

TRAFFICKING WITH HUMAN BEINGS, IDENTIFICATION AND THE PRINCIPLES OF NON PUNISHMENT FOR VICTIMS OF TRAFFICKING

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Abstract: *One of the organized crime activities in the modern world is trafficking with the human beings. Organized crime at the same time is considered key factor on incitement of trafficking with the human beings-activity which despite the violation of human rights of individuals threatens also the security in the region and broader. However, the increase of trafficking comes as the consequence of economic, social and political none quality of people in many developing countries and those in transition. Seen from the aspect of human rights trafficking is a complex and multidimensional problem and it is also a modern form of slavery. It is treated as: abuse of human rights which touch upon a group of human rights of victims of trafficking. Obligations and recommendations that derive from international documents consist on improving the status of the victims as well as offering some rights for victims of trafficking. On prevention and combating trafficking with human beings international community as well as states individually have undertaken preventive and repressive measures in order to prevent and combat this profitable activity for organized criminal groups. Principle of non punishment of victims is seen in a number of international standards, including those with binding legal and political force approach, which respects in every time the dignity and the human rights of victims of trafficking. In the opposite punishment of the victims of trafficking linked directly with their trafficking is violation of their basic dignity.*

Key words: *trafficking with human beings, human rights, identification, principle of non punishment*

Trafficking of human beings, identification and the principle of non punishment of victims of trafficking

At the end of the cold war, in general in most countries, the concern about the trafficking with the human beings as a form of organized crime, has been increased. Governments of some European and Western America were those which would lead this whip in 1990-s by involving other regions as well that happen to be states of origin, transit or host of illegal emigrants.

In this regard by mid of nineties, trafficking and smuggling with human beings was seen as an issue of management and the control of migration. While by the end of 90-s, trafficking of human beings and smuggling has been treated as the issue of organized transnational crime and the issue which threaten society and the economy⁵⁰⁸.

Based in various forms of appearance of the organized criminality, the phenomenon of trafficking with human beings is not a new phenomenon---it exists since the time when borders

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⁵⁰⁸ John Morrison, FMO Research Guide: Human Smuggling and Trafficking, www.forcedmigration.org/guides/fmo011/fmo011.

were put between states and nations. Trafficking with human beings is nothing less than a form of modern slavery, an unforgivable crime against the most sensitive parts of the society in general⁵⁰⁹. Even though trafficking with human beings is not a new phenomenon, it continually draws attention of more subjects from various profiles, because it takes new forms by changing structure, characteristics and more and more spreading of this phenomenon of the criminal nature. Due to this reason, author Lee M. concludes that trafficking of human beings has become issue of many scientific and professional researches at the national, regional and international level.⁵¹⁰

Starting from the Convention on measures against trafficking of human beings, the European Council has given definitions which was generally accepted and according to what, term trafficking of human beings means "recruitment, transportation, transfer, housing or taking persons under the threat, the use of force or other forms of pressure, abduction, fraud, snare, misuse of power, of them that have unprotected positions or giving or getting payments or profits in order to achieve the approval of a person who has a control over the other person with the profit intention.

According to this definition, exploitation will cover minimally the exploitation of others for prostitution, other forms of sexual exploitation, work or other forced services, slavery or practices similar to slavery or taking off organs"⁵¹¹.

Based on the motives of offenders of this criminal activity, when talked about the trafficking of human beings, there should be a difference made based on the motive where there could be noted two basic forms of trafficking of human beings. First, the motive of exploitation of work and the second the exploitation for sex.⁵¹²

Groups of organized crime with the trafficking activity create big profit from the transport and exploitation of people in various forms. Incentive factors of trafficking according to the EU strategic approach, trafficking is generally broad phenomenon and transnationally complex caused for poverty, lack of democratic culture, gender inequality and violence against women, conflicts and post conflict situations, the lack of social integration, lack of possibilities of employment, approach on the education, the work of children and discrimination.

