

ILPA Response to:**European Commission Communication: Fighting trafficking in human beings – an integrated approach and proposals for an action plan COM(2005) 514 final***Introduction*

Trafficking in human beings has become a matter increasingly on the agenda of the international community. In 2000 the UN adopted as protocols to the Convention against Transnational Organized Crime, an instrument to prevent, suppress and punish trafficking in persons and one against the smuggling of migrants by land, sea and air. The Convention came into force in December 2003. The Commission has proposed that the EC conclude the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children to the UN Organised Crime Convention¹.

The International Labour Office issued Guidance for Legislation and Law Enforcement on human trafficking and forced labour exploitation in September 2005 (ISBN 92-2-117347-X). Numerous other international organisations have also addressed the issue of trafficking and smuggling of human beings over this five-year period.²

The European Union has already adopted two specific measures on the subject – the Framework Decision on trafficking in persons (OJ 2002 L 203/1) and Directive 2004/81 on residence permits for trafficking victims, as well as other measures that indirectly affect this subject.

In our opinion, the approach that has been adopted by the Commission should to be reconsidered. While mention is made of the need to ensure respect for human rights, there is no recommendation aimed specifically at protecting the human rights of either smuggled or trafficked persons. We urge the Commission to include such a recommendation in subsequent texts

Instead the focus is on the enhancement of border controls, and negotiations with states beyond the Union aimed at encouraging them to take measures against trafficking and smuggling of human beings. For the reasons which we set out below, we considered that this approach is misguided and will only result in an increase of smuggling and trafficking of human beings as ever stricter border controls and enforcement mechanisms perversely tend to make smuggling and trafficking more profitable.

The Council of Europe has drawn up its own Convention against trafficking in persons,³ which the EC may ultimately sign and conclude.⁴ We urge the Commission to recommend that the EC sign the Convention.

¹ COM (2003) 512, 22 Aug. 2003. As of 12 Oct. 2005, sixteen Member States had ratified the Protocol, which entered into force on 25 Dec. 2003 (Austria, Belgium, Cyprus, Denmark, Estonia, France, Latvia, Lithuania, Malta, Netherlands, Poland, Portugal, Slovenia, Slovakia, Spain and Sweden). Nine Member States have signed the Protocol, but not ratified it (the Czech Republic, Finland, Germany, Greece, Hungary, Ireland, Italy, Luxembourg and the UK). The EC has ratified the main UN Convention on organised crime (OJ 2004 L 261/69).

² See for instance the Global Programme against Trafficking in Human Beings of the UN Office on Drugs and Crime; also the UN agencies which are engaged in the issue are listed at: http://www.unodc.org/unodc/en/trafficking_links.html

³ ETS 197, open for signature 16 May 2005. As of 19 Oct. 2005, fifteen States, including eight Member States, had signed the Convention (Austria, Cyprus, Italy, Luxembourg, Malta, Poland,

The Communication

This Communication is intended to contribute to the strengthening of the EU's commitment to prevent and fight trafficking in human beings and to the protection, support and rehabilitation of its victims. The fundamental concern of the Commission, according to the Communication are "the persons concerned, their needs and rights". It is intended to follow a human rights centred approach to the issue.

The Commission stressed that human trafficking "has to be converted from a 'low-risk high reward enterprise for organised crime' into a 'high risk-low reward one'." The Communication then seeks to address this issue under the following headings:

1. fundamental rights (one page);
2. organised crime dimension (two pages);
3. illegal immigration dimension (two pages)
4. specific groups especially women and children (two pages)
5. reliable data (one page)
6. coordination and cooperation (two pages).

The focus of all the sections is on prohibiting trafficking through law enforcement, tackling labour exploitation, anti-corruption strategies and relations with third countries. Before making some specific comments on the Communication, we would wish to place trafficking of human beings into context, with a view to persuading the Commission to make explicit such a context in subsequent texts and tailor its approach accordingly.

The Context of Trafficking in Human Beings

The concepts of smuggling and trafficking of persons can only be understood within a context of borders and border controls. Both these activities (smuggling and trafficking of persons) depend on the existence of an international border. Further, passage over that border (or the attempt to do so) must be a rationed resource in order for either activity to make any sense economically. People normally do not pay for activities that they enjoy freely. To make people pay for an activity it must otherwise be unavailable to them. Where borders are not controlled, or controlled very lightly, the activities of smuggling and trafficking can only rarely occur. Of course, the criminal offences of forced labour etc. can and do still exist but they are not tied to the international border, rather to the immigration status of the individual who is on one or other side of the border.

