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International Law Meeting Summary

Human Trafficking

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INTRODUCTION

Drawing on her experiences working with trafficked women in Bosnia, Madeleine Rees reflected on the role of international organisations and international law in response to human trafficking and sexual exploitation in contemporary society. Among other questions, the speaker considered whether civil society can play a greater role. Further, the event examined the law in practice with regards to trafficking and whether there is a disconnect with what is happening on the ground and if so, how this can be resolved.

The participants included practising lawyers, academics and representatives of government, business, and NGOs.

This meeting was not held under Chatham House Rule.

Madeleine Rees:

The Women's International League for Peace and Freedom (WILF) places high priority on ensuring that its work in the sphere of international law reflects the real lived experiences of people rather than being something that compartmentalises experiences. The danger of the latter approach is that it places individuals into specific categories of law thereby often depriving them of any sort of redress when their situation does not fit within one of these categories. Human trafficking is one such area where significant gaps in protection exist.

To fully appreciate the challenges that are confronted by those working in this field it is necessary to understand how the law currently defines human trafficking. A working definition is provided in the United Nations Convention against Transnational Organized Crime and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (which, together with two other protocols on people trafficking and firearms trafficking, are collectively referred to as the Palermo Protocols).¹ The crime of human trafficking has three elements. There must be: 1) recruitment; 2) transfer; and 3) an exploitative labour outcome. If, during the course of this pattern of events there is coercion, the use of force, or an abuse of a position of authority, then any consent given is negated. The negotiators had intended this legal definition to form the basis of a practical framework that would reflect and address the realities of trafficking. However, in practice, if one speaks to victims of trafficking, it is unlikely that they will characterise their experience using the categories and concepts set forth in the Protocol. Thus, the question emerges as to what in reality the crime of trafficking involves.

Using examples of the experiences of trafficked individuals, the following discussion will explore trafficking through the lens of international law, addressing both the human rights and prosecutorial perspectives. In doing so, it will demonstrate that the current regimes and practices have not succeeded in describing and reflecting the experiences of persons going through linear or circular trafficking cycles.

'A profound misdiagnosis'

The following example illustrates the problems presented by the application of national legislative frameworks to a trafficked individual without listening to their account of their experiences, and the consequences of that approach for both the accuracy of how the situation is described, and more importantly, the potential consequences for the trafficked individual. The woman concerned, who was of Moldovan origin, had come to the attention of local NGOs after having been arrested and was being detained by Bosnian local police for prostitution, the possession of illegal documents, and the use of those documents to remain in the country. Under Bosnian law, she was facing a sentence of up to four years in prison for those charges. Furthermore, under national law, prostitution attracted strict liability, thus meaning that no justification be provided in defence or mitigation of that liability. Under this narrative, the fact that the woman was found to be engaging in prostitution was compounded by the *assumption* that she had introduced the false documentation with the intent to deceive the Bosnian authorities. However, this stands in stark contrast to the reality. In the context of the economic impoverishment that was afflicting Moldova in the early 1990s, the Moldovan woman had been recruited by a local man whom she had long trusted, who had offered her the promise of migration in order to work and earn a better living. Upon reaching Belgrade, she was given a new passport, before being taken across the border and sold into prostitution. Thus, in this situation the elements of trafficking as elaborated in the Protocol had been established; there had been recruitment, there had been transportation, and there was a forced labour outcome. During that forced labour outcome, she was kept in a single apartment, forced and forced to cook and clean and provide sexual services for up to 20 men a day. On occasion, she was taken to local bars, which is where she was found to be engaging in prostitution by the local police, and was subsequently arrested. Although local NGOs and the OHCHR were able to secure her release, clearly the operation of the national legal framework had significant shortcomings.

¹ Available at: <http://www.unodc.org/unodc/en/treaties/CTOC/>.