Other drawing factors of trafficking include sex industry which is on increase and requests for sexual services as well as the global requests for free labor force and free products⁵¹³

Importance of identification of trafficked persons as a pre-condition to practice the principle of non-punishment

In order to have the principle of non-punishment to be not in the function it is very necessary that as early as possible a person to be identified as a victim of trafficking and this enables

⁵⁰⁹ President George W. Bush, Oct. 2, 2002, Assessment of U.S. Activities to Combat Trafficking in Persons, Aug. 2003, p. 1, [hereinafter Assessment] at <http://www.state.gov/g/tip/rls/rpt/23495.htm>

⁵¹⁰ Lee, M. (2007) „Introduction: Understanding human trafficking“ u: M. Lee (ur.) *Human trafficking*, Devon: Willam Publishing, f.1-2 www.ilo.org/wcmsp5/groups/public/---ed.../wcms_142882.

⁵¹¹ Convention of Council of Europe on measures against trafficking with human beings, Warshaw, May 16,2005 –series of European treaties ETS nr.197

⁵¹² J. Markovic, *Trgovina ljudima kao oblik organizovanog kriminaliteta*, Kriminalističke teme nr. 3.4/2003, pg. 127, Faculty of Criminalistic Sciences, Sarajevo.

⁵¹³ "EU strategy on eradication of trafficking with human beings, 2012-2016", June 2012, pg.3

undertaking of measures so you avoid penal sanctions or administrative measures regarding the pretended criminal offenses.

For this reason, the creation of mechanisms and effective procedure are essential on identifying victims of trafficking always when this is possible. Non identification could result with treating the victim as the “real” actor of a criminal act, meaning that he/she should be hold responsible and even punished for such deeds. As the consequence, early identification is essential and states should ensure that civil servants which could be put in the contacts with the trafficked persons, e.g. police, custom officers, social services and labor inspectors---to be trained for this job and to cooperate themselves.⁵¹⁴ Moreover state authorities should be active in a way to reveal possible situations of trafficking with human beings, prosecutor should undertake initiative to ensure investigation on circumstances of suspected and the circumstances of the ban⁵¹⁵.

One of the definitions of the identification process is given by La Strada: “identification of trafficked is considered a whole range of actions through which, the police worker, based on the collected information from the supposed victim or from private/judicial persons, who have the information on the illegal activities of the mentioned person, is able to conduct analysis of the collected information, to comprise data on the conducted crime with the elements that define the criminal act of trafficking and who comes to the conclusion that the person is the victim of trafficking. Identification of the trafficked persons has as the goal the guarantee to an access in a package in the minimum of free necessary help, whose measure is determined by an effective legislation”.⁵¹⁶

Based on the Law Nr.04/L-218 on preventing and the fight against trafficking with human beings and the protection of victims of trafficking in Kosovo, article 12 it is said that: ”official identification of trafficking victims is done by respective police units, prosecutors, defender of victims and the centers for social work based on [...], when there is a based doubt that a determined person is the victim of trafficking in accordance with the standard procedures of action drafted by respective authorities”.⁵¹⁷

Identification of trafficked persons is crucial on ensuring the human rights – since the first identification and most important there should be thoughts of protection and the necessary assistance. In order to protect and assist the victims, it is important to identify them precisely and immediately. In many international law documents it is stressed out the need for effective identification of trafficked persons. For example, in the document (ECOSOC) on Principles and Recommended Guidelines on human rights and trafficking with human beings it is said: ”failure on correct identifying of a trafficked person could result with the denial of his rights. For this, states are obliged to ensure that identification could and should be developed.”⁵¹⁸ Importance

⁵¹⁴ OSCE Ministerial Council, Decision No. 8/07 Combating Trafficking in Human Beings for Labor Exploitation (Madrid, 30 November 2007), paragraph. 4; OSCE Permanent Council, Decision No.557/Rev. 1 OSCE Action Plan to Combat Trafficking in Human Beings (Vienna, 7 July 2005), Chap. III para. 5, Chap. V para. 3, Addendum paragraph. 5

⁵¹⁵ Court of Appeal of Britain and Wales, Case Regina against O, Criminal Sector of the Court of Appeal 2835 (2008) , accessed on April 10, 2013

⁵¹⁶ International Centre for Women’s Rights Protection and Promotion. Identification of Trafficked Persons in Moldova. La Strada. 2006.

