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Risks of trafficking, trafficking, its prevention, and forced return

A report¹, in Swedish and English by Karin Johansson Blight, independent researcher, for Etikkommissionen i Sverige, 28 March 2015.

- **What is trafficking?** According to the 'UN (United Nation) Palermo protocol' (2000)², Article 3. 1, states: “‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs” (on page 2). Further, the international legal framework on human trafficking and actions to prevent this is already well developed³ and obligations towards children are set out in several specific instruments. UNODC⁴ recommends that “[p]rotecting the rights of trafficked persons should be the first priority of all antitrafficking measures” (page 49).
- **Victims of crime and of human rights violations:** Trafficked persons are *victims of crime* and *of human rights violations*⁵. “Trafficking in human beings is a serious crime, often committed within the framework of *organised crime*, a gross violation of fundamental rights”⁶ (page 1). Victims of gross violations of human rights and serious violations of international humanitarian law have the right to be treated with humanity and respect for their dignity and human rights⁷.
- **Protection against re-victimization:** “*measures should be taken to ensure their wellbeing and avoid re-victimization*”⁷(page 131).⁸ The UN Palermo protocol², Article 9.1. states that: “States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization” (page 5).
- **The risks to health and life** for trafficked persons are often cumulative; conditions that pose specific risks include: immigration detention, exploitation and re-trafficking⁹.

¹ This brief review should be read together with ‘the EU (European Union) Rights of Victims of Trafficking in Human Beings’ from 2013, and the report: Freudenthal, S., D’Orazio, A., Jonsson, L. (Editors) (2015). ‘They Have Taken My Life but Not Killed Me. A Report in Swedish about Women Who Have Been Raped In Relation To Persecution but Who Have Been Rejected Asylum and Protection in Sweden’, Etikkommissionen i Sverige, Karin Almlöfs förlag, ISBN 978-91-87097-24-9.

² UN (2000). ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children’, supplementing the United Nations Convention against Transnational Organized Crime (<https://treaties.un.org/>). Also available in: UN (2004). United Nations Convention against Transnational Organized Crime and the Protocols Thereto. United Nations Office on Drugs and Crime, Vienna.

³ E.g. Council of Europe Convention on Action against Trafficking in Human Beings (‘the Trafficking Convention’), Warsaw, 16.V.2005. Available at: <http://conventions.coe.int/Treaty/en/Treaties/Html/197.htm>.

⁴ The UN Office on Drugs and Crime, reference: UNODC (2008). ‘Toolkit to Combat Trafficking in Persons, Global Programme against Trafficking in Human Beings’, United Nations Office on Drugs and Crime, Vienna.

⁵ Joint UN Commentary on the EU Directive – A Human Rights Based Approach (2011). ‘Prevent, Combat, Protect, Human Trafficking’. OHCHR, UNHCR, UNICEF, UNODC, UN Women, and ILO.

⁶ Council Directive (2011). Directive 2011/36/EU of the European Parliament and the Council of 5 April 2011 on Preventing and Combating Trafficking in Human Beings and Protecting its Victims, and Replacing Council Framework Decision 2002/629/JHA, Official Journal of the European Union, 15 April.

⁷ Office of the High Commissioner of Human Rights (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, General Assembly resolution 60/147, para. 8-10, 16 December. Available at: <http://www.ohchr.org/>.

⁸ United Nations (2010). “Recommended Principles and Guidelines on Human Rights and Human Trafficking”, Commentary, United Nations Human Rights, Office of the High Commissioner for Human Rights, United Nations Publication, New York and Geneva, 2010. ISBN 978-92-1-154190-8.

⁹ World Health Organization (2012). ‘Understanding and Addressing Violence against Women’. Human Trafficking. World Health Organization, Pan America Health Organization: Regional Office of the World Health Organization.