Trafficking cannot be profitable unless the state takes on the full cost of expulsion of the trafficked persons and very seriously pursues foreigners irregularly present on their territory. Without these two key factors a trafficker will not be able to make money as the victim will not fear to seek the protection of the law within the state where he or she is being exploited. All too often the victims of trafficking fear expulsion more than they fear the trafficker, which renders them vulnerable to continue labour exploitation. If the European Union is serious about the evil of forced labour and seeks to take seriously the Member States' commitments under the ILO's Force Labour Convention 1930 and Abolition of Forced Labour Convention 1957, the first thing which needs to be done is the separation of border crossing from forced labour. Those who cross a border irregularly are not necessarily or indeed often those who are forced to work in circumstances that constitute forced labour.

It is very important to differentiate (i) forced labour - the essence of which is work under threat of a penalty - from (ii) simple irregular work. For example, there is a specific criminal

Portugal and Sweden). No State had yet ratified it; it requires 10 ratifications, including eight by Council of Europe Member States, to enter into force.

⁴ See Hague Programme implementation Action Plan (OJ 2005 C 198/1), point 2.6.

offence relating to (i) in UK law - section 4 of the Asylum and Immigration Treatment of Claimants etc Act 2004. This is fundamentally different in nature from employer sanctions which address (ii). Keeping this distinction is critical because the 'trafficking' discourse is often applied to the facilitation of irregular labour migrants, not just those who are subject to forced labour. If the distinction between the two concepts is not maintained, and there is an elision of forced labour and irregular work, the legal tools available for the protection of those working when in an irregular position become ever more limited.

Nationality and immigration status render the individual vulnerable to exploitation on the territory of a foreign country. If the individual is not a national of the state or does not have an immigration status that permits him or her to work in the territory then, should he or she do so, the economic activity will be irregular (if not illegal) and the individual carrying it out at risk of exploitation on account of this. The border is central to that equation. The border becomes central when the act of crossing a border without the permission of state authorities is made an administrative or criminal offence. The more elaborated the offence – and in some of the Member States there appear to be dozens of offences around border crossing – the more the point of entry becomes the focus of state surveillance.

This raises a number of curious points. All Member States have advanced much legislation over the past few years to criminalise the crossing of borders. By this we mean the adoption of increasing criminal offences relating to the crossing of border by persons. These offences have become more and more complex, extending beyond the border of the state into activities carried out in other states (for instance preparation for smuggling) and also including the protection of the borders of other states – for instance laws which make the act of smuggling or trafficking persons into other Member States than the one where the law has been passed also criminal offences in that state. This emphasis on the border as the place where a crime takes place sits unhappily with the abolition among some of the Member States of border controls amongst themselves. Thus the border of sovereignty remains the place where a crime takes place even where that border is not subject to control.

In all Member States the crimes of smuggling and trafficking raise difficult questions both about perpetrators and victims. Where the victim is the state, as in the case of smuggling, its protection is by way of criminal prosecutions. The smuggled person will always be complicit with the smuggler and depending on the Member State may be criminally liable either as an accomplice or separately for incitement of the crime (whether or not the crime took place). However, among smuggled persons are some closely connected with the asylum process for the simple reason that refugees may be forced to seek the services of smugglers in order to get out of their country of origin and into another country.⁵ Thus, the smuggled person may not be the victim of the smuggler but may well be the victim of the state of origin. In any event, offences against the state require careful justification if they are to be politically and socially legitimate.

Trafficked persons are, by and large, defined in the legislation of the Member States as victims of the crime of trafficking, which includes an element of coercion and threat of violence. The criminalisation of acts that harm other people, i.e. where there is a human victim, requires a clear definition of the victim. If the criminal offence is to be credible it must be justified either as an offence against the state or against the individual. The argument that the Communication makes on the basis of a *human rights centred approach* is that its objective is the protection of the victim. But, as is apparent in the Directive on residence permits for trafficking victims, protection of victims of trafficking lags far behind the enthusiasm of the Member States to criminalise traffickers. Member States are not even obliged to give three-month residence permits to victims. Indeed, as is implicit in the Communication's reference to Framework Decision on the standing of victims in criminal proceedings, victims will often have better rights within the criminal justice system as victims of an offence than they can hope to have either before or after the end of the criminal procedure when they are categorised as irregularly present foreigners. Once the victim is no

⁵ Oxfam, *Foreign Territory, The Internationalisation of EU Asylum Policy* Oxfam Oxford, 2005 pp 34-43.

longer useful in the criminal procedure he or she is usually given only a short period of time before expulsion back to the country of origin. This is certainly far from protection of the victim particularly when the individual risks being trafficked again somewhere else by the accomplices of the trafficker resident in the country of origin.