⁵¹⁷ Law Nr. 04/L-218 on prevention and combating trafficking with human beings in Kosovo, article 12.

⁵¹⁸ UN ECOSOC, “Principles and Recommended Guidelines on Human Rights and Trafficking with Human Beings. Report oh High UN Commissionar for Human Rights in the Economic and Social”, E/2002/68/Add.1, 2002, pg. 6.

of developing effective methods on identifying trafficked persons is noted in many studies. According to assessments made by international experts, around 65% of victims of trafficking are identified.⁵¹⁹ This happens for various reasons, as for example: persons that were trafficked in a foreign state often are frightened with the fact that they will be prosecuted because of the violation of the domestic law---this is especially the case when a foreigner violates emigration laws related to entrance and the stay in the third territory. Despite this, trafficked often believe the structures of the state agencies as long as they are not aware of their rights and possibilities to deal with the protection and to offer help, as the trafficked persons. Often psychological trauma does not allow trafficked to in an adequate way evaluate events so they can undertake necessary steps in repairing the situation. And as the result, trafficked more often in a routine way are presented as illegal immigrants rather than trafficked, they are put and stopped in court or administrative process, they are fined or expelled from the country. After turned in the country of origin these persons may be prosecuted further for using false documentation, for illegal escape from the country etc. As the consequence, sufferings and the suffered trauma are more complicated from the nightmarish caused during the talks with the state execution organs.

“The rights of trafficked victims should be in the center of the efforts on prevention and the fight against trafficking, assistance and ensuring the compensation of victims”⁵²⁰.

Identification is very important to stop further violation of rights and victimization of trafficked victims, and in many cases to prevent victimization from authorities and the structures that are supposed to defend victims. In many countries of destination “victims of trafficking could be taken by mistake as illegal immigrants and thus they are deported or they are put in the detention centers”.⁵²¹

UN Commissioner for Human Rights considers the failure of quick identifying of victims as ;”a further violation of human rights of this person”.⁵²²

Identification of trafficked persons is important on ensuring human rights; form the first identification and the most important is that there should be ensured the access on protection and the needed protection.

In order to protect and to help, it is important that the victims are precisely and immediately identified. In many of international law documents the need for effective identification is stressed out. For example, in the document ECOSOC (UN Economic and Social Council) on the Principles and the Recommended Guidelines on the rights of trafficked persons it is said: ”failure on correct identification of a person could result as a denial of his rights. For this states are obliged to ensure that the identification could and should be developed by commitment”.⁵²³

EU Action Plan in the field of anti trafficking adopted by the Council of Europe in December 2005, covers a package of measures in order to facilitate development of abilities to identify

⁵¹⁹ Limanowska, B., “Trafficking of human beings in South-East Europe”, UNICEF, OKB OHCHR, OSBE/ODIHR, 2002, page 142.

⁵²⁰ OESC/ODIHR. National Mechanisms of reference. Unified Efforts on Protecting the rights of trafficked persons. Practical Manual,

⁵²¹ IOM. IOM Manual for direct assistance of victims of trafficking, Tirana 2007.

⁵²² UNHRC. Report of UN High Commissioner for Human Rights. Principles and Guidelines on Human Rights and Trafficking with Human Beings, 2002.

