

The Human Rights Framework Applicable To Trafficking in Persons And Its Incorporation into UNMIK Regulation 2001/4

by John Cerone

With the General Assembly's adoption of the text of the Protocol to Prevent, Suppress and Punish Trafficking in Persons in November 2000, the international community achieved a degree of consensus on an issue that had been the subject of politically-charged and morally-loaded debate since it undertook to elaborate the draft in December 1998. That debate centered around whether and how to incorporate a human rights approach into this new international legal instrument which would supplement the United Nations Convention against Transnational Organized Crime.

Trafficking in persons is a complex phenomenon, encompassing such issues as gender discrimination, economic exploitation, and globalization. As this complexity has been revealed, the international discourse on the issue became more sophisticated, acknowledging the great variety of configurations in which, and purposes for which, it occurs.

Another aspect of this complexity is the range of actors typically involved – from the 'travel agents' and 'employment recruiters' in countries of origin, to the corrupt law enforcement officials in transit countries, to the 'bosses' who control the entire process. It is now well established that governments are not absolved of responsibility simply because acts violating human rights are committed by persons other than state officials. Further, such responsibility is not limited to cases where non-state actors are acting on behalf of the state. Human rights law imposes a duty on states to prevent and respond to violations committed by non-state actors, even when there is no connection between such actors and the state.

The complexity of trafficking is also reflected in the agreed upon definition of trafficking in persons, which is broad enough to cover all actors and intermediaries and to respond to the realities faced by victims of trafficking. This definition has found immediate application in Kosovo, where the absence of law enforcement following the withdrawal of Serbian and Yugoslav forces in June 1999, coupled with the slow build-up of effective interim police services, enabled organized crime to flourish – and with it, the trade in human beings.

THE SITUATION IN KOSOVO IN 2000

WHILE REMAINING PART OF THE FEDERAL REPUBLIC of Yugoslavia (FRY), Kosovo has been under United Nations administration since June 1999. The United Nations Interim Administration Mission in Kosovo (UNMIK), together with the NATO-led Kosovo Force (KFOR), exercises full public authority in Kosovo. Among the responsibilities expressly set forth in the Security Council Resolution establishing UNMIK is the protection and promotion of human rights.

TRAFFICKING IN KOSOVO

Although the state of inter-ethnic relations in Kosovo has been and continues to be so appalling that the Special Representative of the UN Secretary-General (SRSG) had to abandon multi-ethnic integration in favor of a plan of 'peaceful co-existence', there is one sector in which inter-ethnic cooperation has fostered a thriving economy. While communication among ordinary citizens across the Ibar River in the divided town of Mitrovica has been at a standstill since the summer of 1999,

organized criminal elements have had no difficulty overcoming their cultural and historical differences in order to enrich each other through the exploitation of trafficked women.

The International Organization for Migration (IOM) conducted comprehensive interviews with 130 trafficking victims between February 2000 and February 2001. All of the victims were women, and the vast majority had been forced into prostitution.

According to IOM, most of these women had been sold three to six times while en route to Kosovo. During their travel to Kosovo, they were completely deprived of freedom of movement, beaten and raped by the traffickers, and already forced into prostitution while still in the transit countries. Upon arrival in Kosovo, most of the victims continued to be subjected to physical, mental, and sexual abuse; denied freedom of movement, including access to health care; made to live in unsanitary conditions; and forced to have unprotected sex.

The primary perpetrators of trafficking in Kosovo tend to be non-state actors. However, there is growing evidence of participation of public actors. In recent months, the involvement of UNMIK personnel, including international police officers, in trafficking networks has come to light.



*The UN has attempted to play a larger role in preventing trafficking in Kosovo.
Credit: Nicole Trudeau*

The lack of adequate training, sensitivity, and awareness of legal professionals in Kosovo exacerbates the violations already suffered by victims. When trafficking victims have appeared before the Kosovo courts, they have been afforded neither legal counsel nor a professional interpreter, and have been met with hostility from the bench. In most cases, they have been convicted of prostitution and/or illegal entry into Kosovo, sentenced to a fine and/or imprisonment for 30 days, and ordered expelled from Kosovo for a period of three years.

VICTIM PROFILE

Among the IOM cases, almost all of the victims are Eastern European women trafficked into Kosovo through Serbia-proper and the Former Yugoslav Republic of Macedonia (FYROM). Over sixty percent of the victims are from Moldova, the poorest country in Europe. The IOM has also documented two cases of internal trafficking (i.e., trafficking of persons entirely within Kosovo).

