**Submission to the UN Committee on the Elimination of All Forms of Discrimination against Women**

**General discussion on trafficking in women and girls in the context of global migration**

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**Joint submission by**

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## Human Rights, Gender Equality and a Human Rights based approach to combating trafficking in women and girls

1. A human rights based approach to combating trafficking in women and girls is critical to ensuring that the rights of survivors are effectively respected and fulfilled by States, and that women and girls’ empowerment and gender equality are central to all anti-trafficking measures adopted.
2. The right to non-discrimination on grounds of gender and to equal protection of the law and equality before the law must be ensured in all measures adopted by States to combat human trafficking. Gender equality means not only non-discrimination but also positive measures to achieve equality, and to recognise the intersections of multiple and intersecting axes of discrimination on grounds including race, religion, disability, political opinion, age, nationality, migration status, birth or social origin, gender and family status.
3. The participation of the most affected persons should be recognised as a core principle in human rights based approaches: Survivors of human trafficking, including girls, should participate in the design, planning, implementation and review of all anti-trafficking measures.

## Definition of trafficking in persons: Abuse of a position of vulnerability as a ‘means’

1. The ‘**abuse of a position of vulnerability’** is a means by which trafficking occurs. It is critical to recognise the broad concept of abuse and the personal, situational and circumstantial elements of such abuse. The UNODC Guidance Note on Abuse of a position of vulnerability notes that:

“[…] abuse occurs when an individual’s personal, situational or circumstantial vulnerability is intentionally used or otherwise taken advantage of, to recruit, transport, transfer, harbour or receive that person for the purpose of exploiting him or her, such that the person believes that submitting to the will of the abuser is the only real or acceptable option available to him or her, and that belief is reasonable in light of the victim’s situation. In determining whether the victim’s belief that he or she has no real or acceptable option is reasonable, the personal characteristics and circumstances of the victim should be taken into account.”[[1]](#footnote-1)

1. Consent of a survivor of trafficking is irrelevant where any of the **means** stated in the definition of trafficking of human beings are found. In *Chowdury and Others v. Greece,* the European Court of Human Rights noted that ‘the validity of the consent had to be assessed in the light of all the circumstances of the case’, and furthermore that, ‘in certain cases or circumstances, a given “service could not be treated as having been voluntarily accepted beforehand” by an individual’.[[2]](#footnote-2)
2. It should be noted that a question of **consent**is irrelevant to a situation of trafficking of **children**. It is sufficient to establish the act of trafficking of a child for the purpose of exploitation, regardless of the existence of the means element of the definition of trafficking.

## Practical and Effective Prevention of trafficking

1. Prevention measures must be practical and effective. As noted by the European Court of Human Rights in *Rantsev v Cyprus and Russia* (para. 284):

The Court considers that the spectrum of safeguards set out in national legislation must be adequate to ensure the practical and effective protection of the rights of victims or potential victims of trafficking. Accordingly, in addition to criminal law measures to punish traffickers, Article 4 requires member States to put in place adequate measures regulating businesses often used as a cover for human trafficking. Furthermore, a State’s immigration rules must address relevant concerns relating to encouragement, facilitation or tolerance of trafficking.

1. Effective measures to promote gender equality, including temporary special measures as required by Article 4 CEDAW and the elimination of harmful traditional practices as required by Article 5 CEDAW and General Recommendation no. 31, are critical to effective prevention of trafficking of women and girls.[[3]](#footnote-3)
2. Targeted preventive measures should include at a minimum:
3. Comprehensive country-wide programmes to promote birth registration of all children;
4. Expanding access to education for all girls, monitoring drop-out rates among girl children and adopting effective follow up programmes to ensure school participation and completion among girls particularly in socio-economically disadvantaged communities, minority groups, indigenous peoples, refugees and internally displaced persons, and other communities affected by conflict.
5. School and education curricula play an important role in informing girls and young women about the risks of human trafficking and assistance measures and programmes available. Education curricula should include age-appropriate information about all forms of human trafficking, and human rights of women and girls.
6. Gender stereotyping perpetuates direct and indirect discrimination against women and girls, and heightens risk. In accordance with Article 5 and 10 (c) of CEDAW, gender stereotyping of women and girls should be eliminated in education curricula, supporting women’s and girls’ empowerment as a preventive measure in the fight against human trafficking.
7. Expanding and enabling safe and legal routes to migration, including through family reunification, expanded resettlement programmes, humanitarian visas, and expanded routes to safe and regular labour migration, reduces vulnerability to human trafficking.
8. Consular and Embassy officials play a critical role in ensuring that visa and work permit applicants have access to information about the risks and prevalence of all forms of trafficking in human beings, and in providing information about assistance to possible victims. Targeted awareness raising initiatives in consular and embassy mission offices may be effective prevention measures.