It is now useful to contrast these outcomes against those presented when the framework of international criminal law is applied to a very similar fact-set arising out of the conflict in Bosnia. In the judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) in the case of *Kunarac, Kovac and Vukovic (Foca)*², three men were prosecuted for sexual slavery. The case involved the imprisonment of three women during the course of the on-going armed conflict in the former Yugoslavia. During the period of their incarceration, the women were forced to cook, clean and have sex with numerous men. Thus, one can see a close correlation between the *experiences* of the victims in the *Kunarac* case and the Moldovan woman in Bosnia. The difference was the legal outcome. In *Kunarac*, the men were charged and prosecuted with war crimes, crimes against humanity, and slavery. By contrast, the woman from Moldova had the full force of the law come down on *her*, despite the fact that all the circumstances were the same – and what the women actually went through both physically and emotionally were almost identical. However, because the forced labour outcome was understood in the Moldovan case as *prostitution*, the entire outcome was skewed from the outset.

Contained within the Palermo Protocol's conceptualisation of trafficking are three distinct, but related approaches towards the issue of human trafficking; law enforcement, migration, and the 'moral panic', prostitution. It will be argued however that operation of these three approaches each and together negate the approach that should actually be advocated for. This is one of a comprehensive human rights approach that analyses the experiences of trafficked women through the information they provide, in order to *then* formulate a policy for better prevention, protection and assistance. Without this, as the example of the Moldovan woman illustrates, what occurs is a profound misdiagnosis of the realities of what is happening.

The context leading to recruitment into trafficking

In question here is the political economy of migration. Largely speaking, people do not wish to leave home; rather there are coherent push factors that induce people to leave their homes. Poverty, violence and persecution, and increasingly, situations of environmental degradation, are the factors compelling individuals to migrate. The vast majority of trafficked persons met in Bosnia shared the wish to ultimately return home, and to do so in dignity. So, while many wished to return immediately, even those who preferred third country resettlement for fear of organised crime greeting them upon their return, did not want resettlement on distant shores in, for example Canada, since they hoped and believed that in time, they could return home when the situation had improved.

It is one thing to acknowledge the 'push factors', but quite another to consider the 'demand' and its nature in order to comprehend the kind of exploitation taking place. For this, it is necessary to adopt a gender analysis, which will also take into consideration the age and sex of the trafficked individual, but also the gender perceptions of the destination labour-market. Whereas young children or the elderly will be trafficked into begging, children mainly for begging and pornography, women will invariably be trafficked into forced labour in domestic service or sexual slavery. In contrast, men are likely to be trafficked into industries requiring heavy labour, often construction, but sometimes mining. The need to take this gender-based analysis is to appreciate the fact that despite all these constituting forced labour outcomes, it is only in the case of women trafficked into sexual slavery that the 'moral panic' accompanying the discourse around prostitution emerges. It is this moral panic that then prevents further progress being made.

The adoption of gender analysis of the situation in home states can also be useful when diagnosing the push factors encouraging migration. In particular, thematic reports of the UN Special Rapporteur on Violence Against Women have emphasised the political economy of violence, and how the absence of women in the spheres of politics and the economy can contribute to the creation of situations in which there is a greater chance of violence against an individual. Where there is an imbalance in the distribution of power, the control of resources, and participation in

² UN International Criminal for the former Yugoslavia (ICTY), Sentencing Judgement in the *Kunarac, Kovac and Vukovic (Foca)* Case, 12 June 2002, available at: <http://www.icty.org/sid/8095>

those processes, there is a greater chance of violence or conflict. Consequences of these imbalances, economic downturns or post-conflict situations, also strengthen the push-factors for migration and recruitment. It was noted that roughly 30% of the women spoken to who were trafficked into Bosnia stated that their 'push factor' was not economic but violence within the family. Indeed, one woman, who had been trafficked from Kosovo, did not wish to be repatriated, since the violence she was subjected to in the sex industry in Bosnia was much less than that which she would face at home. Evidently then, it is important to consider the situation in the country of origin, not only when considering the push factors compelling migration, but also when considering the appropriate responses to trafficked persons.