- **Who is at risk¹⁰ of being trafficked?** The EU Commissioner for Home Affairs states that trafficking is ... “a gross violation of human rights. It is a serious crime affecting women, men, girls and boys of all nationalities”¹¹ (page 1). Vulnerability to trafficking derives from factors such as discrimination against ethnic minorities, infringements of children's rights, armed conflicts, marginalisation, poverty, social and gender inequality and economic exclusion¹² (page 2). Children are “more vulnerable than adults and therefore at greater risk of becoming victims of trafficking in human beings. In the application of [Directive 2011/36/EU], the child's best interests must be a primary consideration”⁶ (page 2).
- **On return:** Directive 2008/115/EC¹³, Article 9, states that a “[r]emoval must be postponed when the principle of *non-refoulement* would be violated. It may also be postponed for other reasons taking into account specific circumstances of the individual case, in particular the victim's physical state or mental capacity, or technical reasons such as lack of transportation capacity or lack of id- documents” (page 11 and 26).
- **Children, the best interest of the child and return:** Article 10 states that: “[a] child victim who is a third-country national, unaccompanied by a parent or guardian, can only be returned once the child's best interest has been taken into consideration and the Member State is satisfied that the child will be returning to the family, a nominated guardian or adequate reception facilities” (page 11 and page 26). In the United Nations Convention on the Rights of the Child¹⁴ (‘CRC’) (1989) are e.g. Article 3, 6, 9, 25 and 37 relevant to consider in relation to return. As are Article 3 and 13 of the Hague Convention on the Civil Aspects of International Child Abduction¹⁵ (1980). Crucially, “[n]on-rights-based arguments such as those relating to general migration control, cannot override best interests considerations”¹⁶ (page 23)¹⁷.
- **Voluntary return:** the UN Palermo Protocol² Article 8.2. concerns the ‘Repatriation of victims of trafficking in persons’, and states that a return of a victim of trafficking: “... shall be with due regard for the safety of that person and for the status of any legal proceedings related to the fact that the person is a victim of trafficking and shall preferably be voluntary”¹⁸ (page 4-5).
- **National level co-ordination:** Moreover, Article 5, of the Trafficking Convention³ states that: “1 Each Party shall take measures to establish or strengthen national co-ordination between the various bodies responsible for preventing and combating trafficking in human beings. 2 Each Party shall establish and/or strengthen effective policies and programmes to prevent trafficking in human beings, by such means as: research, information, awareness raising and education campaigns, social and economic initiatives and training programmes, in particular for persons vulnerable to trafficking and for professionals concerned with trafficking in human beings. 3 Each Party shall promote a Human Rights-based approach¹⁹ and shall use gender mainstreaming and a child-sensitive approach in the development, implementation and assessment of all the policies and programmes referred to in paragraph 2” (page 3).

¹⁰ “‘Risk’ is simply defined to be the likelihood of a potential hazard becoming reality and the consequences if it does” (page 2, in: UN (2009). ‘Anti-Human Trafficking Manual for Criminal Justice Practitioners, Module 5: Risk Assessment in Trafficking in Persons Investigations’ UNODC, UN.GIFT (Global Initiative to Fight Human Trafficking), New York.

¹¹ European Commission (2013). ‘The EU Rights of Victims of Trafficking in Human Beings’, Luxembourg: Publications Office of the European Union, ISBN 978-92-79-28460-1. Doi: 10.2837/67603.

¹² European Commission (2015). “Trafficking Explained, Together Against Trafficking in Human Beings”. Available at: https://ec.europa.eu/antitrafficking/citizenscorner/traffickingexplained_en. Last up-dated 23 March 2015.

¹³ Council Directive (2008). ‘Directive 2008/115/EC of the European Parliament and of the council of 16 December 2008 on common standards and procedures in Member States for Returning Illegally Staying Third-country Nationals’, Official Journal of the European Union, 24 December.

¹⁴ Sweden ratified the Convention on the Rights of the Child (the ‘CRC’) (1989) the 29 June 1990, at: <https://treaties.un.org>.

¹⁵ ‘The Hague Convention on the Civil Aspects of International Child Abduction’ (1980). Available at: <http://www.hcch.net>.

¹⁶ ‘The UNCRC General comment No. 6 (2005). Treatment of unaccompanied and separated children outside their country of origin, Committee on the rights of the child. Convention on the Rights of the Child’, at: <http://www.refworld.org/>.

¹⁷ ‘The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment’, resolution 39/46 of 10 December 1984, must be considered to ensure humane treatment of adults and children, at: <http://www.unhchr.ch>.

¹⁸ Return under duress is prohibited under Article 7 of the International Covenant on Civil and Political Rights (1966) UN Treaty Collection. Available online at treaties.un.org/.

¹⁹ Work is currently undertaken by for example Unicef Sweden to make the CRC part of Sweden's domestic law.

