

Mandates of the Special Rapporteur on trafficking in persons, especially women and children; the Special Rapporteur on violence against women, its causes and consequences and the Working Group on discrimination against women and girls

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Excellency,

We have the honour to address you in our capacities as Special Rapporteur on trafficking in persons, especially women and children; Special Rapporteur on violence against women, its causes and consequences and Working Group on discrimination against women and girls, pursuant to Human Rights Council resolutions 44/4, 41/17 and 41/6.

In this connection, we would like to bring to the attention of your Excellency's Government information we have received concerning the **Trafficking in Persons (Prevention, Care and Rehabilitation) Bill 2021 and its compliance with the State's obligations under international law to prevent trafficking in persons, assist and protect trafficked persons without discrimination, ensuring gender equality and promoting the human rights of trafficked persons.**

We note that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children ("the Palermo Protocol") ratified by your Excellency's Government on 5 May 2011 aims to: (i) prevent and combat trafficking in persons, paying particular attention to women and children; (ii) protect and assist the victims of such trafficking, with full respect for their human rights; (iii) promote cooperation among States Parties in order to meet those objectives (Article 2).

Under the terms of the Protocol, State Parties are required to take into account, "the age, gender and special needs of victims of trafficking in persons". We are concerned that the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill 2021, as it stands now, does not ensure the timely identification of trafficked persons. We are also concerned that the Bill does not ensure assistance and protection to victims of trafficking. We note that the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) address the obligations of States concerning the identification and protection of victims. Specifically, regarding the identification of trafficked persons, it is provided:

"A failure to identify a trafficked person correctly is likely to result in a further denial of that person's rights. States are therefore under an obligation to ensure that such identification can and does take place". (Guideline 2)

And, concerning the protection and support afforded to victims of trafficking:

"States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care".

We bring to the attention of your Excellency's Government, the obligations arising under the Convention on the Elimination of All Forms of Discrimination

against Women, ratified by your Excellency's Government on 9 July 1993, applicable to trafficked women and girls. As is noted in General Recommendation no. 38 (2020) of the Committee on the Elimination of Discrimination against Women (CEDAW) on trafficking in women and girls in the context of global migration, there is a positive obligation, "to identify victims of trafficking, a duty placed firmly on States, irrespective of the lack of self-identification by a victim." (CEDAW/C/GC/38, para 38) A failure to identify a victim of trafficking by the State is to deny the trafficked person their right to special assistance and protective measures. Often, regrettably, such victim-centred measures are, "lacking in anti-trafficking response measures due to poor victim identification" (CEDAW/C/GC/38, para 39). We are concerned that the Bill does not seem to fulfil the State's duty to ensure the identification of victims of trafficking, and that there is an absence of recognition of right of the trafficked person to victim-centred special assistance and protective measures.

In its report on women deprived of liberty submitted to the Human Rights Council (A/HRC/41/33), the Working Group on discrimination against women and girls stressed that owing to limited pathways for regular migration opportunities for women, irregular status becomes a contributing factor to deprivation of liberty of migrant women. Restrictions related to "protective" stereotypes that aim to prevent women from legally migrating, on the grounds that they may become victims of trafficking or forced prostitution, push women to seek alternative (irregular) migration channels and consequently increase their vulnerability to forced or bonded labour, confinement and other human rights violations. Lack of choice and opportunities push women into the realm of human trafficking and contemporary forms of slavery that may result in varied forms of confinement, exploitation and violence. The Working Group recommended to incorporate laws, policies and effective programmes that will enhance protection from trafficking in persons, irregular migration and contemporary forms of slavery, and establish regular migration channels.

Sections in the Bill relating to the identification of victims of trafficking

From the outset, we are concerned that the definition of 'victim' under Chapter I of The Trafficking in Persons (Prevention, Care and Rehabilitation) Bill, as it stands now, includes:

"[...] any dependent of a victim or any child born in the course or in furtherance or as a result of an offence committed under this Act".

The absence of distinction between categories of victims under the Anti-Trafficking Bill may create confusion as to the positive obligations of states, and obligations of child protection, distinct from the obligations to ensure assistance and protection of trafficked persons (recognizing the "special status" of trafficked persons (CEDAW/C/GC/38, para 39)).

