



IOM International Organization for Migration
OIM Organisation Internationale pour les Migrations
OIM Organización Internacional para las Migraciones

INTERNATIONAL DIALOGUE ON MIGRATION 2009
INTERSESSIONAL WORKSHOP ON

**TRAFFICKING IN PERSONS AND EXPLOITATION OF MIGRANTS:
ENSURING THE PROTECTION OF HUMAN RIGHTS**

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BACKGROUND PAPER

Introduction

Human rights abuses and exploitation are some of the darker realities of migration for too many migrants. One specific category of exploited migrants is trafficked persons who deserve particular attention due to their extreme vulnerability, the gravity of human rights abuses suffered and the links between trafficking in persons and organized crime. Trafficked persons, and migrants who are exploited or abused but not trafficked, may have very similar needs, yet providing them with appropriate and necessary human rights protection and humanitarian and other forms of assistance can prove challenging.

The first intersessional workshop of the International Dialogue on Migration (IDM) of 2009, *Effective Respect for the Human Rights of Migrants: a Shared Responsibility*, 25 – 26 March, looked at the international human rights legal framework applicable to migrants and practical tools and measures to ensure protection of the human rights of migrants.¹ This second IDM workshop focuses more closely on trafficked persons, as well as other migrants who suffer exploitation and abuse.

Trafficking in persons and exploitation of migrants present themselves in a variety of forms, raising operational challenges in responding to the different situations and needs of affected migrants. Issues surrounding identification are particularly acute. Is there one standard approach to identifying an individual as “trafficked”? Questions arise in relation to those who do not fit the trafficking definition but who nonetheless have been abused or exploited. How to respond to the needs of migrants who have been smuggled, rather than trafficked, but suffer gross human rights violations along the way? What challenges do mixed migration flows pose for the protection of trafficked persons and abused or exploited migrants? What should be done for someone who has migrated freely and with appropriate documentation but who is subsequently forced into slavery-like conditions? What are the implications of these questions for effective implementation of existing mechanisms to protect the human rights of migrants?

¹ See www.iom.int/idmhumanrights for further information on the first intersessional workshop.

Since the advent of the United Nations Convention against Transnational Organized Crime, and its supplementary Protocols on Trafficking in Persons and Migrant Smuggling, State concern about these phenomena has been demonstrated by the growing number of national, regional and international legal and policy frameworks that address trafficking and smuggling specifically. Trafficking in persons constitutes a crime to which governments respond in accordance with and in the interest of the rule of law. Many States have recognized that this phenomenon undermines their sovereign right to regulate their borders, hamper the effectiveness of immigration and labour policies, and compromise their ability to observe their international human rights obligations. The same is true for the broader problem of migrant exploitation which contributes to the flourishing of “grey and black markets”. The existence of such spheres beyond the scope of governmental and public oversight distorts understanding of a country’s real and legitimate labour needs and policy development while simultaneously eroding public support for legal migration.

Neither trafficking in persons, migrant smuggling, nor migrant exploitation can be seen in isolation from international migration at large. While States have a sovereign prerogative to decide which non-nationals to allow onto their territory (within the boundaries of international legal obligations), it is also important to recognize that overly restrictive immigration regimes that do not provide adequate legal channels for needed migration can inadvertently fuel these problems. Migrants, many of whom respond to real demands in the labour markets of destination countries, may see no other option but to resort to perilous migration means, making them vulnerable to trafficking, human rights violations and abuse.

Legal Framework

As a fundamental premise, all migrants, whatever their migratory status and whatever their living and working conditions, have and are entitled to respect for their human rights.² Labour, humanitarian, refugee and other branches of law offer further sources of rights applicable to migrants. Numerous international and regional instruments ensure the protection of individuals from a range of abusive and exploitative practices³. Migrants are vulnerable to different forms of exploitation and abuse, discrimination and hostility, with direct consequences for the enjoyment of their human rights. Despite the *de jure* applicability of all but few human rights to all migrants, in reality migrants continue to be particularly vulnerable to human rights violations due to their status as non-nationals, a condition exacerbated in the case of migrants in an irregular situation.

With respect to trafficking in persons, *the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children*, supplementing the UN

² For a more detailed discussion of the human rights of migrants, please refer to the background paper for the IDM interessional workshop *Effective Respect for the Human Rights of Migrants: A Shared Responsibility* (25 & 26 March 2009), available at www.iom.int/idmhumanrights.

³ In particular, it is worth highlighting the following instruments: the Convention on the Eradication of all Discrimination against Women; the Convention on the Rights of the Child; the International Convention on the Protection of the Rights of all Migrant Workers and their Families; the 1973 ILO Convention No.138 concerning Minimum Age for Admission to Employment; the 1999 ILO Convention No.182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour; the 2002 OHCHR Recommended Principles and Guidelines on Human Rights and Human Trafficking; and the 1951 Refugee Convention.