⁵²³ OKB-ECOSOC, (UN- Economic and Social Council) “Principles and Guidelines Recommended for Human Rights and Trafficking with Human Being. UN Report by High Commissioner for Human Rights in the Economic and Social Council”, E/2002/68/Add.1, 2002, pg. 6.

trafficked persons (e.g. workshops and exchange of best experiences and practices).⁵²⁴ Importance of developing of effective methods on identifying trafficked persons is stressed out in many studies ensuring that victims not to be penalized or punished for deeds or related directly to the fact of being trafficked, in this regard, as soon as there is a justifiable doubt that someone could have seen trafficked there should be a cautious evaluation of their case. Further, the order for deportation should be suspended⁵²⁵ and a help should be given in accordance with the needs and the rights they joy, including legal independent counseling regarding their situation.

Article 12.1 of European Council Convention foresees: "each party should adopt these legislative measures and others based on needs in order to help victims on their physical, psychological and social renewal. This help should include at least:[...] counseling and information, especially regarding the services at the disposal for them in a language they do not understand. Similar obligation exists also in EU⁵²⁶. OSCE engagement against trafficking calls on states to ensure assistance to the victims and especially on the access in the legal help and counseling in a language which is understood by the victim."⁵²⁷

Principle that a trafficked person should not be penalized acts in two ways: a) for the violations committed during the process of trafficking (violations which come as cause-consequence); b) violations which are not linked with the act of trafficking but victims of trafficking are obliged to commit being that they do not have autonomy on acts they commit (violations committed by being forced to commit).⁵²⁸

State legislations, guideliness for prosecutors and other subjects of criminal law should include both of these violations in fulfilling their duty on not punishing victims of trafficking. A complete list with the violations victims could do during their trafficking or as the consequence of trafficking, is impossible to be done. People are trafficked for many reasons and violations and therefore consequently violations are linked to these reasons. However, there are some violations which are committed more often in the context of trafficking with the human beings.⁵²⁹

⁵²⁴ "EU Plan on best practices, standards and procedures on combating and preventing Trafficking with human beings". Official Gazette, *C 311, 09/12/2005*.

⁵²⁵ Council of Europe, Op. Cit., Article 10, paragraph. 10. 3: "when the age of victim cannot be known for sure and when there is a reason to believe that victim is minor, he/she is presumed to be minor and there should be given special measures on his/her protection while waiting for the verification of his/her age".

⁵²⁶ EU Directive 2011/36/ European Parliament and Council, date April 05, 2011 on preventing and combating trafficking with human beings and protection of victims and that replaces Cadre Decision of Council 2002/629/JHA (April 05, 2011), Art. 11.5.

⁵²⁷ Beings for Labour Exploitation (Madrid, 30 November 2007), para. 3; OSCE Ministerial Council, Decision No. 5/08 Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach (Helsinki, 5 December 2008), para. 10; OSCE Permanent Council, Decision No.557/Rev. 1 OSCE Action Plan to Combat Trafficking in Human Beings (Vienna, 7 July 2005), Chap. IV, para. 6.1.

⁵²⁸ United Nations Working Group on Trafficking in Persons, Non-punishment and non-prosecution of victims of trafficking in persons: administrative and judicial approaches to offences committed in the process of such trafficking, CTOC/ COP/WG.4/2010/4 (9 December 2009), paragraph. 4, (UN Working group on Trafficked Persons), accessed on April 10, 2013

⁵²⁹ UN Office for Drugs and Crimes (UNODC), Model Law against Trafficking of Persons (August 05, 2009), accessed on January 29, 2013, pg.40:" Model Law against Trafficking of Persons" in the commentary of article 10 gives examples for guideliness for prosecutors regarding legals systems where prosecutors are given a level of discretion:"a victim of trafficking should not be detained, arrested or burdened with the responsibility for prosecution or administrative sanctions for criminal offenses committed from him or as a direct result of crime of trafficking of persons, including: a) illegal entry, exit or stay of a person in [state];b) ensuring of possession of whatever travel document or falsified identity that he/she has taken in order to enter or exit to/from the country