## Trafficking for the purpose of labour exploitation: Prevention

1. Reducing risks and vulnerability to human trafficking for the purpose of labour exploitation requires that migrant workers have the right to change employers, independent residence status, and access to social security and public health care services.
2. Labour inspectors play a key role in preventing trafficking for the purpose of labour exploitation. The mandate of labour inspectors should be comprehensive to include all sectors, including those at particular risk such as agriculture sectors and domestic households, where migrant women and girls may be isolated and at risk of exploitation. This requires revising all legislative and policy measures that limit the mandate and scope of labour inspectorate functions.
3. Labour inspection services and other services responsible for the implementation of labour legislation and legislation relating to human trafficking should be strengthened, ensuring sufficient numbers and capacity of labour inspectors to carry out regular and unannounced inspections including in remote agricultural regions and domestic households.
4. Monitoring and regulation of recruitment agencies and other intermediaries is essential to protecting persons, particularly migrant workers, from possible abusive and fraudulent practices during the recruitment and placement process, and preventing trafficking for the purpose of labour exploitation.
5. Effective due diligence measures, required by law, to manage procurement and supply chain processes, in both the public and private sectors are essential to prevent and respond to risks of trafficking for the purpose of labour exploitation.

## Identification of victims of trafficking

1. States are under a procedural obligation to investigate the crime of trafficking where there is a credible suspicion that an individual is a victim of trafficking.[[4]](#footnote-4) The requirement to investigate and to identify potential victims does not depend on a complaint from the victim or next-of-kin. The authorities must act where they knew or ought to have known that there was a credible suspicion of trafficking occurring.
2. Identification of potential victims is a critical step in ensuring that the human rights of victims are effectively protected. Investigation is independent of criminal proceedings against the accused and a conviction of an accused person should not be linked to identification of a victim.
3. Identification of victims requires multi-agency involvement in identification processes, through granting a formal role to a wider range of frontline actors such as NGOs, labour inspectors, social workers, health-care staff, coast-guards or naval services, and other bodies that may come into contact with victims of trafficking.
4. To ensure timely and effective identification of victims of trafficking, regular access to detention centres, including immigration-related detention and removal centres, should be provided to specialised NGOs and lawyers. Following a positive reasonable grounds decision, presumed victims of trafficking must be removed from detention without delay, and be provided with assistance and protection.

## Assistance to victims of trafficking

1. Assistance to victims of trafficking should not be conditional on cooperation in criminal investigations, and must include timely and effective access to legal aid, interpretation services, counselling and all medical services necessary to ensure full physical, psychological and social recovery. Victims of trafficking require specialised assistance, in a safe environment. To facilitate recovery, access to education and to employment should be facilitated by states, without obstacles arising from immigration status or nationality.
2. Children of victims of trafficking should also be recognised as in need of protection and specialised assistance, including all medical, counselling and psychological assistance required. Access to education for children of victims should be facilitated to avoid delays and further marginalisation.

## Recovery and reflection period

1. The recovery and reflection period constitutes an important guarantee for victims and potential victims of trafficking and serves a number of purposes, including allowing a period for recovery from the injury endured, and protection from perpetrators of the crime of trafficking. It also allows victims to make an informed decision on whether to co-operate with the competent authorities in a criminal justice investigation.
2. The recovery and reflection period must be for a minimum period of 30 days. It is noted, however, that a longer period is required for recovery, and good practice would entail the granting of a longer recovery and reflection period. The recovery and reflection period is not conditional on cooperation with the investigation or prosecution authorities and must be granted when there are reasonable grounds to believe that the person concerned is a victim of trafficking.
3. During the recovery and reflection period, authorisation to remain in the territory of the State must be provided and no expulsion or removal orders can be enforced against a possible victim during this period. States must take all appropriate measures to ensure the safety and protection of possible victims and their families during the recovery and reflection period, including through the provision of safe and secure accommodation and social security. Assistance measures, including access to legal assistance, interpretation services, medical assistance, counselling and other measures necessary to ensure physical, psychological recovery of victims, must be provided.

