

Alliance Against Trafficking in Persons Conference

‘Assistance to Victims of Trafficking: We Can Do Better’



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**‘The Identification of Trafficked Persons in the Face of Conflicting
Agendas’**

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Excellencies.

Ladies and Gentlemen.

It is with great pleasure that I am able to present to you today on this first panel devoted to the topic of Victim Identification, Protection and Assistance. I have been asked by the organizers of the conference to reflect in my presentation on the different agendas underpinning the identification of victims. In preparing for today's event I found it useful to ask myself one simple question – why are we identifying victims? In asking this it is clear that the reasons differ both between States and between government agencies and civil society in the same country.

For some, the purpose of identifying a victim of trafficking is to protect and assist or 'rescue' that individual from a harmful environment and because there is an obligation to intervene to prevent further harm. For others the whole notion of rescuing the victims is almost absent. Instead the effort to identify a victim, if at all, is only to facilitate investigation of the crime and elicit evidence to increase the chances of a successful prosecution. In other cases identification of victims is to generate statistics or data on victims of trafficking to satisfy international reporting requirements or to better understand the extent of trafficking in the country. In other circumstances it is to secure funding for one's organization whose existence is dependent on funds to assist trafficking victims. Finally in certain cases it might be to prevent the removal of an individual whose unauthorized immigration status exposes them to deportation measures.

The fact that there are different reasons leads us to think about the right and wrong reasons for identifying victims of trafficking. Some would no doubt argue that some of the reasons illustrated here are wrong. The approach much lauded by the political commitments of the OSCE, or the human rights approach, steers us firmly along one course in determining the right reasons for identification: that the identification of a victim is essential to the provision of protection and assistance and that a failure to identify a victim will lead to the denial of that person's rights. The protection of a trafficked person's rights therefore should be at the centre of efforts to identify victims of trafficking in the OSCE region.

KEY FACTORS INFLUENCING THE IDENTIFICATION OF VICTIMS

Some of the reasons already described clearly reflect the fact that often trafficked persons' rights are not central to efforts to identify them. There are also a number of other factors which deeply influence identification. So let me now try to summarise some of the important issues that have emerged through our work in the anti-trafficking unit at the ODIHR, especially our activities devoted to supporting establishment of National Referral Mechanisms in the OSCE region. These activities have included conducting a small number of assessments in OSCE States, in partnership with local researchers, and in countries both East and West of Vienna, to better understand how in practice victims of trafficking are being identified and protected. I will therefore in this presentation draw rather generically on the findings from some of our assessments, in the hope of illustrating for you some of the patterns that we see emerging and the factors currently influencing the process of victim identification.

(i) The first key issue concerns what the law on trafficking says and how it is interpreted

In unraveling the identification of a victim of trafficking we need to ask who is a trafficking victim? Trafficking is a crime defined in law – although who the victim of this crime may be is often not defined in law. Despite an internationally accepted definition of trafficking, following the adoption of the Palermo Protocol, national law and practice are still often unclear as to what constitutes the crime of trafficking and who the victims of trafficking in fact are. This is no doubt due in some measure to inadequacies in the international definition of trafficking which fails to define exploitation or the degree or nature of coercion or deceit to which someone must be subject before the crime of trafficking is committed.

Different meanings are therefore often given to the definition of trafficking by different organizations and agencies, even in the same country. The ODIHR assessments have shown that although the law might say one thing, practice guidance in the same country may highlight different elements of trafficking whilst service providers again may have their own criteria as to what constitutes trafficking and who qualifies as a victim. At the same time political sensitivities can influence interpretations and responses to trafficking so that for instance only foreign nationals are seen as victims, identified and assisted, whilst one's own nationals are excluded from consideration. Alternatively harsh sentencing guidelines for the crime of trafficking has inhibited prosecutors who feel safer prosecuting lesser crimes, which in turn may impact on whether someone is ultimately identified as a victim and entitled to subsequent benefits such as residency permits.

In many cases in fact we have found that ‘identification checklists’ have not been developed to promote some transparency and consistency in identifying victims amongst state agencies. Instead agencies depend very much on their own sense as to who is a ‘genuine’ victim. This can have serious negative consequences for trafficked persons in some cases where agencies are insufficiently sensitized to the nature of trafficking and for whom the victim appears ‘untrustworthy’; possessing fraudulent documents, having illegally entered or exited the country, engaged in prostitution or generally of a disheveled and homeless appearance. The cultural and institutional bias of these agencies might result in their treating such persons as the criminals rather than the victims of crime.

So the law and how it defines trafficking and other policy guidance around it needs to be carefully scrutinized to ensure consistency in the identification process.

(ii) The frontline agencies and identification

The ODIHR assessments have shown that trafficked persons are frequently not given the benefit of a reflection delay, which has been seen in a number of international documents, including the OSCE commitments, as an essential component in the process of identification. In some cases this is due to the fact that victims of crime are obliged to provide evidence of the crime to law enforcement or otherwise risk criminal prosecution and there is little acceptance that victims of trafficking should be dealt with any differently to victims of other crime. In other cases it is because law enforcement are

under time constraints to bring charges against possible traffickers and therefore need to secure evidence as quickly as possible from victims in a short space of time.

In other cases, where a reflection delay even exists in principle, it is because law enforcement demand a higher standard of proof to satisfy their suspicions of trafficking when a person is also being charged with immigration offences. In such cases, where there is insufficient evidence at an early stage to either locate the perpetrator of trafficking or adequately prove that trafficking has occurred, law enforcement are reluctant to give that person the benefit of the doubt which would release them from liability for immigration offences. Here the interest in protecting the human rights of a presumed trafficked person are trumped by the need to take a tough line on immigration offences, even where those offences have allegedly occurred as a result of trafficking.