In summary, the recommendations made in Freudenthal et al. (2015)¹ and their call to reassess all of the 12 rejected asylum seekers' legal cases (called for on page 30), is strengthened by the review of the anti-trafficking frameworks referenced in this report. Moreover, “[w]hen transposing the Directive [2011/36/EU] into national legislation, Member States are encouraged to define human trafficking as *a violation of human rights as well as a crime*”⁵ (page 10). However,

- **About violations of human rights:** whilst, the 12 women in Freudenthal et al. (2015)¹ are victims of serious crime *and* serious human rights violations, it seems that the migration authorities have not recognised their rights as victims of both but seem to underplay their experiences as ‘violations of human rights’ (and thus also their consequent rights e.g.^{20,21}).
- **State obligations:** the outcomes of the Freudenthal et al. (2015)¹ review as well as previous work (Johansson Blight et al. (2012)²² raise serious concerns about how well the Swedish Migration Board and Migration Courts are contributing to the fulfilment of the Swedish government’s obligations under agreements in for example ‘the Trafficking in Persons Protocol’², and generally, with respect to ratified conventions.
- **Return:** is not always a durable solution but a violation e.g. of human rights.
- **Severely poor mental health:** the severely poor mental health status of the 12 women in Freudenthal et al. (2015) suggests reasons to postpone removal as outlined in Directive 2008/115/EC, Article 9, and in several human rights conventions.
- **Family separation:** Directive 2008/115/EC, Article 10, which concerns ‘adequate reception facilities’, refers to *unaccompanied* children and is arguably not applicable to accompanied children. To deport a child without sufficient support and/or with an assumption that the child might have to be separated from his or her parent on return, such as in Case 4 (in Freudenthal et al. 2015), is arguably contravening the CRC (e.g. Article 16) and Unicef guidelines²³.
- **Competence needs:** This is supported by Ecpat Sweden²⁴ (2014)²⁵ who state that: “the Government needs to improve the national responsibility for children at risk in the migration system” (page 12), for example through training and improved collaboration between authorities. Further, the international body monitoring the Trafficking Convention³, ‘GRETA’²⁶ (2014)²⁷ “considers that the Swedish authorities should strengthen the training provided to judges, prosecutors and other relevant professionals on the issue of human trafficking and the relevant criminal law provisions with a view to ensuring practical application of these provisions so that victims of trafficking, including children, subjected to different types of exploitation, are adequately informed, protected and assisted during the pre-trial and court proceedings” (page 8).
- **Lack of competence:** these issues must be fully investigated²⁸, and action taken, partly due to the co-ordinating role e.g. the Swedish Migration Board²⁷ has/had in the past (see e.g. the Directive 2011/36/EU⁵, page 2), and put in relation to recent criticism raised by the UN²⁹.

²⁰ Such as the right to a Remedy and Redress in: ‘UN 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’ (‘UN Basic Principles and Guidelines’), Adopted by General Assembly resolution 60/147, 16 December 2005, at: <http://www.ohchr.org>.

²¹ For example Article 34 and 35 of the CRC.

²² Johansson Blight, K., Dorazio, A., Wilks, E. Hultcrantz E (2012). ‘Children without a Voice’. January. Etikkommissionen i Sverige.

²³ “Long-term care arrangements should, as much as possible, favour family and community-based arrangements rather than residential/institutional care” (page 27), referens: UNICEF Guidelines on the Protection of Child Victims of Trafficking, Unicef technical notes. PD/Child Protection Child Trafficking and Migration. September 2006.

²⁴ That is, ‘End Child Prostitution, Child Pornography and the Trafficking of Children for Sexual Purposes’.

²⁵ Ecpat Sweden (2014). ‘Comments to the Fifth Swedish Government Report on the UN Convention on the Rights of the Child and the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography’, 28 February. For the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography see: <http://www.ohchr.org/>.

²⁶ I.e. ‘the Group of Experts on Action against Trafficking in Human Beings’.

²⁷ GRETA (2014). ‘Report Concerning the Implementation of the Council of Europe Convention on Action against Trafficking in Human Beings by Sweden’, First Evaluation Round. Council of Europe, 27 March.

²⁸ Consider raising the concerns outlined in this report and the Freudenthal et al. (2015) report with for example the UN Special Rapporteur on Trafficking, with ‘GRETA’, and Unicef (internationally and in Sweden) for further actions.

²⁹ UN (2015). ‘Concluding Observations on the Fifth Periodic Report of Sweden Adopted by the Committee at its 68th Session (12-30 January 2015)’. Committee on the Rights of the Child. CRC. Available at: <https://unicef.se>.