Convention against Transnational Organized Crime is the most recent and comprehensive international instrument addressing this issue⁴. The Trafficking Protocol defines and standardizes the terminology relating to the act of trafficking, thereby providing, despite certain shortcomings, for a solid definition under which circumstances a person becomes a victim of trafficking. While the Trafficking Protocol is first and foremost a criminal justice instrument, it makes provisions for the protection of the human rights of and assistance to trafficked persons.

In short, protection and assistance for all trafficked persons and migrants who suffer exploitation and abuse must be based on their human rights, guided by the applicable human rights standards and aim at full implementation of and respect for the human rights of all persons. In addition, special additional protection regimes are available for those falling under a specific category, such as trafficked persons.

Putting Rights into Practice: Challenges and Solutions

Trafficked persons – While there is no shortage of international law mechanisms related to the human rights of migrants and trafficked persons, putting these mechanisms into effective practice has proved challenging. Notwithstanding the goodwill on the part of the international community to protect trafficked persons, in practice there are significant difficulties in applying the international legal definition of trafficking to individual cases. In attempt to identify victims, practitioners frequently ask, for example, if movement of the victim is essential to the trafficking process. If so, how far does someone need to have moved? To what extent does trafficking in persons require the involvement of an organized criminal group?⁵ Is it necessary, for example, to have a clear indication of collusion between the victim’s recruiter, transporter, and exploiter? Due to the complex realities of the crime of trafficking and the situation of trafficked persons, compounded by reluctance of affected persons to come forward due to fear and trauma, trafficking frequently remains un- or under-detected. Identification challenges are further exacerbated by certain clichés surrounding trafficking, for instance that it uniquely concerns women and girls trafficked for sexual exploitation. The reality of trafficking is much broader, including for example the trafficking of men and boys for forced labour. As a result, the protection and assistance needs of many trafficked persons remain unmet.

Exploited migrants – Many migrants who suffer abuse and exploitation have never been trafficked at all. In other words, all victims of trafficking are also victims of exploitation, yet not all exploited migrants are also trafficked persons. Contrary to common assumptions, documented migrants too can find themselves subject to exploitation and abuse. Exploitation and abuse, including physical, psychological and sexual violence, can result

⁴ In Article 3(a) the Protocol defines trafficking as “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”.

⁵ See articles 2, 3, and 37(4) of the Convention against Transnational Organized Crime, and article 1(1) of the Protocol.

from fraudulent recruitment and labour management practices; it can occur at the hands of smugglers or marriage brokers, in private homes and on the factory floor. Trafficked persons and exploited migrants are frequently found in informal and unregulated sectors of the economy. Domestic work provides a case in point: as an activity that takes place in the private sphere and which is frequently carried out by migrant women, vulnerability to exploitation is compounded. Excessive working hours, unpaid wages, inadequate care for health and wellbeing, and physical and sexual violence are some of the abuses suffered by migrant domestic workers.

It is worth noting, however, that there are no generally applicable definitions for the exploitation or abuse of migrants. As a result, again, questions arise: is exploitation determined by an objective or subjective test? Is it relevant that a migrant was promised \$400 a month, and only earned \$300 or \$250? Is it relevant that this migrant has understood, agreed, and wants to work for \$5 a day picking tomatoes, even if the minimum or standard wage is \$5 per hour? And what of the case of the migrant who has paid a smuggler an exorbitant sum yet suffers severe physical abuse in the course of her passage? In other words, what are the critical differences that distinguish a trafficked person from an exploited migrant, or from a smuggled migrant who has been abused?

A needs-first approach – The reality, therefore, is one in which two migrants, despite both suffering abuse or exploitation and having similar needs, may face wholly different protection solutions if one is identified as trafficked, and the other is not. In addressing these circumstances, the challenge is to ensure respect for the rights of all migrants, while meeting the specific needs of those that have suffered or may be particularly vulnerable to exploitation and abuse. At the same time, additional support and legal protections should be afforded to those positively identified as trafficked. In practice, response mechanisms should prioritize the determination of needs – humanitarian, legal, social, medical and otherwise – in order to provide necessary assistance and protection. A “needs-first approach” would ensure that the basic needs of all migrants are met, whether they have been trafficked or subjected more generally to exploitation and abuse. Such a practical approach ensures implementation of human rights principles enshrined in generally applicable human rights law as well as specific protections contained in the Trafficking Protocol. It would also allow some of the existing identification hurdles to be overcome and could generate a more nuanced response to the difficult circumstances presented by individual cases.