One initiative that attempted to address these issues was the trafficking Task Force established as part of the 1999 Stability Pact,³ enacted in South East Europe and intended to regenerate that region. The Task Force focussed on the areas of prevention, law enforcement, referral, and human rights protection and aimed to promote best practices among the member states. In the context of prevention, the Task Force looked at social and economic rights in the countries of origin. It focussed on trade and investment policies as well as donor relations and bilateral donor relations. It advocated addressing these issues from a gendered perspective in order to ascertain how to generate sustainable economic growth that is built upon the participation of women. However, given that this was necessarily a long term project, demanding considerable time and resources in order to construct a long term, coherent and sustainable strategy for economic development that would build a place from which people would not need to migrate, the necessary political will, and consequential financial assistance, was not forthcoming. In the event, short term initiatives were pursued, such as infrastructure regeneration. In the case of Romania, for example, the building of a major road through the country without conducting a gender-analysis, bore the consequence of marginalising certain trading patterns in the country that had a disproportionately negative impact on women over men.

Thus, to summarise, we have identified some of the push factors that create an environment from which people want to migrate. A number of cases before the European Convention on Human Rights have illustrated how the lack of a real and effective framework to provide protection against domestic violence and sexual violence in countries of origin did in effect become part of the push factors compelling migration. These are issues that can be addressed by states by enacting domestic legislation to implement international law.

The 'market' for trafficked persons: the exploitative labour situation

Although there may exist a 'need to migrate', there is still a large jump to be made to reach an exploitative labour situation. To explore many of the relevant issues, it can be useful to take the Bosnian experience as an example, which serves as a relevant microcosm from which lessons can be learned and applied elsewhere. This situation demonstrates what can happen in a relatively short period of time when a 'perfect storm' of events occurs, even if the Bosnian situation was particularly intense.

An appropriate term for this situation is a 'peace-keeping economy'. This exists in all situations whereby peacekeepers are present. This 'economy' feeds into all aspects of society but generates separately from the rest of the local population. Peacekeepers are extremely well paid individuals, who enjoy immunity, who have no tax liabilities and accordingly a large disposable income, in fragile or post-conflict situations where there is little to spend it on. Accordingly, boom towns are created, and a whole economy develops to service the needs and wants of the international peacekeeping community based there, creating a situation of difference between those who can access it and those who cannot.

Another key characteristic of areas of concentrated peacekeeping activity is its highly gendered nature, particularly in the immediate conflict and post-conflict periods. In these periods, the vast majority of peacekeepers are men. Thus in the case of Bosnia in 1996, there were 80,000

³ More information can be found at: <http://www.stabilitypact.org/>

peacekeepers and most of them were men. When free market capitalism in extremis takes operation in this context, problems occur. It is not suggested that peacekeepers intended to go to Bosnia with a view to partake in the services of the sex industry, but a speculative notion emerged that there may be a demand amongst the peacekeeping community for sex. In the event, the creation of a perception of a market became realised.

However, further preconditions are necessary for this situation to emerge, namely the existence and operation of organised crime both during the conflict, and continuing in the post-conflict phase. During the conflict in Bosnia, in the absence of a formal economy, organised crime became rife a wonderfully inter-ethnic initiative to supply the arms, food, drugs and other demands that existed within Bosnia during the conflict. In the post-conflict phase, with the structures of organised criminality in place, the goods transported simply changed. In the absence of a policed border, no real and effective enforcement of the rule of law, and a domicile population traumatised by the conflict, there was little standing in the way of the criminal networks. For a long time, a perception existed amongst the local population that the women being trafficked were 'international' prostitutes working for the 'international community', such that it was nothing to do with them, or their own problems.

As was accurately depicted in the film 'The Whistle Blower', the international community effectively became engaged in the actual trafficking cycle itself. When the borders did become policed, peacekeepers and other international presences began to assist in bringing women across the borders, using UN vehicles and diplomatic privileges. A perception existed that what was occurring in this peace-keeping economy was nothing to worry about; it was simply prostitution and 'boys in uniform being boys'. The reality, of course was far from that; it was not prostitution or a sex industry in which women were voluntarily participating, it was slavery, violence and exploitation, and even on occasion, killings.

Developing strategies to address trafficking: frequent challenges and possible options

When designing programmes to prevent the crime of human trafficking, and to provide the appropriate protection and assistance to those who have been trafficked, it is of critical importance to speak directly to those who have been trafficked and to listen to their experiences. However, at the same time, it is important to expect and accommodate the sense of mistrust that victims of trafficking frequently display towards authorities and NGOs, a consequence of their experienced during their trafficking journey.

