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Agenda item 3

**Promotion and protection of all human rights, civil,  
political, economic, social and cultural rights,  
including the right to development**

**Joint written statement\* submitted by Franciscans  
International, a non-governmental organization in general  
consultative status, the Global Alliance Against Traffic in  
Women, a non-governmental organization in special  
consultative status**

The Secretary-General has received the following written statement which is circulated in accordance with Economic and Social Council resolution 1996/31.

[16 May 2011]

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\* This written statement is issued, unedited, in the language(s) received from the submitting non-governmental organization(s).

## **Deported without justice: Discrimination in the identification of foreign born victims of human trafficking**

### **Introduction**

Franciscans International (FI) and the Global Alliance against Traffic in Women (GAATW) welcome the report of the Special Rapporteur on trafficking in persons, especially women and children, on the right to an effective remedy for trafficked persons.

The need to redress wrongs and provide remedies to victims of crimes is a fundamental legal principle, and a well-established rule of international human rights law<sup>1</sup> with obligations and responsibilities widely articulated in international human rights treaties<sup>2</sup> and soft law<sup>3</sup>. Further, substantial dedicated anti-trafficking laws and policies have been adopted in increasing numbers of countries worldwide, many of which consider the need to provide remedies to victims of trafficking.

Our organisations are concerned that despite this widespread commitment in national and international law, redress and remedies for violations committed against trafficked persons are overwhelmingly unrealised, compounding the array of rights abuses trafficked persons experience.<sup>4</sup>

In particular we are concerned that in many countries of destination foreign born victims of human trafficking are being discriminated against; they are prosecuted for immigration status related offences and deported without being identified as victims of trafficking, denying them the right to access remedies.

### **Identifying trafficked persons**

The positive identification of victims is the first step in trafficked persons accessing their right to remedies for crimes committed against them. As noted in the chapeau to Guideline 2 of the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, “[a] failure to identify a trafficked person correctly is likely to result in a further denial of that person’s rights”.

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<sup>1</sup> Anne Gallagher (2011) The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy

[http://www2.ohchr.org/english/issues/trafficking/docs/Bratislava\\_Background\\_paper1.pdf](http://www2.ohchr.org/english/issues/trafficking/docs/Bratislava_Background_paper1.pdf)

<sup>2</sup> The International Covenant on Economic, Social and Cultural Rights (ICESCR) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

<sup>3</sup> The 1985 UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power and the 2005 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Principles and Guidelines on the Right to a Remedy and Reparation)

<sup>4</sup> GAATW (2006) A Global Consultation on Access to Justice, GAATW; GAATW (2007) A Consultation on Access to Justice in Nepal, GAATW; GAATW (2007) A Consultation on Access to Justice in Nigeria, GAATW; GAATW (2007) Collateral Damage, GAATW; GAATW (2011) A Woman’s Life is Richer than her Trafficking Experience Feminist Participatory Action Research, GAATW; Anne Gallagher (2011) The right to an effective remedy for victims of trafficking in persons: A Survey of International Law and Policy

[http://www2.ohchr.org/english/issues/trafficking/docs/Bratislava\\_Background\\_paper1.pdf](http://www2.ohchr.org/english/issues/trafficking/docs/Bratislava_Background_paper1.pdf)

States are obliged to ensure that the identification of trafficked persons can and does take place. However, in practice, a lot of trafficked persons go unidentified. In many instances it is foreign-born victims of human trafficking who go unidentified; instead they are criminalized and deported for immigration offences. As noted in the OHCHR Commentary to the Recommended Principles and Guidelines on Human Rights and Human Trafficking, “trafficked persons are [often] detained and subsequently charged, not as victims of trafficking, but as smuggled or irregular migrants, or undocumented migrant workers”<sup>5</sup>.

In criminalizing, detaining and deporting foreign born victims of trafficking States fail to afford victims the rights to which they are legally entitled under national and international law, simultaneously depriving them their right of access to assistance measures, or remedies for the crime suffered.

This is a clear example of immigration law taking precedence over human rights or labour rights, resulting in a victim’s legal status and/or nationality impacting on their access to remedies. In the UK, for example, there is a startling disparity between UK, EU or third country nationals being recognised as trafficked. The UK Anti-Trafficking Monitoring Group conducted analysis of cases submitted to the National Referral Mechanism and found that 76 per cent of British nationals referred were officially recognised as trafficked, compared with 29 per cent of non-British EU nationals and 12 per cent of third country nationals.<sup>6</sup>

The following cases demonstrate the barriers posed to effective remedies for trafficked persons, in three countries of destination, which are sadly representative of themes identified by FI and GAATW’s members in many countries around the world.

