof. Valentina Milano, Law Faculty, University of the Balearic Islands (Spain)

Introduction

Migration is increasingly linked to criminal networks and activities that have a devastating impact on the human rights of those who move voluntarily or are deceived or coerced in the course of their journey. In order to adequately protect these rights but also to prevent, investigate and prosecute smuggling and trafficking, a human rights-based approach is required, as UN agencies have been upholding in the last few years. At the core of this approach lies the idea that protecting victims’ rights and empowering them vis-à-vis their exploiters is key to transforming the current vulnerabilities and power imbalance that allow widespread exploitation of people on the move. Only an empowered victim who knows that if he/she turns to authorities he/she will be listened to, understood and protected with adequate measures and for a sufficient period of time, avoiding the risk of revictimization in the form of arrest, detention, prosecution and refoulement, will be in a position to denounce his or her situation and allow for an investigation and prosecution of the crime, ending the current cycle of abuses and pervasive impunity of smugglers and traffickers. Importantly, a human rights-based approach also calls for a preventive approach, calling for changing structural political and legislative choices that promote smuggling and trafficking in the first place.

However, the current international law framework does not adequately reflect a human rights-based approach to migrant smuggling and human trafficking. The main focus in the current anti-trafficking framework at the universal level (essentially the Palermo Protocols on trafficking and smuggling) is on criminalization and prosecution, while prevention and protection measures are not adequately addressed. Most of the protection and assistance measures are non-mandatory, and commitments in the area of prevention are too vaguely drafted. Even if the mandatory nature of the obligations to prevent trafficking and to provide adequate protection and assistance to victims stems from international human rights law and, in particular from State’s due diligence duty, the current fragmentation of rules amongst various international law regimes results in lack of legal clarity and certainty. In that context, the Global Compact on safe, orderly and regular migration (GCM) provides a unique opportunity to clarify the scope of States’ obligations towards trafficking victims and smuggled migrants. While they do to a certain extent also apply to migrant’s smuggling, the recommendations that follow specifically focus on human trafficking.

RECOMMENDATIONS with a particular focus on prevention and protection

In order to adequately reflect a human rights-based approach to trafficking in persons, the Global Compact on safe and orderly migration should cover the accepted 4 Ps framework: prevention, protection, prosecution and partnership (as set out in the 2010 Global Plan of Action against Trafficking, for example). Since prosecution and the corresponding partnership requirements are quite satisfactorily covered by the Trafficking Protocol (inadequate results in this area are principally due to a lack of implementation), it is of utmost importance that the GCM includes more detailed provisions on prevention and protection, in particular on the following points:

1. Include an explicit reference to the duty to adopt **a human rights-based approach to trafficking** in persons, that focuses on protection, prevention and prosecution in a balanced way and places the protection of human rights as the primary concern that should never be subordinated to the needs of criminal investigation and prosecution.

2. Include the adoption of measures for **preventing** smuggling and trafficking, which should include the commitment to:
 - A. Provide safe and legal migration paths for migrants, in order to avoid a massive use of smuggling as the only available way to migrate. Indeed, in the absence of safe and legal paths for migration, desperate migrants have few other options than to rely on smugglers (for example, more than 90% of migrants use smugglers to reach Europe, according to a Interpol-Europol joint 2016 report). Preventing movement is impossible: people will continue to move if their basic needs are not fulfilled, and restrictive policies only drive them underground and fuel criminal networks.
 - B. Provide safe and legal paths for asylum seekers and other persons in need of international protection who flee.
 - a. In situations of conflicts or massive human rights violations, in order to avoid them turning to smugglers as the only solution to flee and/or them falling in the hands of traffickers, specific provision should be made for emergency programs that ensure the safe relocation from countries of origin and/or the establishment of humanitarian corridors that allow people to reach a safe destination where they can request asylum.
 - b. In other situations, States may wish to consider providing for the right of asylum seekers to submit claims in their embassies abroad, in order to avoid people undertaking dangerous migration routes where they will unavoidably have to resort to smugglers and may fall in the hands of traffickers.
 - c. In cases where international protection is eventually granted, family reunification should be guaranteed within a reasonable timeframe.
 - C. Regulate labour markets including through avoiding migration programs that link a migrant with a particular employer (sponsorship programs) or recruitment fees (which generate debt bondage): a reference to the ILO General principles and operational guidelines for fair recruitment might be useful. Also, adopt labour protection laws and regulations that effectively guarantee the rights of migrants to decent work, and significantly increase labour inspections in order to disrupt current policies that tolerate migrants' abusive employment and working conditions in the labour market, including but not limited to agriculture, construction, prostitution and domestic work.
 - D. Substantially increase human rights-based development and humanitarian cooperation in order to combat the root causes that generate migration flows: poverty, gender discrimination and gender violence, racial and other forms of discrimination, climate change and conflict and humanitarian crisis. In that context, States should commit to develop livelihoods and employment opportunities to empower the most vulnerable and implement strategies to fight discrimination.
 - E. Decrease the demand for trafficking victims services, in particular sexual services, raising awareness among clients and considering the possibility of criminalizing the purchase of sexual services.
 - F. Proactively identify persons who are at high risk of trafficking in order to adopt measures to remove them from that situation of risk and avoid them falling into the hands of traffickers. Such situations include persons trapped in conflicts (as the Special Rapporteur said, trafficking is not a possible side effect of conflict, it is a systemic consequence of it) or living in refugee camps, in particular unaccompanied children and young women, as well as persons working in economic sectors where trafficking is known to take place such as agriculture, textile, entertainment, prostitution, construction and hotels and restaurants, among others.
3. Include the adoption of measures for **protecting trafficking victims**, which should include commitments on the following points:

- A. **Identification:** the duty to identify trafficking victims should be clearly spelled out (the Protocol on trafficking does not refer to it). Essential elements of the identification duty to which reference should be made in the GCM are:
- a. the duty to identify is a **proactive** duty which does not depend on victim's self-identification. Officials should be adequately trained to proactively detect trafficking signs, considering that self-reporting by victims is very rare due to the very serious fears, threats and post-traumatic disorders victims experience.
 - b. a **reflection and recovery period** should be granted to possible victims as soon as authorities have reasonable grounds to suspect that a person might be a trafficking victim, so that authorities have enough time to investigate the situation of the victim and establish the victim's status while guaranteeing that the victim is not deported during the identification process.
 - c. Identification must be a **multi-stakeholders process** where a range of governmental and non-governmental actors participate in the identification process and decision (in accordance with the partnership requirement). Actors would typically include law enforcement, judicial, social services, labour sector agencies and non-governmental entities specialized in protecting and assisting victims. (This is required under European standards and the UK and the Netherlands are examples of countries that have taken this approach in the most comprehensive way). Also, a low identification threshold should be used in identification decision-making, based on reasonable grounds to believe and not on certainty.
 - d. The **right to appeal** negative identification decision. This is a particularly important since international law does not provide for the right to appeal negative trafficking identification decisions, which currently generates a widespread practice of hasty deportations without due process guarantees.
 - e. **Protocols and indicators** should be developed, widely disseminated and used by all officers involved in identification: law enforcement, judicial, social services and labour sector agencies, consulates and embassies, and non-governmental entities.
- B. The obligation of **non-punishment** of trafficking victims, which includes non-prosecution and non-detention. The prosecution and punishment of victims is still too frequent today. Many delegations have referred to it during the thematic session and it is of utmost importance that the GCM includes this principle (in particular because it cannot be found in the Trafficking Protocol and in other relevant treaties).
- C. **Protection and assistance:** protection from further harm, including through voluntary accommodation in safe shelters and the protection of victim's privacy, as well as the provision of medical, psychological, social and legal assistance for possible and confirmed victims. For confirmed victims, rehabilitation and reintegration services should also be provided. Moreover, the right to information on victims' rights and the right to access to consular assistance should be referred to. None of these rights should be made conditional upon the victim's cooperation in judicial investigations.
- D. **Residence permits and asylum.**
- a. Residence permits must be granted when humanitarian or protection needs warrant it, and not only in relation to prosecution needs. At the same time, access to international protection procedures including asylum should be guaranteed, in conformity with the non-refoulement rule. Access to residence permits for trafficking victims procedures and to international protection procedures should not be offered to victims as alternative rights. It should be made clear that trafficking victims have the right to access both procedures: they may decide which to choose or may wish to apply to both. For that purpose, officers with responsibilities in trafficking victim identification and protection *and* asylum officers should be trained on both procedures and be made aware of their duty to inform potential victims about their rights to access both

procedures. Importantly, they should work in a coordinated manner: for example, the establishment of a human trafficking focal points in asylum offices as well as of asylum focus points in human anti-trafficking teams represents a good practice in this area.

- b. In that context, it is of utmost importance that a **comprehensive risk assessment** be carried out before any person is returned to his or her country of origin, which includes victims' right to be heard and to appeal the decision. Also, authorities should seek and include in their assessment the information provided by all governmental and non-governmental organizations involved and allow for sufficient time for an accurate risk assessment to be carried out. This assessment should be carried out by especially trained officials who are trained to identify and distinguish between a smuggled migrants and the possible human rights violations he/she might have been subjected to, a trafficking victim and the particular risks of revictimization he/she may face, and an asylum seeker who might fear persecution under the Refugee Convention. Also, a person might often fall under the definition of more than one of these categories, in which case he/she shall have access to the protection measures and residence permits provided for each of the categories, or opt for the most protective one.
4. The right to access **remedies** for victims, including compensation. A reference to the "Draft basic principles on the right to an effective remedy for trafficked persons" drafted by the Special Rapporteur on trafficking could be useful (see report A/66/283, Annex).
5. **Participation**: multidisciplinary partnership among governmental and non-governmental organizations - principally at the national but also at the international level - is key to any intervention and should be recognized as a transversal requirement. As IOM held, the number of people benefiting from protection is low: we need to increase identification and protection and therefore we need to engage more actors. **Without a broad engagement, no progress will be made.** Also, NGOs that have specialized expertise and capacity to identify, protect, assist and build trust with victims should be adequately financed. As has been done in several countries, multidisciplinary national and regional/local task forces composed of governmental and non-governmental entities should be established to manage jointly all phases of the process: prevention, identification, protection and assistance, and access to remedies. Cooperation with international organizations and between States is also required.
6. **Training**: a human rights-based approach requires empowerment of both duty-bearers and rights-holders, for any strategy to be effective and sustainable in time. Therefore, sufficient resources should be allocated to train relevant officers (law enforcement officers, labour inspectors, judges, prosecutors and lawyers, immigrations officers, health professionals, social services providers, parliamentarians, etc.) as well as to raise the awareness of target groups, i.e. vulnerable populations and those that fuel the demand for trafficking victims services (prostitution clients, the private sectors, etc.).
7. **Accountability**: a system should be established to monitoring the implementation of GCM, in order to promote State's accountability towards the international community and rights-holders. Also, the GCM should require States to establish accountability mechanisms at the national level, including access to justice (see point 4), mechanisms for vulnerable populations to denounce their abusive situations in an easy and friendly setting (migrant workers, persons working in prostitution etc.), and allowing victims to appeal negative identification decisions (see point 3.A.d). Also, an independent body, such as an Ombudsperson, should regularly monitor the effective functioning of those mechanisms and the broader implementation of anti-trafficking regulations.