We are also concerned that Chapter III of the Bill, provides for the establishment of Anti-Human Trafficking Committees and Nodal Officers, seemingly without representation of critically important actors working on labour rights. Specifically, although representatives of the Ministry of Labour and Employment and the Department of Labour are included in the establishment of the National Anti-Human Trafficking Committee and the State Anti-Human Trafficking Committee respectively (ss. 5(2)(d) and 6(2)(c)), section 8(2) omits labour representatives from the District Anti-Trafficking Committee, thus potentially excluding trafficking for

purposes of forced labour from its work and functions. Concerning trafficking for purposes of forced labour, CEDAW highlights that, “demand for trafficking persists due to an insufficient regulatory environment” (CEDAW/C/GC/38, para 31).

In this regard, Guideline 2 of the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) highlights the importance of:

“Ensuring cooperation between relevant authorities, officials and non-governmental organizations to facilitate the identification and provision of assistance to trafficked persons”.

Further, in addition to the exclusion of labour representatives in the functions of the District Anti-Trafficking Committee, there would be no attention to ensuring the participation of survivors of trafficking in persons, in core areas of work, including under s. 8(3)(h), viz, to:

“[...] facilitate survey of the areas and vulnerable population to identify source, transit and destination areas of trafficking and based on the information received, draw up action plans for the prevention of trafficking, for rescue and safety and protection of victims, and for protection of people who are vulnerable to trafficking.”

Guideline 3 of the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) recognizes, “the important contribution that survivors of trafficking can, on a strictly voluntary basis, make to developing and implementing anti-trafficking interventions and evaluating their impact”.

We are also concerned that section 35 of the Bill, which provides for the imprisonment: “of every person, not a family member of the person trafficked” (s. 35(2)) who fails to inform police should they have “reason to believe” (s. 35(1)) that a person has been trafficked, may lead to the criminalisation of civil society organisations working with victims of trafficking who are not yet ready to disclose their experience of exploitation. We note that CEDAW highlights that survivors, “are often reluctant to self-identify and disclose their traffickers for fear of retaliation,” as well as due to, “fear of engaging with authorities, including being detained, prosecuted, punished and deported.” (CEDAW /C / GC/ 38, para 38) We are therefore concerned that this provision may hinder the effective identification, assistance and protection of victims of trafficking and potentially result in an increased distrust of authorities amongst victims.

Chapter V of the Bill is of serious concern, and would potentially contribute to further stigmatisation of trafficked persons, and what could be seen as a paternalistic approach to combating trafficking in persons, which would fail to ensure the human rights of trafficked persons and a human rights based approach. We are concerned that a number of provisions within the Bill, as it currently stands, would not fulfil the obligations of the State to afford victims of trafficking with assistance and protection, in accordance with international human rights law, and without discrimination. We highlight the obligation to provide for the physical safety of victims, under *the Palermo Protocol*, specifically Article 6 (5), which states:

“Each State Party shall endeavour to provide for the physical safety of victims

of trafficking in persons while they are within its territory”.

Section 11(1) of the Bill, as it stands now, confers the power to remove a person from any place or premises where a, “police officer not below the rank of a sub-inspector,” has reason to believe that the person is at imminent danger, “of becoming a victim or of being exploited as a victim”. Insufficient safeguards are provided against possible abuse of this power and its potential discriminatory impact, in particular, on women. We highlight Guideline 5 of the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) which states that States should consider:

“Implementing measures to ensure that “rescue” operations do not further harm the rights and dignity of trafficked persons. Such operations should only take place once appropriate and adequate procedures for responding to the needs of trafficked persons released in this way have been put in place”. (para 6)

Further, Section 11, as it stands now, confers the power on the officer to, “take all necessary steps for the medical examination” of the ‘rescued’ individual. Section 11(2), as it stands now, provides that such a medical examination will be subject to the provisions of section 164A of the Code of Criminal Procedure, 1973, and section 27 of the Protection of Children from Sexual Offences Act, 2012. We are concerned that the requirement of consent to medical examination is not explicitly provided for men, trans persons or non-binary persons. This seems to further illustrate the narrowed focus on forms of trafficking, and on types of victims.¹

The Bill places an undue emphasis on institutionalisation of trafficked persons, both adults and children, in protection and rehabilitation homes, in what could be considered a violation of the human rights of trafficked persons to freedom of movement, and to non-discrimination. As currently drafted, the Bill provides insufficient safeguards against arbitrary detention of trafficked persons. Section 16(5) of the Bill provides that a Magistrate:

“may make an order that the victim be placed, for such reasonable period as he considers suitable, in a protection home or a rehabilitation home.”.