The majority of victims are adult women between 18 and 24 years of age. Fewer than ten percent of the victims are between the ages of 14 and 17.

More than half of those who were employed in their countries of origin made less than 40 DM (\$20 USD) per month. Indeed, most of the victims who initially decided to go abroad did so pursuant to a false promise of employment elsewhere in Europe.

While personnel of international organizations are disproportionately represented among individuals procuring 'services' of trafficked women in Kosovo, the clientele consists mainly of Kosovan people.

THE LEGAL ENVIRONMENT

As noted above, UNMIK serves as the governing body of Kosovo, with the SRSG retaining final executive and legislative authority. Although Kosovo is not a state and UNMIK not a sovereign, UNMIK is bound by international human rights law by virtue of its mandate and as part of the law applicable in Kosovo.

The basis of the applicable law is set forth in UNMIK Regulation 1999/24, as amended. It states that the applicable law consists of the regulations promulgated by the SRSG as well as the law in force in Kosovo on March 22, 1989. The regulations prevail if a conflict arises between these two sources of law. Regulation 1999/24 further stipulates, "[i]n exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards." It then provides an extensive list of major international human rights instruments from which these standards are to be drawn.

While several provisions of the law in force on March 22, 1989 are relevant to the crime of trafficking, they are clearly inadequate for confronting the crime as it exists today or for responding to the needs of victims. First, there is no express criminalization of trafficking. Second, penalties for some trafficking-related crimes are not proportional to the gravity of the crime. Finally, and of particularly serious concern in an environment where the rule of law has not been consolidated, there is no provision for victim assistance.

MODES OF STATE ACCOUNTABILITY UNDER HUMAN RIGHTS LAW

A BREACH OF HUMAN RIGHTS LAW, in the strict sense, may arise only from conduct attributable to the state. Under the law of state responsibility, conduct is attributable to the state when it is committed by an organ of the state, which essentially includes any state actor acting as such. The conduct of non-state actors may also be attributable to the state in certain narrow circumstances. However, apart from these circumstances, the conduct of non-state actors will not in itself give rise to state responsibility under human rights law. Nonetheless, state responsibility may still arise depending upon the conduct of the state in relation to the conduct of the non-state actors.

Article 2(1) of the International Covenant on Civil and Political Rights (ICCPR) states, "Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant..."

(emphasis added). In its General Comments, the Human Rights Committee has construed this provision to oblige states to protect the rights contained in the Covenant against non-state interference. The regional human rights institutions have similarly interpreted comparable provisions in their respective treaties.

In the Velásquez Rodríguez case, the Inter-American Court of Human Rights found that agents who acted under cover of public authority carried out the disappearance of Manfredo Velásquez. The Court stated, however, that "even had that fact not been proven, the failure of the State apparatus to act, which is clearly proven, is a failure on the part of Honduras to fulfill the duties it assumed under Article 1(1) of the [American] Convention, which obligated it to ensure Manfredo Velásquez the free and full exercise of his human rights."

Earlier in its opinion, the Court had surmised, "what is decisive is whether a violation of the rights recognized by the Convention has occurred with the support or the acquiescence of the government, or whether the State has allowed the act to take place without taking measures to prevent it or to punish those responsible." This statement reflects the twin obligations to respect and ensure human rights.

In either case the government would be held responsible. In the former case, where the violation occurred with the support or acquiescence of the government, the state would be directly responsible for the violative act itself. In the latter case, the state would be responsible for failing to ensure the right through the exercise of due diligence.

In most cases, due diligence to prevent violations would require both legislative prohibition of the violative behavior and enforcement. Legislative prohibition and enforcement alone, however, are not generally successful in preventing violations and are thus insufficient to meet a state's obligation. States must take effective measures to meet their obligations in this context. This follows from the principle of good faith and has been echoed by various human rights bodies. It is for this reason that the Inter-American Court emphasized that states are under a duty to employ "all those means of a legal, political, administrative and cultural nature that promote the protection of human rights and ensure that any violations are considered and treated as illegal acts, which, as such, may lead to the punishment of those responsible and the obligation to indemnify the victims for damages." The Court recognized that "[i]t is not possible to make a detailed list of all such measures, since they vary with the law and the conditions of each State Party." In addition, they will vary with the nature of the right violated. Nonetheless, a list of general measures can be extracted from international practice, bearing in mind the principles of effectiveness and reasonableness.