## Residence permits

1. Recognising the importance of progressive realisation of rights, and the importance of residence to victims of trafficking without immigration permission, States should ensure that a residence permit is provided on humanitarian grounds, recognising that trafficking in human beings is a serious violation of human rights. As such, the grant of a renewable residence permit, and a pathway to citizenship, may be considered to be a component of the right to an effective remedy for victims of trafficking and their families.

## Non-punishment of victims of trafficking

1. Recognising that trafficking in human beings is a serious human rights violations, it is essential to ensure that victims of human trafficking are not subject to sanction, criminal or administrative, arising from their involvement in unlawful activities, to the extent that they were compelled to engage in such activities. Ensuring compliance with the non-punishment provisions requires legislation and other measures, including comprehensive guidance and training for police officers, prosecutors, immigration enforcement officers, and the judiciary, on the scope and purpose of the non-punishment provisions.

## Access to effective remedies including compensation

1. The right to an effective remedy for victims of trafficking include both the substantive elements of an effective remedy and procedural safeguards (as provided in the UN OHCHR Draft Basic Principles on the right to an effective remedy for victims of trafficking). States must ensure:
2. Victims of trafficking are systematically informed in a language they understand of the available avenues to seek compensation and the procedures to be followed to secure compensation;
3. Effective access to legal aid and early legal intervention is available and properly resourced;
4. Eligibility for compensation is not dependant on immigration status, residence or nationality and all procedural obstacles to accessing compensation, such as payment of fees or requirements to enter labour mediation, are removed;
5. Effective access to State compensation from for injuries and material and non-damages;
6. Effective access to compensation for violations of labour law, including non-payment or under-payment of wages;
7. Criminal assets are secured as early as possible in trafficking investigations to make confiscation orders effective.

## Child victims of trafficking in the context of global migration

1. The best interests of the child should be ensured in all measures adopted to prevent trafficking and to ensure effective protection of child victims.
2. Effective protection requires child specific identification and referral measures, and competent staff trained in child protection. Timely appointment of guardians *ad litem,* and referral of children to specialised and safe accommodation, is essential.
3. Children in minority communities, or internally displaced, refugee or stateless children, may be particularly vulnerable to trafficking. Targeted prevention measures are essential to ensure effective protection, including through working with youth and cultural mediators and all child protection professionals, and other frontline actors working with children. Targeted social, economic and other initiatives should include specific support for children in street situations, and children living in residential institutions, at risk of going missing or being exploited in begging and forced criminality in particular.
4. Age assessment plays a key role in ensuring that children are identified as such, and provided with all necessary child protection measures. Age assessment procedures should comply with General Comment no. 6 of the UN Committee on the Rights of the Child (2005) *Treatment of Unaccompanied and Separated Children Outside their Country of Origin.* In cases of doubt relating to age, the presumption of childhood should be applied and the benefit of the doubt given to the child.
5. All professionals working with child victims of trafficking or potential victims, should be trained to recognise and respond appropriately to the individual needs and the best interests of the child.

## Role of civil society

1. Civil society can play a key role in the identification of victims of trafficking, and in provision of assistance and protection. Coordination, planning and design of anti-trafficking measures should be based on strategic partnerships with and support for civil society. This must include financing and resourcing of NGOs and a supportive regulatory framework for their work, including in search and rescue activities at sea.

## International cooperation

1. Effective international cooperation in prevention, protection and investigation of the crime of human trafficking is essential. This includes proactive measures to facilitate mutual legal assistance, joint and mirror investigations and effective follow up in searching for missing children. In Rantsev v. Cyprus and Russia, it was held by the European Court of Human Rights, that:

 ‘[…] States are also subject to duty in cross-border trafficking cases to cooperate effectively with the relevant authorities of other States concerned in the investigation of events which occurred outside their territories’.[[5]](#footnote-5)

## Investigations and obligations of due diligence

1. In order for a positive obligation to take operational measures to arise in the circumstances of a particular case, it must be demonstrated that the State authorities were aware, or ought to have been aware, of circumstances giving rise to a credible suspicion that an identified individual had been, or was at real and immediate risk of being subjected to treatment in breach of Article 4 of the Convention. In the case of an answer in the affirmative, there will be a violation of that Article where the authorities fail to take appropriate measures within the scope of their powers to remove the individual from that situation or risk.[[6]](#footnote-6)
2. A requirement of promptness and reasonable expedition is required in all cases, where a credible suspicion of human trafficking arises. The investigation must be capable of leading to the identification and punishment of the persons responsible for the crime. As stated by the *European Court of Human Rights* in *Rantsev v. Cyprus and Russia,* this is an obligation of means, not result.[[7]](#footnote-7) Where it is possible to remove the victim from a harmful situation, the investigation must be undertaken as a matter of urgency.