We bring to your attention Guideline 1 of the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) which highlights, “the right of all persons to freedom of movement”, and Guidelines 2 and 6 which provide that trafficked persons should not be held in detention facilities or any other forms of custody under any circumstances. We are concerned that this provision could amount to a serious risk to the right to liberty and security of trafficked persons, including the right to be free from arbitrary arrest and detention, protected under Article 9(1) of the International Covenant on Civil and Political Rights, and General comment No. 35 *Liberty and security of person* (CCPR/C/GC/35). We remind your Excellency’s Government of the requirement of Article 3 ICCPR to ensure that all human beings should enjoy the rights provided for in the Covenant, “on an equal basis and in their totality.” (GC no.28 The equality of rights between men and women)

We are concerned that provisions within Chapter VI of the Bill, as it currently

¹ Prabha Kotiswaran, ‘The Sexual Politics of Anti-Trafficking Discourse’ (2021) 29 Feminist legal studies 43, 48.

stands, would not fulfil the State's obligation of non-refoulement, a principle of customary international law, or provide alternatives to repatriation for victims of trafficking and their dependents. Specifically, s. 21(5) provides for the mandatory completion of inter-country repatriation of all victims of trafficking within 6 months of that victim being produced before the District Anti-Trafficking Committee. Further, we highlight the obligations accepted under the Palermo Protocol, specifically Article 7, which states:

“1. In addition to taking measures pursuant to article 6 of this Protocol, each State Party shall consider adopting legislative or other appropriate measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases.

2. In implementing the provision contained in paragraph 1 of this article, each State Party shall give appropriate consideration to humanitarian and compassionate factors”.

We also highlight obligations accepted under Article 14 of the Palermo Protocol, which states:

“1. Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law and, in particular, where applicable, the 1951 Convention and the 1967 Protocol relating to the Status of Refugees and the principle of non-refoulement as contained therein”.

In this regard, we also highlight Principle 10 of the OHCHR *Principles and Guidelines on Human Rights and Human Trafficking* (E/2002/68/Add. 1) which states:

“Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families.”

We also highlight the protection against refoulement ensured to all victims of trafficking, guaranteed by Article 7 ICCPR, and Article 5 CERD.

We remind your Excellency's Government of the obligation under the Convention on the Rights of the Child (CRC), to respect and ensure the rights set forth in the CRC to each child within their jurisdiction without discrimination of any kind. (Article 2). We also note the obligation of non-refoulement arises under the CRC, as noted in General Comment no.6 (2005) (Treatment of separated and unaccompanied children outside of their country of origin).

Specifically, the Committee on the Rights of the Child has stated that:

“[...] non-refoulement obligations apply irrespective of whether serious violations of those rights guaranteed under the Convention originate from non-State actors or whether such violations are directly intended or are the indirect consequence of States parties' action or inaction.” (CMW/C/GC/3-CRC/C/GC/22, para 46)

We are concerned that the Bill may lead to detention of child victims of trafficking, or children at risk of trafficking. We remind your Excellency's Government that Article 39 CRC provides that recovery and reintegration of a child shall take place in an environment, "which fosters the health, self-respect and dignity of the child victim." The Committee on the Rights of the Child, in its General comment No. 6 (2005) on treatment of unaccompanied and separated children outside their country of origin, stated that children should not be deprived of their liberty and that detention cannot be justified solely on the basis of the child being unaccompanied or separated, or on their migratory or residence status or lack thereof.

We also remind your Excellency's Government of the obligations stated in Article 37 (b) CRC:

No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time.

As currently drafted, we are concerned that the Anti-Trafficking Bill would not ensure the rights and best interests of the child, as required by international law and specifically the CRC.

As it is our responsibility, under the mandates provided to us by the Human Rights Council, to seek to clarify all cases brought to our attention, we would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the issues mentioned.
2. Please provide detailed information on how your Excellency's Government intends to proceed with regard to the Trafficking in Persons (Prevention, Care and Rehabilitation) Bill 2021 and how its provisions comply with India's obligations under the international legal framework of human rights law relating to trafficking in persons.
3. Please provide information on any measures that your Excellency's Government has taken or intends to take in order to implement the recommendations by human rights bodies, referred to above.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting [website](#) after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

Please accept, Excellency, the assurances of our highest consideration.

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