Recent practice has included measures such as education and awareness-raising, government condemnation of violations, rehabilitation and support services for victims, training for law enforcement personnel, ratification and implementation of other international human rights instruments, improving access to legal remedies on both the domestic and international planes, implementation of the recommendations of international human rights bodies and mechanisms, protection of complainants and witnesses to violations, promoting research and compiling statistics on violations, publishing reports on the state's responses to violations, providing financial support to organizations that combat discrimination, and changing patterns of socialization that perpetuate discrimination.

Such measures are particularly important in situations where the rule of law has not been firmly established. In such cases, the government may be unable to effectively punish perpetrators, and, consequently, must more diligently act to prevent violations by addressing the underlying conditions that lead to them.

HUMAN RIGHTS NORMS TYPICALLY VIOLATED IN THE CONTEXT OF TRAFFICKING IN PERSONS

IT IS UNIVERSALLY RECOGNIZED that trafficking in women constitutes a grave human rights violation. The UN General Assembly has recently reaffirmed that “sexual violence and trafficking in women and girls for purposes of economic exploitation, sexual exploitation through prostitution and other forms of sexual exploitation and contemporary forms of slavery are serious violations of human rights.”

Trafficking entails violations of freedom from torture or cruel, inhuman, or degrading treatment or punishment; the protection against arbitrary or unlawful interference with privacy, family, home, or correspondence; the right to information (a constituent part of the freedom of expression); freedom from discrimination on the basis of race, gender, or other status; and freedom from slavery and servitude.

Further, the conditions to which trafficked women are ultimately subjected in the destination country can be extreme, deplorable and may potentially implicate all human rights. Violations that may be particularly common include: violations of the right to life; torture or cruel, inhuman, or degrading treatment or punishment; violations of the right to liberty and security of the person; arbitrary or unlawful interference with privacy, family, home, or correspondence; discrimination on the basis of race and gender; and slavery and servitude.

COMMENTARY ON UNMIK REGULATION 2001/4

UNMIK REGULATION 2001/4 establishes the crime of trafficking in persons as part of the law applicable in Kosovo. Incorporating a human rights approach to trafficking, the Regulation also provides specific protection and reparations for victims including a defense to prosecution for prostitution, the right to apply for compensation, and access to legal, medical, and other services.

The Regulation is divided into three chapters respectively providing for Criminal Acts and Penalties; Investigation, Confiscation, and Court Procedures; and Victim Protection and Assistance.

CHAPTER I: CRIMINAL ACTS AND PENALTIES

The Regulation employs a very broad definition of trafficking in persons. The breadth of the definition recognizes the complexity of trafficking. In particular, the purpose of employing a broad definition is to sweep within its scope all intermediaries in the trafficking process. It thus encompasses a wide range of means, purposes, and actors. The definition was taken, almost verbatim, from the recently adopted Protocol on Trafficking in Persons to the Convention on Transnational Organized Crime.

Trafficking in persons is defined in Section 1.1(a) 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.

The definition sets out three elements: the act (“recruitment, transportation, transfer, harbouring or receipt of persons”), the means (“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”), and the purpose (“for the purpose of exploitation”). These three elements

must be met for the crime of trafficking to arise. It is significant to note that international movement is not required. Thus, trafficking may occur within a single state’s borders.

The Regulation criminalizes the act of trafficking in persons, as well as organization and negligent facilitation of trafficking. The existing applicable law already provided for accomplice liability as well as universal jurisdiction. Thus, these were not included in the Regulation.

Trafficking is almost always accompanied by the seizure of the victim’s passport or other identification documents as a means of coercing the victim and limiting her freedom of movement. Thus, the Regulation also prohibits the withholding of identification papers. This provision will enable prosecution where it is impossible to prove the intent to traffic.

The Regulation also prohibits using or procuring the sexual services of a person in a situation of sexual exploitation. The provision incorporates a fairly high mens rea requirement. Perpetrators must know that the person whose services they are using is a victim of trafficking. While actual knowledge can be difficult to prove, the Working Group that drafted the Regulation was of the opinion that knowledge could be inferred from the circumstances surrounding the use of such services.

CHAPTER II: INVESTIGATION, CONFISCATION AND COURT PROCEDURES

In light of the precarious security situation prevailing in Kosovo, special steps must be taken in the course of investigations in order to protect trafficking victims from the traffickers and their criminal networks. For example, the Regulation provides that “[t]he taking of a statement by a law enforcement officer or investigating judge shall in no way inhibit or delay the voluntary repatriation of an alleged victim of trafficking.” This provision recognizes that the longer victims remain in Kosovo, the longer their lives are in jeopardy and, consequently, requires the police and judges to act expediently.

The Regulation also provides for the confiscation of property and the closure of establishments. Section 6 permits the confiscation of assets that are used in connection with trafficking, including proceeds, and empowers investigative judges to close establishments associated with trafficking.