Criminal offenses which could be committed from victims during the time of trafficking include and which are not limited only with the law on immigration, giving the false information in order to get travel documents, working permission, temporary residence, illegally crossing border and the violations during the time of stay with the visa. These criminal offenses which may be committed as a consequence of trafficking and those committed during the time of being trafficked when the victim is controlled by the trafficker. Such criminal offenses include but are not limited to the criminal offenses linked to the type of exploitation for what the victim is trafficked. For example, victims forced to deal with the prostitution may not have permission (when in fact they should) or they may be working against the legislation on prostitution. These criminal offenses contain threat for law and order. State has a legitimate interest to prevent these activities and to arrest them. However in cases when a victim of trafficking has committed a crime as a cause or as a consequence of being direct victim of trafficking, prosecutor or judge should in each case analyze the level of linkage of this criminal offense with the victims trafficking and with the lack of their autonomy. There were the criminal offense is linked to the situation of an accused or suspected as the trafficked the state should give them immunity on prosecution, detention or execution of the punishment. But if trafficked person has committed a crime that was not dependent on the fact of being trafficked or if he has committed a crime but his own will without being object of any of ways foreseen with the definition of trafficking, he should be hold responsible for his deeds. Most of the countries of the Council of Europe have ratified Convention of European Council on the activities against trafficking with the human beings.⁵³⁰

Despite the fact that the above mentioned conventions are ratified the theoretical and practical problems on concepts regarding identification of trafficking exist in most EU countries by not refined still national standards on identifying of trafficked persons, therefore as the lack of proper or not proper identification, we may have also unlawful punishment against the victims of trafficking with human beings.

Principle of nonpunishment as an essential element in the approaching human rights

Trafficked who were victims of one or more criminal offenses, states are obliged to help these persons and not to treat them as criminals. Principles and Guidelines recommended by United Nations express: "human rights of trafficked should be in the center of all efforts on preventing and fighting trafficking as well as protection, assistance and offering solutions for victims".⁵³¹ European Council Convention for action against trafficking with human beings 2005 in its preamble foresees: "the most important objectives should be consideration of human rights of trafficked, protection of victims and the fight against trafficking".⁵³² In Porto Declaration of Council of Ministers, states participant in OSCE have confirmed also that: "dignity and human rights of victims should be respected in all the times"⁵³³.

regarding the act of trafficking of persons; c) involving of person in the illegal activities in a size in which he/she were forced to do it.

⁵³⁰ European Council Convention on activities against Trafficking with Human Being (Warsaw, 2005).

⁵³¹ UN Office of the High Commissioner for Human Rights, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 (20 May 2002), (Office of UN High Commissioner for Human Rights), accessed on: January 31, 2013.

⁵³² European Council, Convention for Acting against Trafficking with Human Beings, CETS Nr. 197 (Warsaw, 2005), Art. 26.

⁵³³ OSCE Ministerial Council, Declaration on Trafficking in Human Beings, MC(10). JOUR/2 (Porto, 7 December 2002), Annex 2, Section II, para. 6 (OSCE Council of Ministers).

Penalization of a person for acts he has done as the direct cause or consequence of being trafficked, should be seen exactly in that context: this not only labels and punishes them without right but this also affects objectives of these human rights.

Principle of nondiscrimination besides it requires states to not undertake determined activities against trafficked persons, it sets up some positive obligations. In this regard the decision of European Court for Human Rights related to article 4 of the European Convention on Protection of basic human rights and freedoms (forbiddance of slavery and forced labor), case *Rantsev vs. Cyprus and Russia*, determined the obligation of states ---that respect of human rights includes also existence of the appropriate legislation”[...] to guarantee practical and effective protection of possible victims of trafficking”.⁵³⁴ This emphasis on protection of victims rights shows in reality that obligation includes also the guarantee that these persons will not be punished for the criminal offenses which are directly linked to the fact that they were trafficked. For this reason, obligation for non-punishment is closely linked to the obligations of the state to identify, to protect and to assist victims of trafficking⁵³⁵ as well as with the obligation of the state to prosecute a situation of trafficking in order to identify smuggler and to require to bring the smuggler to the responsibility before justice⁵³⁶.