In almost all cases, women who have been trafficked have repeatedly had their trust abused and betrayed by their traffickers. Accordingly, by the time they come to the attention of those who may genuinely seek to assist them, they are no longer willing to place their trust in anybody. When speaking to trafficked women, it is important not to expect the whole, straight story, at least straight away. Women who have been trafficked are fearful of everybody, not least the authorities – having either encountered officials during the course of their forced labour activities, or having been told by their traffickers that outsiders are themselves traffickers who are looking to sell them on and send them to other countries, perhaps where the experience of trafficked women is even worse.

If a trafficked woman does place their trust in someone seeking to assist them, it is most likely that they will trust women who work in the NGOs. In Bosnia it was these women who were able to give these women the time they need to come to terms with their situation, and be able to provide the healthcare and therapy that a trafficked woman may need, without asking any questions or placing pressure on the woman to talk about issues she may not be comfortable with. NGOs are better placed to provide trafficked women with legal advice and information, explain the different options available to them and the consequences of taking those options. This enables the women to make an informed decision and gives them the opportunity to recover some of the agency deprived to them during their experience.

In light of this, the Office of the High Commissioner for Human Rights helped the Bosnian government to develop a legal framework that recognised the rights of the women to go to a shelter. During this process, the women were not required to talk to or register with the police until

the manager of the shelter felt it was an appropriate time to do so (typically, the *minimum* length of time required is six weeks. The authorities allowed for 2 weeks but then only to confirm name and decision to remain for a longer period)). Only at the shelter manager's discretion could the police come to the shelter and discuss the situation in private with the women, and receive any information that the women were willing to provide. However, there was no obligation upon women to speak to the police or provide information, nor was the entry into the trafficking programme made contingent upon the provision of information. This method did work and produce results; women began to feel safe, and the programme went some way to earning their trust. Women did become more willing to provide information to the police, if not testify in courts of law, and using that information, the police were able to conduct intelligence based police work in order to disrupt the trafficking networks and to identify and target some of the main actors. The affected women could decide if they wanted to return home and if so, they were assisted in the process of obtaining the relevant documentation, working with the embassies and returning home with dignity.

Despite the indications that the human rights based approach was really beginning to work, , (which was pursued in coordination with the Bosnian Government which realised the importance of allowing trafficked women the necessary time to come to terms with the situation they faced) this process was derailed. It was submitted that the cause of this derailment was the pressures placed on the process by advocates of the law enforcement and migration approaches to addressing human trafficking. Advocates of the law enforcement model, such as that embodied by the annual 'TIP' Report issued by the US State Department,⁴ have been seen to put pressure on government authorities to secure a higher rate of prosecution and to take a firmer stand. As a result of this pressure to secure prosecutions, women were sent directly to the police and as the women began to lose trust in the programme and to not speak to the police, the system began to fall apart

At the same time, there was a growing backlash in Western Europe against the fear of heightened levels of migration of those who had been victims of trafficking into Western European countries. These states thus provided funding to the International Organisation for Migration (IOM), which assured States that their "one stop shop" as in running shelters, getting women back home was the most efficient way of dealing with the problem. IOM imposed tight conditions, and women in shelters were unable to leave, share their clothes, and had their jewellery and mobile phones taken from them, until such time as they stated that they wished to return home. As a result, the whole system began to fall through the faultlines of migration and law enforcement. The prioritisation and employment of the migration and law enforcement approaches over the human rights based approach had the outcome of denying trafficked women agency and dictating to them a fixed notion of morality. In the view and experience of many trafficked women, it was preferable to continue to work in the forced labour conditions in order to enable them to pay their debt to the traffickers and to return home on their own accord, rather than to return home immediately with the IOM. It was often the case that should the woman return home under the aegis of the IOM, she would be in a worse situation in light of the stigma that is attached to prostitution and the work that she had been doing. In contrast, had she continued to work in order to pay her debts, have 2000 euros in her pocket, and return home on her own, she would have returned home with dignity.