We highlight four fields of legal and social concern that we consider should be explicitly addressed in subsequent texts, both in preamble and specific recommendations.

1. Differentiating the smuggler in people from the smuggled person: the relationship between the smuggler and smuggled person is one of complicity. Both parties seek the same end – the crossing of a border where both consider there is a high likelihood that if the smuggled person presented him or herself to the authorities that crossing would be prevented. Into this relationship money or compensation of some kind generally appears, although not always. Of course where nationality differentiates the two – i.e. the smuggler has the nationality of, or an immigration status in, the state into which the smuggled person is seeking to enter - the two are more easily separated as categories. But that both parties have the same objective and interest means that the smuggled person will not, by virtue only of being smuggled, be classified as a victim. In this case it is the state that is the victim. Here there is something of a conundrum, by passing laws that create the offence of people smuggling, the state creates itself as a victim of those who commit the offence.
2. Differentiating between smuggling of persons and trafficking of persons: in many Member States, the idea of trafficking has traditionally been linked with prostitution. This is also the case in the Communication as is apparent from the focus on women and children. Whether or not women and children are more likely to be victims of the sex trade than other forms of trafficking remains uncertain. That the protection of women and children from exploitation in the sex trade is a powerful argument for measures in the field is more evident. For instance in the case of France, this relationship stretches back to the beginning of the 20th century. As prostitution has been decriminalised in most Member States, the figure of the prostitute as a foreigner compelled to work in degrading conditions has replaced the more generalised figure of the prostitute as always subject to physical or emotional threat and coerced. The border becomes an important factor in the enforcement of physical or emotional threat, if the individual does not continue the activity he or she will be revealed to the authorities and expelled from the state. In this framework, the individual is a victim in criminal law but, as can be seen from a number of chapters, a most unwilling victim. The unwillingness of the individual to be a victim appears in many cases to be an unwillingness to come to the attention of the state authorities at all. Victim status presupposes visibility, which will sooner or later result in expulsion in most Member States. While some states have provisions for the issue of a residence permit for a limited time while the individual is useful to the criminal justice authorities as a victim, this status tends to be highly precarious and to end when the criminal proceedings end. Thus the victim, in the end, may fear more becoming a victim of the state's expulsion procedures than remaining the victim of a trafficker.
3. Differentiating between punishing smuggling and trafficking on the one hand and protecting persons who fear persecution or torture in their countries of origin: in many Member States, the commitment of the state to counter smuggling and trafficking of persons through the criminal law finds itself in conflict with the state's duty to protect persons fleeing persecution and torture in their home state.⁶ Sometimes it is those persons with the greatest incentive to use smugglers and traffickers who are most at risk of persecution and torture in their country of origin. As visas and border controls are increasing directed at preventing exactly this group from arriving in EU states, so their recourse to smugglers and traffickers to cross the border may increase. The criminal justice system then finds itself caught between the national laws which criminalise border crossing of the kind which fulfils the definition of smuggling or

⁶ While there are simple mechanisms to avoid conflict – such as recognising trafficking as a ground for protection for the individual with a durable residence status, this option is too rarely used.

trafficking, and the Member States' obligation under Article 31(1) Geneva Convention not to penalise refugees for the manner in which they entered the state.

4. Differentiating between smugglers and traffickers on the one hand and legitimate transport businesses on the other: the introduction first of administrative sanctions and then criminal sanctions on transporters who carry persons into the state who are deemed to be irregular (carriers' sanctions) has raised a series of problems for states. While they seek to punish those who are carrying out irregular border crossings for profit nonetheless they seek to promote cross border economic activity and encourage businesses to engage in cross border activities.

The UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children provides for protection to be given to the victims of trafficking including residence permits, temporary or permanent as appropriate, recognizing the risks to victims of trafficking in their countries of origin. Repatriation should generally be voluntary and the safety of the victim must be taken into consideration. Furthermore the social welfare needs of the victims are specifically referred to, although the provision of social assistance, education and housing is not made obligatory by the Protocol. Social methods of prevention, such as research, advertising and social or economic support, are also provided for. The specific provisions of the Protocol are to be read in conjunction with the parallel provisions of the UN Convention against Transnational Organized Crime, which contains additional language dealing with the alleviation of social conditions and the need for public information campaigns.

