

**Observations by
the United Nations High Commissioner for Human Rights and
the United Nations High Commissioner for Refugees
on the
Proposal for an EU Council Framework Decision
on Combating Trafficking in Human Beings**

Introduction

1. The United Nations High Commissioner for Human Rights (HCHR) and the United Nations High Commissioner for Refugees (UNHCR) wish, at the outset, to express their support for the work of the European Union against trafficking in human beings and related exploitation. They do so from the viewpoint of two United Nations bodies with different but complementary mandates in this area. Both organisations believe that the present proposal to strengthen common approaches to this issue through the adoption of a Council Framework Decision is an important and timely step forward.

2. HCHR and UNHCR understand from the explanatory memorandum that the proposed Framework Decision seeks to extend the obligations contained in the recently adopted UN *Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organised Crime* (A/55/383). While supporting this effort, HCHR and UNHCR are concerned that adopting an approach which differs from that contained in the United Nations Protocol on Trafficking may weaken the link between the two instruments. In addition, it is cause for concern that several aspects of the proposed Framework Decision, in particular those dealing with protection of victims and witnesses, fall considerably short of established international standards. The lack of reference to even basic protective measures for victims and witnesses of trafficking, as well as the omission of a saving clause concerning asylum-seekers and refugees, may create an impression that such protections are both unimportant and optional in the fight against trafficking.

3. On 21 March 2001, the High Commissioner for Human Rights submitted to the European Commission and the Swedish Presidency of the European Union a note addressing the above issues in some detail with the view to assisting the European Union in ensuring that this new regional instrument reinforces the letter and spirit of existing international legal standards. It is not clear as to whether the Council, in reviewing the Commission proposal, has considered taking account of these key concerns of HCHR. In the circumstances, HCHR and UNHCR are making the present joint submission, on the basis of HCHR's earlier comments, to urge the Commission and the Member States of the European Union to ensure the proposed Framework Decision's compatibility with established international standards. It is significant to note that most of the concerns of HCHR and UNHCR regarding the main shortcomings of the proposed Framework Decision are also shared by the European Parliament as evinced by its deliberations during its session on 12 June 2001, including a call for incorporating the definition of trafficking of the Palermo Protocol into the Framework Decision.

Victims and Witnesses of Trafficking

4. The proposed Framework Decision contains only minimal provisions for the protection of victims of trafficking. HCHR and UNHCR have taken note of the provisions of the Council Framework Decision of 15 March 2000 on the standing of victims in criminal proceedings yet believe that the special needs of trafficking victims are not sufficiently covered by these provisions and, moreover, should have their place in a specific EU instrument on trafficking in persons. Therefore, HCHR and UNHCR urge the Commission and Member States to consider the following issues for inclusion in a revised Article on this issue.

(i) Prosecution for status related offences

5. Victims of trafficking should be protected from prosecution for the illegality of their coerced entry or residence, or for the activities they may be coerced to perform as a consequence of their status as trafficked persons. Victims of trafficking should, for example, be able to use the fact of their being trafficked as a defence against status-related offences.

(ii) Protection of and assistance to victims

6. In order to promote uniformity and minimum standards, the protection and assistance provisions of the United Nations Protocol on Trafficking should be incorporated into the proposed Framework Decision as basic obligations. To this end, the proposed Framework Decision should require EU Member States to provide for the physical safety of trafficking victims within their territory, counselling and information as well as basic measures for their physical and psychological recovery. The instrument should also provide for adopting legislative or other measures that permit victims of trafficking to remain in an EU Member State, temporarily or permanently, in appropriate cases. In addition to providing a measure of safety, such a provision would encourage victims of trafficking to co-operate with the authorities and thereby contribute to achieving the law enforcement objectives of the Framework Decision. It is important, in this context, to note that victim protection must be considered separately from witness protection, as not all victims of trafficking will be selected by investigating and prosecuting authorities to act as witnesses in criminal proceedings.

(iii) Witness protection

7. Trafficked persons who agree to testify against their traffickers are at considerable risk of acts of retaliation by trafficking networks. Depending on the circumstances on the case, such witnesses require appropriate protective measures, including preventive measures during the investigation, in-camera hearings at the trial stage, or the granting of temporary or permanent residence. The adoption of separate measures for the protection of witnesses, while meeting their humanitarian needs, can also help to maintain the integrity of asylum systems and procedures in EU Member States.

(iv) Repatriation of trafficked persons

8. Safe, and as far as possible, voluntary return must be at the core of any credible protective strategy for trafficked persons. The draft Framework Decision should include a provision on the return of trafficked persons in safety and dignity. Such return should occur only after a proper identification of the protective needs of trafficked persons, including in relation to measures for victims and witness protection.

(v) Protecting the right of asylum

9. HCHR and UNHCR acknowledge that being a victim of human trafficking normally does not suffice to establish a valid claim for refugee status. However, this does not exclude that, under exceptional circumstances, trafficked persons may be in need of international refugee protection, for instance if the acts inflicted by the perpetrators would amount to persecution for one of the reasons contained in the 1951 Convention definition, in the absence of effective national protection. For such persons, HCHR and UNHCR strongly urge the Commission and Member States to incorporate a “saving clause” into the proposed Framework Decision which will maintain the right to submit an application for asylum, in accordance with the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and other relevant international instruments. This clause should state that “nothing in this Framework Decision shall adversely affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and human rights law and, in particular, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement set out therein.”

(vi) Remedies

10. Victims of human rights violations, such as trafficking, have a right under international law to be provided with access to adequate and appropriate remedies. The effective exercise of this right requires that States provide trafficking victims with information on the possibilities of obtaining remedies, including compensation for trafficking and other criminal acts to which they have been subjected, and legal and other assistance to enable them to obtain the remedies to which they are entitled.

(vii) Protecting the Rights and Interests of Trafficked Children

11. Although a separate Framework Decision on combating the sexual exploitation of children and child pornography is currently being discussed, it is essential to acknowledge that the problem of child trafficking is a distinct one requiring separate attention. The power of the Framework Decision to protect the rights and interests of trafficked children would be strengthened through an explicit reference to the fact that children have special rights under international law, in particular the Convention on the Rights of the Child; that child victims of trafficking have special needs that must be recognised and met by EU Member States; that EU Member States are obliged to take measures to prevent trafficking of children; and that in dealing with child victims of trafficking, the best interests of the child (including the right to physical and psychological recovery and social integration) are to be at all times paramount. It is also important to ensure that the trafficked child is not criminalised in any way (for example, through prosecution for status-related offences) and that sensitive and appropriate measures should be taken to reconcile the child with her or his family or to otherwise meet her or his best interests.

Preventing Trafficking

12. The acknowledged root causes of trafficking include economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women and girls, gender discrimination in the family, the community and by the State; political and legal factors such as a lack of appropriate legislation and public sector corruption; and international factors such as the growing feminisation of labour migration, on the one hand, and increasingly restrictive immigration policies of recipient countries, on the other. While it is clearly beyond the scope of the proposed Framework Decision to address these issues in any depth, the lack of any reference to prevention of trafficking is a source of concern for HCHR and UNHCR.

The Need for a Non-discrimination clause

13. The principle of non-discrimination is a fundamental rule of international law and one of particular relevance to the situation and vulnerabilities of irregular or illegal migrants. Measures aimed at prevention of trafficking have been used in some situations to discriminate against women and other groups in a manner amounting to a denial of their basic right to leave a country and to migrate legally. The inclusion of a general non-discrimination clause would go some considerable way towards ensuring that such discrimination does not become an unintended side effect of the proposed Framework Decision.

27 June 2001

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