## International protection for trafficked persons

1. In its 2006 Guidelines on International Protection, the UNHCR has recognised that “some victims or potential victims of trafficking may fall within the definition of a refugee contained in Article 1A(2) of the 1951 Convention and may therefore be entitled to international refugee protection”.[[8]](#footnote-8) Indeed, a claim for international protection submitted by a victim or potential victim of trafficking can arise in a number of circumstances: e.g. the victim may be trafficked abroad and seek the protection of the State where she or he now is, or the victim may be trafficked within national territory and flee abroad in search of international protection, or also the individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may flee abroad in search of international protection. These circumstances are clearly exacerbated by current large movements of people across international borders. The acknowledgment that some victims of trafficking might be entitled to refugee status, combined with the principle of non-refoulement, Art. 14(1) of the 2000 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children,[[9]](#footnote-9) requires that victims of trafficking are not only entitled to access protection schemes that are specific to victims of trafficking, but also not excluded from applying for and obtaining international protection.
2. In a number of jurisdictions, immigration authorities and courts have developed a substantial amount of case-law reaffirming the connections between human trafficking and asylum in terms of protection schemes and outcomes. Despite these developments in several jurisdictions, survivors of trafficking continue to face barriers in receiving the assistance and protection they need, particularly in accessing international protection. Indeed, in many countries the processes of refugee status determination and identification as a victim of trafficking run separately and survivors are faced with a choice as to which route to follow, with the latter choice often involving in practice cooperation in criminal proceedings. Numerous reports have highlighted how State authorities, particularly immigration and asylum authorities, often consider trafficked people as only being entitled to protection schemes and measures that are specific to victims of trafficking, resulting in their exclusion from the asylum route and the preclusion of access to other forms of protection such as subsidiary or humanitarian protection.[[10]](#footnote-10)
3. Asylum authorities lack not only the capacity to assess the nexus between asylum and trafficking when it is proven that the applicant is a victim of trafficking, but also the competence to spot indicators of human trafficking when assessing an asylum claim in which the applicant has not yet come forward. Overall, there are significant gaps in the data available on how often asylum is granted where the persecution feared is linked to human trafficking.
4. The need for the “identification and referral of victims of trafficking in persons and other forms of exploitation to appropriate processes and procedures, including for identification of international protection needs or victim support”,[[11]](#footnote-11) has been highlighted and emphasised also in the recently adopted Global Compact on Refugees. Access to asylum and other forms of international protection represents an essential alternative to current anti-trafficking instruments,[[12]](#footnote-12) particularly when the latter do not offer long-term protection, or make residence conditional on cooperation in criminal justice proceedings.
5. In the Italian context, the vast majority of instances in which refugee status has been granted to victims of trafficking relates to cases of Nigerian women and girls who have been trafficked for the purpose of sexual exploitation. A number of Territorial Commissions (TCs)[[13]](#footnote-13) and Tribunals have granted refugee status at first instance or after appeal trials considering the serious repercussions that victims might face after their escape and/or return in the country of origin, including retaliation from trafficking rings, re-trafficking, severe community or family ostracism, and severe discrimination. The grave violations of human rights to which victims of trafficking were subject was considered to be amounting to persecution and women victims of trafficking for the purpose of sexual exploitation was deemed to be members of a particular social group.[[14]](#footnote-14) When the applicant was unable to demonstrate that the well-founded fear was linked to one of the Convention grounds, or the belonging to a particular social group, TCs and Tribunals have decided to grant subsidiary protection.[[15]](#footnote-15)
6. In the United Kingdom, victims of trafficking have been deemed capable of being members of a particular social group and therefore entitled to refugee status in certain circumstances. In SB v. The Secretary of State for the Home Department, the Asylum and Immigration Tribunal held that former victims of trafficking and former victims of trafficking for sexual exploitation are capable of being members of a particular social group because of their shared common background or past experience of having been trafficked. The Tribunal however also emphasised that the group in question must have a distinct identity in the society in question. In the specific case, it was recognised that in the context of Moldovan society, a woman who has been trafficked for the purposes of sexual exploitation is a member of a particular social group, the particular social group in question being “former victims of trafficking for sexual exploitation”.[[16]](#footnote-16)
7. In France, the French National Court of Asylum (CNDA) had for a long time granted subsidiary protection only to victims of trafficking whose international protection claim was evaluated. In recent times, however, the CNDA has been increasingly granting refugee status to trafficked persons. The Courts have developed a set of criteria for determining whether an applicant is a member of a social group and whether no alternatives to international protection, e.g. internal relocation, exist. In the case of Mlle J.E. F, which concerns a Nigerian national from the Edo State who was forced into prostitution after being trafficked into France, the CNDA found that victims of trafficking from the Edo State do share a common background and distinct identity which falls within the definition of a particular social group. The applicant was therefore granted refugee status.[[17]](#footnote-17)