There is a strong nexus between the law enforcement and the migration approaches. The speaker recalled the experience of a former police officer who used to work in the anti-trafficking network, where the strategy adopted echoed those of the human rights oriented approach in its focus upon the needs and experiences of the trafficked individual. However, the work of that network became subsumed with the vice squad, a department predominantly concerned with the prosecution of organised crime, and its focus is on the perceived ills of prostitution rather than the circumstances of the women in that situation. However, the strategies used by such law enforcement officials, such as raiding brothels, can have disastrous consequences, driving the industry underground and making the situation even more dangerous for the women concerned.

⁴ See <http://www.state.gov/j/tip/rls/tiprpt/index.htm> .

Accountability: breaking the architecture of impunity

This is another area where international law in relation to trafficking has been found deficient. Drawing once more on the Bosnian example, it is clear that there were significant criminal acts being committed in relation to women being trafficked. These were gross violations of international law, both human rights law and criminal law, committed by UN peacekeepers, yet there was not a single prosecution, thus creating a culture of impunity. It is shameful that neither the UN nor the wider international community has acted upon this in order to prevent it occurring again, or prosecuting those responsible for these crimes.

What does exist are a handful of arguably fatuous policies that are unenforceable in practice and unfounded in law. For example, the 'zero tolerance policy' of paying for sex on a mission adopted by the UN is not based on law, but rather on a perception of the morality of paying for sex and to avoid scandal. Similarly codes of conduct and disciplinary practices adopted by member states of the UN, although in principle, are moves in the right direction, in practice are difficult to assess. The lack of transparency of such procedures make it difficult to track the numbers of individuals subjected to disciplinary procedures, their countries of origin, and the consequences of those procedures. This lack of transparency currently means that there is a cycle whereby those who are actually returned to their home countries following misconduct, and there are very few, are then being redeployed and carrying on with impunity. It is necessary to adopt and implement measures that have teeth; they must have a strong legal basis and constitute a transparent process that people will take seriously.

It is necessary that the measures adopted form a coherent framework that incorporates the human rights perspective, and which reflects the realities of the experiences of trafficked women. The lack of coherence within the current system is evident in the fact that immunity from prosecution can be enjoyed by UN peacekeepers for crimes under international law such as slavery and rape that are recognised as holding the status of *jus cogens*.⁵ It seems to have been forgotten that functional immunity does not apply in criminal cases in any event. It is also important to encourage the Secretary General to raise the issues of training and accountability with troops in contributing countries. The UK and other states in the Human Rights Council are starting to push for this after they were made aware of the realities of the situation as portrayed in the film 'The Whistleblower'. It is necessary to foster a culture whereby it is considered that the adoption and implementation of transparent training and accountability mechanisms are an essential pre-requisite for the eligibility of states to contribute troops to UN activities. Concerns that the imposition of too great obligations on troop-contributing nations might reduce the number of troops that Member States are will to provide thus compromising UN missions, are, it was submitted, misguided. It is important to consider not only the number of troops on the ground, but also the quality, since the presence of high numbers of troops who are committing serious human rights violations against domicile populations itself condemns the mission to fail. As the Bosnian example demonstrates, the presence of these rogue elements fuel the illegal economy run by the organised crime groups, thus causing the situation to further deteriorate.

It is also important to note that this culture of impunity has worsened as a consequence of increased privatisation through the use of private contractors to conduct UN operations. As private military contractors move to locate their headquarters outside of jurisdictions such as the US and UK, it becomes increasingly difficult to hold their personnel accountable for their infringements of international human rights and criminal law. In contrast, where state forces are involved, if individual accountability cannot be secured, there is the potential option to pursue state responsibility for internationally wrongful acts.

⁵ *Jus cogens* are the peremptory norms of international law which are universally binding and from which no derogation is permitted.

Role of NGOs

Finally, it must be noted that the role of NGOs is of fundamental importance. Without the outreach work that they engage in with the trafficked women, and without the work of international legal NGOs who help to develop the legal frameworks for prevention, protection, and assistance, the whole response to human trafficking would be even worse than it is at present. At the same time however, it was cautioned that frequently NGOs become polarised in their perspectives that can impede the development and implementation of a coherent and effective strategy that accurately reflects the realities of the problem. Accordingly, it is necessary for everyone to keep at the forefront of their mind the importance of listening to the people who have experienced trafficking from beginning to the end and responding, not from the subjective positions identified, but to the address the realities they describe.