Principle of non-punishment can be violate directly and indirectly. Indirect violation is done when state authorities do not manage to identify a person as the victim of trafficking which creates an incomplete picture of circumstances of the criminal offence and the criminal responsibility. The direct violation of principle of non-punishment comes from the situations when state authorities treat an criminal offence committed by a victim of trafficking as “they should have known”⁵³⁷ their status and that in fact do not give needed importance of this fact when they decide on his/her responsibility.

Conclusions

Victims of trafficking are victims of criminal offenses and the heavy violations of human rights. According to the international law, states are obliged to ensure protection of the rights of victims by including the right to precisely be identified as trafficked adult or minor and it is precisely this identification that contains the crucial element of their protection. Non-punishment is not only a principle which respects and protects the rights of victim, including here also the right of being protected from re-victimization and offering assurance in recuperation. Respecting of this legal principle helps also the fulfillment of state obligations towards trafficked persons in accordance with the decision of European Court on Human Rights---case *Ranstev*.

Identification of trafficked persons is important in ensuring human rights from the first identification and most important is that it should be thought the ensurance of access on protection and the necessary assistance. In order to protect and to assist victims the precise and

⁵³⁴ European Court for Human Rights, case *Rantsev vs. Cyprus and Russia*, request nr. 25965/04 (Strasbourg, January 07, 2010) , accessed on: January 31, 2013, paragraph. 284

⁵³⁵ Ibid. paragraph 285: “[...] member states should build a legal and administrative cadre on preventing and combating trafficking. Court should take into the account that Protocol I of Palermo and Convention on Anti Trafficking refer to the need for a comprehensive approach to hit trafficking which includes measure on prevention and protection of victims [...] Expanding positive obligations which derive from article 4 should be seen in a broader context”.

⁵³⁶ Ibid., paragraph 286: positive obligations of states towards victims of trafficking start when “authorities are convinced or should be convinced on circumstances which raise believable suspects that an identified individual has been or is in front of close danger to the trafficking or being used[...].

⁵³⁷ Ibid.

immediate identification of victims is important because failure on correct identification of a trafficked person could result with the denial of his/her human rights. For this states/party are obliged to ensure that identification should and could be developed precisely. Development of effective methods on identification of trafficked persons is of specific importance. In this regard the protection of victims of trafficking is objective and an important obligation for all states. Punishment of trafficking victims (for crimes committed or that are linked with their trafficking) contains a heavy denial of justice. States are obliged not to give punishments for committed crimes by trafficked person as a consequence of their trafficking or during the time of being trafficked. Obligation not to punish victims of trafficking should be executed effectively by states when facing trafficking victims. Policies and the criminal issues in the states should treat trafficking with human beings starting from the point of human rights by having in the center victim. States should encourage police, prosecutors and judges to consider trafficking victims as victims of heavy crimes and the violation of human rights---crimes and violations that should be seen as priorities. States should build up effective mechanisms to identify immediately trafficking victims, so the victims will not be punished for criminal offenses they have committed in the time they were trafficked or as the consequence of trafficking. Early identification is crucial and states should guarantee that public officials which may be in contacts with the trafficked as police officers, custom officers, labor inspectors, medical personnel as well the personnel of centers where th eillegal immigrants are kept, should be trained so they could do this professional identification. This training should include also addressing of difficulties on identification of victims who at the first sight could appear as suspected as well as on the guidelines on executing the disposal of non-punishing the trafficking victims.

it can be concluded that the precise identification of trafficking victims and as the result of this identification, their non-punishment contributes to further violation of human rights-trafficking victims.

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