One way of possibly avoiding this problem might be found in an example of practice in one country reviewed by us. The functions of investigating crime and identifying victims are separated so that even where the criminal investigation is unable to determine if trafficking has occurred, a separate administrative process, initiated by a different state agency which is not bound by the conclusions of the criminal investigators, independently assesses the status of the individual on the basis of its own interviews.

Another way of avoiding this problem is by following the guidance of the national referral mechanism concept which encourages collaboration and co-operation between law enforcement agencies and specialized service providers in the identification of

victims. However the assessments indicate that state agencies are more often than not untrusting of civil society organizations and do not accord them a role in the actual identification of victims, even though they may request that those same specialized agencies provide trafficking training to their staff. There are also cases where law enforcement do call on the specialized knowledge of certain service providers to assist in determining the status of an individual, but where there are conflicts of opinion, the government agency's opinion invariably prevails.

Of course it is important that the independence of NGOs to provide impartial and confidential assistance to victims is not compromised by too close a relationship with state agencies, who in the eyes of victims are often not to be trusted. But State agencies should generally put aside their misgivings about civil society organizations and accept at face value informed opinions by expert service providers as to whether or not someone is a trafficked victim.

Now we are all aware of the different political approaches to prostitution which often impacts on who gets included or excluded in identification exercises. The assessments also show how the different law enforcement units in the same country may respond to these arguments in identifying victims. Some law enforcement officers take a pragmatic approach and have commented that the widespread and seemingly voluntary nature of much prostitution in their experience makes it impossible for them to treat all individuals in organized forms of prostitution as victims of a serious crime, as trafficking is considered to be. Therefore such units will focus only on serious forms of coercive

prostitution in identifying victims as a means of using limited resources to best effect.

Whilst colleagues in the same country, but influenced by different arguments as to who should qualify as a victim, might take the broader view of those it would identify and assist: therefore making the 'kinds' of victim identified in the same country differ from police unit to police unit.

Service providers may well replicate these approaches with some extending services to a broad range of persons in prostitution, considered victims of trafficking, whilst others limit their target group to those coerced or deceived into prostitution.

Finally often trafficked persons come to the attention of law enforcement agencies that do not have a mandate to protect and assist them. A typical example of this might be where trafficked persons are intercepted by immigration officials whose task is to fight illegal migration and who therefore focus on the immigration status of an individual with little time or competence to identify trafficked victims. The result may often lead to the detention and deportation of the individual concerned and the failure to identify the victim of trafficking. Similarly agencies that regulate the licensing of labour providers or employers' compliance with labour laws, may have little time or competence to consider or act on other infringements outside this field. This again may lead to the failure to identify and protect trafficked persons. Again the national referral mechanism approach requires that all those likely to come into contact with trafficked persons have a role and responsibility for identifying trafficking victims and referring them for assistance. Again this is something that States should pay attention to.

(iii) Self-identification

An understanding of the factors influencing identification would hardly be complete without considering the position of the person subject to identification as a victim. The assessments indicated that many possible victims of trafficking of both sexual and labour exploitation do not see themselves as victims and are unwilling to be identified as such. Instead they consider their predicament a temporary state of affairs; something they can cope with and overcome on their own; neither relishing the prospect of ‘rescue’ or assistance. Different examples of law enforcement operations in OSCE States illustrate this fact where presumed victims of trafficking have refused assistance and return to the site of their presumed exploitation.

Some commentators have suggested that our preoccupation with ‘rescuing’ people from themselves through identification methods is patronizing and underscores more our own desire to be ‘useful’ to humanity and impose our own ideas on how others should lead their lives.

Although there may well be some truth in this – so we should all start looking for other jobs soon! – the acceptance by a victim of one’s exploitation should not prevent application of the criminal law against those doing the exploiting. However these comments are useful in that they challenge us to look for other solutions, not dependent on the process of identification. We need to ask why does someone accept exploitative conditions – is it because they have no alternative as they are an undocumented migrant

and are not authorized to work legally? Is it due to the fact that they have no support mechanism through which they might be able to exit their situation and find an alternative solution? Is it because they do not know their rights? We seriously need to ask ourselves do we always absolutely have to identify victims to satisfy our criminal justice machinery or can we accept that it is sometimes enough that people extricate themselves quietly from exploitative situations and go their own way. Providing a support network to vulnerable people through increased outreach or community work, raising awareness of rights and remedies and making efforts to improve conditions in work sectors prone to exploitation through greater regulation are all important responses in these cases. It might be that the concern with the ‘rescue’ and pro-active identification of victims in anti-trafficking responses, although important in some cases, has also undermined other much needed efforts to help victims help themselves in these empowering ways, which it is arguable would be more effective in the long term in combating trafficking.

Finally by way of a few concluding remarks, States need to guard against creating inflexible state structures with sole authority for determining victim status. Such structures can only lead to marginalizing the less clear-cut, ambivalent cases which equally deserve redress. The role of expert service providers in assisting in the identification of victims must be acknowledged and greater trust developed between the state agencies and these organizations. Authorities also need to be reminded of why a reflection delay for trafficking victims is so important and how this ultimately helps the prosecuting authorities.

Finally a balance needs also to be struck between pro-active identification of individual victims and efforts to support and empower vulnerable groups to help themselves alongside the adoption of measures to tackle the systemic causes of exploitation. Such efforts will be particularly important in the future to respond to the phenomenon of labour exploitation, in which field little traditional identification of victims has occurred.
