

Mandate of the Special Rapporteur on trafficking in persons, especially women and children

Comments by Special Rapporteur on trafficking in persons, especially women and children, Ms. Siobhán Mullally, to the Draft General Recommendation No. 36 on Preventing and Combating Racial Profiling by Law Enforcement

Responding to the call for submissions by the Committee on the Elimination of Racial Discrimination regarding their draft General Recommendation on Preventing and Combating Racial Profiling by Law Enforcement, the Special Rapporteur on trafficking in persons, especially women and children, Ms. Siobhán Mullally, wishes to make the following suggestions to the draft text:

Racial profiling at borders

The OHCHR Recommended Principles and Guidelines on Human Rights at Borders (2014), provides that measures taken to address irregular migration, or to counter terrorism, human trafficking or migrant smuggling, shall not be discriminatory in purpose or effect, including by subjecting migrants to profiling on the basis of prohibited grounds, and regardless of whether or not they have been smuggled or trafficked. Further the Guidelines provide that:¹

“States and, where applicable, international and civil society organizations, should consider: [...] (2) Ensuring that non-discrimination provisions in legislation are applicable to all border governance measures at international borders; (3) adopting or amending legislation to ensure that respect, protection and fulfilment of all human rights, including mandatory protection and assistance provisions, are explicitly included in all border related legislation, including but not limited to legislation aimed at addressing irregular migration, establishing or regulating asylum procedures and combating trafficking in persons and smuggling of migrants.”

Non punishment

- Racial profiling may lead to a failure on the part of States to identify victims of trafficking and to ensure compliance with the obligation of non-punishment of victims of trafficking. The 2002 Recommended Principles and Guidelines on Human Rights and Human Trafficking of OHCHR recognised for the first time both that trafficking in persons could be aimed at the exploitation of the victims’ involvement in unlawful activities but also that victims might incidentally commit unlawful acts in the context of their status as trafficking victims. The Recommended Principles and Guidelines firmly advised, therefore, that such victims must be provided with protection, not punishment, for their unlawful acts arising as a direct consequence of their trafficking. Correspondingly, and of great importance in respecting the non-punishment principle, the

¹ OHCHR *Recommended Principles and Guidelines on Human Rights at International Borders* (2014) *GUIDELINE 2: LEGAL AND POLICY FRAMEWORK*, p.14.

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Recommended Principles and guidelines firmly advised that the actions of law enforcement involved in trafficking investigations must never take place at the expense of victim's rights.²

- In the context of trafficking victims' rights, the right to non-punishment can be considered as 'the beating heart' of victim's human rights protection at the international, regional, and domestic level. It must be given high-level prominence since it relates to the unassailable legal right of the victim to be protected by law.³ The States' duty to provide all "public servants who are likely to come into contact with trafficked persons, such as police officers, border guards, social services, labour inspectors," as well as prosecutors, judges and lawyers, with adequate training and tools of co-operation, becomes crucial in all cases and indeed even more stringent with respect to child victims of trafficking.⁴ Child victims of trafficking may experience multiple and intersecting forms of discrimination linked to race, ethnicity, migration status and age.
- **Paragraph 23:** In the context of counter-terrorism operations, it is important to note that such operations can also be counterproductive and harmful to victims of non-state human rights violations, such as trafficking in persons. For example, such operations can lead to victims of trafficking declining to come forward or avoiding state assistance fearing discriminatory treatment that can result. Article 14(2) of the Palermo Protocol states that protective measures shall be "applied in a way that is not discriminatory to persons on the ground that they are victims of trafficking in persons. The interpretation and application of those measures shall be consistent with internationally recognized principles of non-discrimination."⁵
- **Paragraph 36:** The Special Rapporteur suggests including a reference on the early application of the non-punishment principle.
- **Paragraph 37:** This paragraph calls for an "internal oversight mechanism within law enforcement bodies in order to prevent discriminatory behaviours". Consideration should be given to the idea that an oversight mechanism be separate and independent from the law enforcement body they seek to regulate, perhaps in the form an Ombudsman's office. This would accord with the reporting mechanism envisaged in paragraph 38, which is currently proposed to be independent.

² Office of the High Commissioner for Human Rights, Principles and Guidelines for Human Rights and Human Trafficking (2002) (hereinafter "OHCHR Principles"). Recommended Principle 7.

³ The importance of implementing the non-punishment provision: the obligation to protect victims, Maria Grazia Giammarinaro, Special Rapporteur on trafficking in persons, especially women and children. 2020.

⁴ OSCE Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Policy and legislative recommendations towards the effective implementation of the non-punishment provision with regard to victims of trafficking (2013) (hereinafter "OSCE Recommendations"), at para.29

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, article 14(2).