In order to protect trafficking victims from further exploitation, Section 7 bars the use of evidence concerning the character or personal history of the alleged victim, including, for example, sexual or employment history. Such evidence can only be used if the defendant receives the express authorization of the president of the panel of judges. Such authorization may only be granted if “the evidence is of such relevance, and its omission would be so prejudicial to the defendant, as to result in a miscarriage of justice for the defendant if not allowed to be introduced.” This standard is intended to embody a balance between the right of the accused to a defense and the victim’s right to privacy.

Similarly, the Regulation permits the judge to exclude the public or to permit witnesses to testify through, for example, closed circuit television. This is particularly important when trafficking victims may be further traumatized by the close presence of the alleged trafficker or the general public.

In response to the continuing punishment of trafficking victims by the Kosovo courts, Section 8 of the Regulation excludes the criminal responsibility of trafficking victims for certain acts that they may have committed as a result of their having been trafficked. It reflects the general principle of law that a person cannot be held criminally responsible where his or her act was not committed voluntarily.

CHAPTER III: VICTIM PROTECTION AND ASSISTANCE

The purpose of Chapter III is to spell out the responsibilities of the public authorities toward victims of trafficking.

Section 9 authorizes the appointment of a Victim Assistance Coordinator who will be responsible for organizing the provision of services to victims. In carrying out that responsibility, Section 10 elaborates on the types of assistance to be afforded to trafficking victims, including:

- (a) Free interpreting services in the language of their choice;
- (b) Free legal counsel in relation to trafficking issues (criminal or civil);
- (c) Temporary safe housing, psychological, medical and social welfare assistance as may be necessary to provide for their needs; and
- (d) Such other services as shall be specified in an administrative direction.

The provision of these services is "subject to availability of resources," and is thus not guaranteed. The provision of other services to be detailed in an administrative direction would include repatriation and reintegration assistance, which was deleted from an earlier draft of the Regulation.

Section 10 also ensures that these services and facilities will be made available to victims "regardless of any charges of prostitution or of illegal entry, presence or work in Kosovo that may be pending against them." In this regard, it is important to note that the Coordinator is empowered to make an independent determination of whether or not the person requesting services is a victim of trafficking. Thus, even if courts continue to charge and convict trafficking victims for prostitution, the Coordinator will still be empowered to provide assistance to them.

Section 11 concerns deportation proceedings against trafficking victims. This section was designed to prevent Kosovo courts from handing down expulsion orders against trafficking victims. As part of the applicable law, this section also provides a legal basis for UNMIK to refrain from expelling trafficking victims who have been ordered expelled by a court notwithstanding the existence of this provision.

In the event that a trafficking victim will face persecution if returned to his or her country of origin, Section 12 permits the possibility that the victim may be granted temporary residence in Kosovo or other assistance.

IMMUNITY

While Regulation No. 4 is silent on the issue of immunity, a prior regulation provides far-reaching immunity for UNMIK, KFOR, and the personnel of both. Under UNMIK Regulation 2000/47, immunity is extended to UNMIK and KFOR as entities, including the property of both. While high-ranking UNMIK officials are afforded blanket immunity, other UNMIK personnel have only functional immunity.

All KFOR personnel are provided blanket immunity. KFOR personnel are "immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo." Regulation 47 also states that they are "subject to the exclusive jurisdiction of their respective sending States" and are "immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States."

Regulation 2000/47 also provides for the waiver of immunity. In light of the growing evidence of perpetration of, or complicity in, trafficking by UNMIK and KFOR personnel, the waiver provisions must be invoked in order to avoid falling afoul of human rights law.

CONCLUSION

WHILE THE PROMULGATION OF UNMIK REGULATION 2001/4 should be welcomed for its progressive approach to the phenomenon of trafficking in persons, providing the legislative foundation can only be the beginning of UNMIK's work in this field. UNMIK must act diligently to prosecute offenders and to make sure that the remedies envisioned in the Regulation are effective.

As a whole, Regulation 2001/4 reflects the complexity of the trafficking problem, encompassing such issues as gender discrimination, economic exploitation, globalization, and the movement of people. In order to move forward and effectively address the problem, UNMIK must implement preventive and remedial measures that recognize these broader dimensions.

In addition, UNMIK cannot by itself adequately address all aspects of trafficking. It must cooperate with the Yugoslav authorities, as well as countries throughout the region and beyond, to jointly confront the issue of transnational organized crime, and to address the global inequalities that cause trafficking to flourish. *HRB*

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