## Criminal Justice proceedings and protection of witnesses and victims

1. All necessary measures should be taken to ensure protection of the private life of victims and witnesses. States must take effective measures to ensure the safety and protection against intimidation of victims’ and witnesses and their families.
2. Special protection measures, including full implementation of child friendly justice measures, should be undertaken in all criminal proceedings involving children as witnesses or victims.
1. Guidance Note on ‘abuse of a position of vulnerability’ as a means of trafficking in persons in Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime. (2012) (para.2.5) [↑](#footnote-ref-1)
2. *Chowdury and Others v. Greece* (Application no. 21884/15), Judgment of 30 March 2017, para. 90 citing *Van der Mussele v. Belgium*, 23 November 1983, § 37, Series A no. 70. [↑](#footnote-ref-2)
3. UN Doc. CEDAW/C/GC/31/CRC/C/GC/18 [↑](#footnote-ref-3)
4. *See C.N. v. the United Kingdom* (Application no. 4239/08), Judgment of 13 November 2012, para. 69; *Rantsev v. Cyprus and Russia* (Application no. 25965/04), Judgment of 7 January 2010, para. 288. [↑](#footnote-ref-4)
5. *Rantsev v. Cyprus and Russia* (Application no. 25965/04), Judgment of 7 January 2010, para. 289. [↑](#footnote-ref-5)
6. *Ibid.* [↑](#footnote-ref-6)
7. *Ibid.*, para. 288 [↑](#footnote-ref-7)
8. Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked [↑](#footnote-ref-8)
9. ‘Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime’ (first published 2000, United Nations Convention against Transnational Organized Crime, no date) vol 2237 UNTS 319 Art. 14(1). [↑](#footnote-ref-9)
10. The Inter-Agency Coordination Group against Trafficking in Persons, ‘Trafficking in Persons and Refugee Status’ (2017); European Migration Network and European Commission, ‘Identification of Victims of Trafficking in Human Beings in International Protection and Forced Return Procedures’ (2014). [↑](#footnote-ref-10)
11. United Nations General Assembly, ‘Global Compact on Refugees’ (2018) para 60. [↑](#footnote-ref-11)
12. Kelsey M McGregor, ‘Human Trafficking and U.S. Asylum: Embracing the Seventh Circuit’s Approach’ (2014) 88 Southern California Law Review 197; Jean-Pierre Gauci, ‘Why Trafficked Persons Need Asylum’ in *Exploring the Boundaries of Refugee Law: Current Protection Challenges* (Brill 2015). [↑](#footnote-ref-12)
13. Territorial Commissions are the designated entities to examine and take decisions on all international protection requests lodged in Italy. [↑](#footnote-ref-13)
14. *Case of unknown* (Italy Commissione Territoriale di Salerno 29 October 2015); *Uknown v Ministry of the Interior (Territorial Commission of Salerno)* No. 9007/2015 (Italy Tribunale di Salerno 2 February 2017); *Unknown v Ministry of the Interior (Territorial Commission of Ancona)* No. 2429/2017 (Italy Tribunale di L’Aquila 10 May 2018); *Unknown v Territorial Commission of Verona* No. 10118/2017 (Italy Tribunale di Venezia 27 July 2018); *Unknown v Ministry of the Interior (Territorial Commission of Bari)* No. 7212/2018 (Italy Tribunale di Bari 10 November 2018). [↑](#footnote-ref-14)
15. *Unknown v Ministry of the Interior (Territorial Commission of Milan)* No. 71577/2015 (Italy Tribunal of Milan 29 April 2016); *Cass Sez 6, ord 6503/2014* (Italy Corte di Cassazione 20 March 2014); *Unknown v Ministry of the Interior* No. XXXX/2017 (Italy Tribunale di Palermo 11 December 2017). [↑](#footnote-ref-15)
16. *SB v The Secretary of State for the Home Department 2007* (Asylum and Immigration Tribunal, 26 November 2007). [↑](#footnote-ref-16)
17. *Mlle JE F* Cour nationale du droit d’asile, 24 March 2015. [↑](#footnote-ref-17)