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- **Paragraph 39:** Consideration should be given to making express reference to minority led civil society organisations, advocacy groups and organisations in the formation of “stop and search” practices but to also partake in monitoring their implementation, as envisaged in the paragraph.
- **Paragraph 41:** Human rights training should include building capacity and awareness around trafficking in persons, and how law enforcement bodies should facilitate screening and identification in a non-discriminatory manner. As the Special Rapporteur on trafficking in persons, especially women and children has noted in 2018, the:

“lack of identification of victims or potential victims of trafficking is also linked to the use of profiling, which tends to categorize women and children as victims, excluding men from protection measures.”⁶

Training law enforcement personnel to be sensitive to, and aware of, such victims would decrease the risk of negative consequences of racial profiling.

- **Paragraph 52:** With regard to accountability, consideration should be given to the express inclusion of “criminal sanction and punishment” for those found to be responsible for unlawful acts of racial profiling.
- **Refugees and Asylum seekers:** Racial profiling poses significant risks to refugees and asylum seekers who are frequently interviewed and screened at border-points. Credibility assessments and interview processes may be tainted by racial bias. In this regard, special emphasis should be placed on human rights awareness and training (paras. 41-44) to ensure that law enforcement bodies who operate at border-points are aware of the risks of racial profiling and can respond to the often urgent protection needs of refugees and asylum seekers, who may also be victims of trafficking or at risk of trafficking. The right to seek and to enjoy asylum is an internationally protected right enshrined in law and is to be applied without discrimination, including race.⁷ It can be negatively impacted by the exercise of racial profiling.

Approach adopted

- **Paragraph 11:** The Special Rapporteur suggests to add the Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination,

⁶ Report of the Special Rapporteur on trafficking in persons, especially women and children, UN Doc. A/HRC/38/45, 14 May 2018, para. 38.

⁷ See e.g. Convention relating to the Status of Refugees, Adopted on 28 July 1951, article 3: “The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”; African Charter on Human and Peoples Rights, adopted on 27 June 1981, article 2: “Every individual shall have the right, when persecuted, to seek and obtain asylum in other countries in accordance with the law of those countries and international conventions.”; Inter-American Convention on Human Rights, adopted on 22 November 1969, article 22(7): every person has the right to seek and be granted asylum in a foreign territory, in accordance with the legislation of the state and international conventions.”

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hostility or violence. Conclusions and recommendations from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat on 5 October 2012.⁸

Defining and understanding racial profiling

- **Paragraph 15:** The Special Rapporteur on trafficking has raised in her previous reports specific concerns about the use of profiling techniques by law enforcement and humanitarian agencies to simplify identification procedures of victims of trafficking. While the profiling by these agencies may have originated with the aim to facilitating access to protection, the excessive use of profiling techniques also in this context can further stigmatize target groups. While this may help in early identification and assistance, it stigmatizes an entire group through the general perception that is generated on the entire group. This model of identification has also not proven effective, as a very modest number of victims have been identified and protected in countries of first arrival.⁹ Also, the use of these techniques in assistance and protection mechanisms and standardized sets of indicators, are usually not comprehensive, and they likely lose sight of other types of vulnerabilities. Typically, it tends to categorize women and children as victims, sometimes even only if these come from a certain region or from a particular origin, excluding others from protection measures.

In addition to age, religion, gender, sexual orientation and gender identity, migration status, work and decent or other status, the Special Rapporteur suggests adding “racial discrimination may also constitute a risk factor for trafficking”.

- **Paragraph 16:** In addition to stops, identity, personal searches, arrests, raids, border and customs checks, home searches, targeting for surveillance, or immigration decisions, the Special Rapporteur suggests adding “spot checks”.

Consequences of racial profiling

- **Paragraph 24:** In addition to sense of injustice, humiliation and loss of trust in law enforcement authorities, the Special Rapporteur suggests adding “fear of reprisals and limited access to information about legal rights or legal assistance”.

Algorithmic profiling and racial bias and discrimination

- **Paragraph 32:** In addition to facial recognition technology, the Special Rapporteur suggests adding “surveillance cameras to track and control certain groups”.

⁸ Rabat Plan of Action on the prohibition of advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence. Conclusions and recommendations from the four regional expert workshops organized by OHCHR, in 2011, and adopted by experts in Rabat on 5 October 2012. Available from http://www.ohchr.org/Documents/Issues/Opinion/SeminarRabat/Rabat_draft_outcome.pdf.

⁹ A/HRC/38/45 para 67.

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Recommendations

A. Legislative and other related measures

- **Paragraph 35:** The Special Rapporteur suggests reference is done to special protection measures including full implementation of child friendly justice measures in all criminal proceedings involving children.

C. Recruitment measures

- The Special Rapporteur suggests including an additional sentence to allude to multidisciplinary and holistic approaches when referring to recruitment, and make clear that such an approach means that the composition of interdisciplinary teams means including professionals from all relevant fields to understand the best protection ways.

F. Accountability

- **Paragraph 53:** line with the suggestion above on a multidisciplinary approach, the Special Rapporteur suggests adding “monitoring measures should be based on strategic partnerships at national and international level”.