Migration management tools to combat trafficking in persons and exploitation of migrants

The following represents a small selection of some migration management tools available to States to prevent trafficking, exploitation, and abuse, and protect the victims of these practices. These and others will be further explored during the course of the workshop discussions.

Protecting migrants in need – Where trafficking and exploitation are detected or suspected, a rights-based approach focusing on “needs first” can ensure that victims are adequately protected and cared for while further steps are taken. In the provision of medical, psychological and material assistance, non-governmental organizations can be

important allies, especially in the case of irregular migrants who often feel more comfortable reaching out to NGOs. Reflection periods are a tool principally used for trafficked persons but could also be considered in cases of severe exploitation and abuse to allow individuals to begin to recover physically and psychologically and consider their options. Reflection periods should not be conditional on a migrant's cooperation with law enforcement agencies; however, many countries have witnessed a positive correlation between the granting of reflection periods and cooperation of the victim in prosecution efforts. Access to remedies and redress is particularly important for trafficked persons and exploited migrants, yet isolation, lack of familiarity with the local language, legal and administrative procedures, and fear of deportation in the case of undocumented migrants, present formidable barriers for migrants seeking access to justice. In many countries, for instance, employment tribunals are not required to distinguish between documented and undocumented migrant workers and may thus offer one channel through which migrants can claim their rights.

Preventing human rights violations and exploitation throughout the migration process

– Establishing appropriate legal frameworks and migration policies with due respect for human rights in countries of origin and destination is a first step toward preventing trafficking in persons and migrant exploitation. Many countries have already adopted specialised domestic legislation to criminalize human trafficking and protect its victims. The particular vulnerabilities non-nationals may experience in the workplace need specific attention, thus highlighting the relevance of labour laws. For instance, many States prohibit the confiscation of migrants' travel documents by employers and have eliminated "sponsorship-systems" that tie migrants to a single employer, as both practices have been shown to increase the risk of exploitation.

Governments in home and host countries need to participate in regulating and monitoring recruitment to ensure a fair, transparent process consistent with human rights and ethical standards. By engaging with relevant partners in the private sector, for example, governments can monitor and verify the contracts and conditions offered to migrants. In countries of origin, migrant information centres can provide migrants with reliable information on safe migration channels, legitimate recruiting agents, contracts and their rights and responsibilities vis-à-vis the country of destination and their future employer, as well as recourse mechanisms. Combating fraudulent recruitment of migrants can be particularly challenging, as distinctions between informal recruiting networks, illegal recruiters and criminal organizations involved in trafficking in persons can be blurred. One element to consider is the extortionate fees paid by many migrants to traffickers, smugglers or fraudulent recruiters, as debt bondage is one of the single most important sources of vulnerability to exploitation and abuse for migrants.

In addressing issues related to trafficking and exploitation of migrants in the workplace, informal and unregulated sectors of the economy, including domestic work, require the particular attention of policymakers and practitioners. Ministries of Labour are particularly important actors, but their work can be strengthened through inter-ministerial partnerships, including with those government bodies charged with immigration affairs, health, social services and the protection of women and children. Useful synergies can also be created with law enforcement agencies, employers, trade unions, NGOs and others. Labour administration authorities which carry out inspection and monitoring have a key role to

play in detecting and preventing trafficking and exploitation. These may be organized as mobile inspection units and are sometimes vested with the authority to enter private home. The effectiveness of any institutions or structures charged with the protection of migrants depends in large part on the definition and strength of their mandate and the human and financial resources made available to them.

All these measures imply roles for countries of origin, transit and destination and well as a range of other stakeholders. There is now wide recognition of the benefits emanating from cooperation and partnerships, at bilateral, regional and international levels as well as with non-state actors, in addressing trafficking in persons and migrant exploitation. Many regional consultative processes on migration, for example, are either specifically dedicated to combating human trafficking or have placed counter-trafficking and protection of the human rights of migrants on their agendas. Cross-cutting partnerships, between different actors, different States, different levels of government, as well as non-State actors can help expand overall capacity to tackle the complex situations at hand.

Conclusion

Migrant exploitation and trafficking in persons pose considerable challenges to managing migration in a safe, dignified and secure manner in full respect of existing international human rights obligations. The complex nature of these phenomena calls for innovative policy solutions to ensure implementation of existing human rights standards and counteract the severe human rights violations associated with trafficking, exploitation and related circumstances. The protection of trafficked persons, whether formally identified as such or not, can be strengthened when embedded in a coherent framework at national and international levels that ensures respect for the human rights of all migrants, irrespective of migratory status or administrative category. This workshop will provide an opportunity to discuss and evaluate the legal, policy and programmatic frameworks available and the capacities required fully to implement them and improve the condition of many migrants around the world.