#### **Singapore: Inadequate definition of trafficking prevents redress**

Kumari, an Indian woman, was promised a job as a hospital attendant in Singapore by a recruitment agent in India, to whom she paid S\$1,500 in recruitment fees. Once she arrived in Singapore, Kumari was forced to work in the sex industry against her will in lieu of her promised employment.

Singapore is a non-signatory to the Human Trafficking Protocol and does not recognize the international definition of trafficking; trafficked persons who have consented to travel to Singapore will not be recognized as victims. The customary perception is that if trafficked persons do not self-identify at immigration checkpoints then they must be guilty of immigration-related offences. Although mechanisms are in place through which victims and their service providers might seek redress, this misguided interpretation of human trafficking results in the majority of trafficked persons being punished and treated as offenders for violations of immigration laws rather than victims. Despite Kumari’s case being one of trafficking within the Human Trafficking Protocol definition, she could instead be viewed as a criminal and deported under Singaporean Law. On these grounds Kumari did not seek redress for crimes committed against her, falling through the gaping protection gaps in the Singaporean system.

#### **Germany: Immigration priorities take precedence over labour rights**

In Germany, local law enforcement must report undocumented individuals to immigration officials, making it very difficult for trafficked persons without legal documents to access remedies for trafficking violations. An example of the negative impact of this policy is

<sup>5</sup> Page 129 [http://www.ohchr.org/Documents/Publications/Commentary\\_Human\\_Trafficking\\_en.pdf](http://www.ohchr.org/Documents/Publications/Commentary_Human_Trafficking_en.pdf)

<sup>6</sup> The Anti-Trafficking Monitoring Group, *Discrimination in the Identification Process* [http://www.antislavery.org/includes/documents/cm\\_docs/2011/d/discrimination.pdf](http://www.antislavery.org/includes/documents/cm_docs/2011/d/discrimination.pdf)

evidenced in the story of Hua, a Vietnamese woman, who traveled to Germany for work. Hua incurred debts to the broker who facilitated her transit and employment in Germany with the agreement that she would work to re-pay the loan.

Upon arrival in Germany Hua was sent to work as a domestic worker for a family, with no pay until her debt was repaid. Hua was held captive, worked seventeen-hour days and seven day weeks. Eventually, she tried to flee her working establishment, and was attacked by associates of her trafficker. With nowhere to turn, Hua sought help from the police, describing her captivity and exploitation, yet, as a matter of policy her case was referred to immigration. Hua was treated as an undocumented migrant, her trafficking case was given neither sufficient attention nor credence, she is currently in detention and will be deported soon.

### **Thailand: Smuggling definition used to avoid rights obligations**

In Thailand, a large group of Cambodian migrant workers found begging in the capital, Bangkok, were identified as undocumented and therefore immigration offenders under Thai law. In a three-day operation Thai law enforcement officials sought to round up all offending migrants, who were subsequently identified as smuggled and deported. The mass deportations took place with such speed that screening to identify victims of trafficking could not have been possible; further, NGOs usually employed to assist the Immigration Bureau in the screening process were not contacted.

Simultaneously intelligence reports revealed the beggars to be working under coercive conditions under the control of gang-masters who were consequently charged under human trafficking legislation. This paradoxical situation indicates that, while the gang-masters were identified as traffickers the victims of trafficking were not identified as such and were instead charged with illegal entry and deported.

## **Conclusions and recommendations**

While all trafficked persons have the right to access remedies it is only those who are identified that are able to enjoy this right, it is therefore critical that all trafficked persons are identified as such and that factors such as legal status and nationality are not used to discriminate against trafficked persons.

In this regard, reflecting the OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking, we call on the HRC to urge all states to:

### **Discrimination**

- “Ensure that protection and support is extended to all trafficked persons without discrimination” (Guideline 6)

### **Identification**

- “Amend or adopt national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements” (Guideline 4.1)
- “Develop guidelines and procedures for relevant State authorities and officials such as police, border guards, immigration officials and others involved in the detection, detention, reception and processing of irregular migrants, to permit the rapid and accurate identification of trafficked persons” (Guideline 2.1)

- “Ensure cooperation between relevant authorities, officials and nongovernmental organizations to facilitate the identification and provision of assistance to trafficked persons” (Guideline 2.3)
- Ensure that immigration laws and procedures in no way impede the identification of trafficked persons;

**Protection**

- “Ensure that trafficked persons are not prosecuted for violations of immigration laws or for the activities they are involved in as a direct consequence of their situation as trafficked persons” (Guideline 5.7);
- “Ensure that trafficked persons are not, in any circumstances, held in immigration detention or other forms of custody” (Guideline 5.7);

**Access to remedies**

- “Ensure that victims of trafficking have an enforceable right to fair and adequate remedies, including the means for as full a rehabilitation as possible. These remedies may be criminal, civil or administrative in nature” (Guideline 9.1).
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