The Council of Europe's Convention contains clauses requiring Parties to take measures to reduce the demand that fosters all forms of exploitation of humans⁷. It contains extensive measures to protect and promote the rights of victims of trafficking including that no steps to expel a victim will be taken before identification of the person as a victim of trafficking has occurred⁸. Additionally the victim's right to privacy is to be respected⁹ and appropriate assistance and welfare is to be afforded to the victim¹⁰. Due regard is given to the need to offer residence to the victim¹¹. Specifically child victims of trafficking are to be granted residence permits in accordance with the principles of the best interests of the child. In respect of adult victims States are to take account of their personal circumstances and whether their presence is required for the purposes of criminal prosecution. We urge the Commission to recommend that the EU ratify this Convention.

Specific Comments on the text of the Communication

According to the Communication, the granting of residence rights is linked with the achievement of prosecutorial goals and is conditional upon co-operation of the victims with prosecutorial authorities. As in the Directive on a short-term residence permit for victims (which further in the Communication Member States are urged to implement – but in respect of which the UK has opt-out), such residence permit is not self-standing, but depends on co-operation with the police. Victims are thus protected if they turn into witnesses. The effectiveness of this approach is questionable, especially given the very limited rights and many conditions set out by the Directive.

The Communication calls for 'financial investigations related to irregular labour' but what exactly is meant by this? Is this an extra check on all employers/companies? What is the goal and what is the type of investigation? Privacy, data protection and proportionality issues arise, especially in the light of potential 'interoperability'.

It further calls, first, for assistance to victims for prosecution of perpetrators of trafficking, and, secondly, to 'further develop pro-active, intelligence led investigations, which do not

⁷ Article 6 of the Council of Europe Convention on Action against Trafficking in Human Beings

⁸ Article 10 of the Council of Europe Convention

⁹ Article 11 of the Council of Europe Convention

¹⁰ Article 12 of the Council of Europe Convention

¹¹ Article 14 of the Council of Europe Convention

depend on the testimony of the victims'. But this proposal suffers from the same shortcoming outlined above. The second proposal has an immense potential impact on national criminal law/procedure systems which immediately raises the issue of EU competence to do so. The impulse to seek access to information held in databases created for other purposes, such as EURODAC, the Schengen Information System etc in order to find possible intelligence is problematic. When the search for the culprit reaches beyond the victim and the offence which may or may not yet (or indeed ever) be committed, the presumption of innocence is impaired. The use of data held for other purposes in order to identify the individual who has the 'profile' which is sought becomes the object of suspicion on the basis of elements unconnected with his or her behaviour. This tendency is particularly problematic when the EU cross border element is added. The overarching problem of the protection of the individual has been well developed by Statewatch.¹²

The Communication states that 'particular attention will be paid to more efficient and targeted checks at the EU's external border crossing points on potential victims'. There is a substantial problem here in that the checks are on victims and not on traffickers. There is an enormous potential negative impact of this stance on access to EU territory, especially for asylum seekers. The same holds true regarding the proposal for on screening visa applications 'which could involve human trafficking'.

The Communication calls for co-operation between Europol and Frontex: but this is without clarification. For instance, will it involve data exchange? Again the central problem here is that the closer the law enforcement agencies work with the border control agencies (without enhanced protection for victims) the less effective efforts to counter trafficking are likely to be as the victims will not seek help.

The Communication also promotes the collection, retention and manipulation of biometric and other sensitive data which may be held on the VIS. No argument is put forward as to how exactly access and use of this data is likely to assist in the matter of trafficking and smuggling. Rather the claim that ever more facilitated access to information and the power to manipulate data is justified in the light of any problem is presented as self evident. It is by no means self evident that information on the VIS, related to visa applications is likely to assist police action on trafficking and smuggling of human beings. What it does do, however, is give police authorities access to databases exclusively on foreigners. The likelihood that foreigners will then be caught while nationals will not be is enhanced and with it the stigmatization of foreigners as criminals. In view of the relatively weak correlation between trafficking, smuggling and data collection and exchange of this kind, the suspicion arises that "human trafficking" is used to promote existing and far-reaching invasive measures. The observer cannot help but ask whether the claim is that biometrics help identify trafficked persons, in which case the validity of that claim must be tested.

ILPA
December 2005

¹² Peers, S., 'The European parliament and data retention: chronicle of a sell out 'foretold'? Statewatch December 2005.