



**Response by the Global Alliance Against Traffic in Women (GAATW)
to the Report of the Special Rapporteur on trafficking in persons, especially
women and children, Sigma Huda**

**“Integration of the Human Rights of Women and the Gender Perspective”
E/CN.4/2006/62, 20 February 2006
for the 62nd Session of the Commission on Human Rights.**

This is a response to the second thematic report of the Special Rapporteur on trafficking in persons especially women and children (the Special Rapporteur), prepared for the 62nd Session of the Commission on Human Rights.

This response is prepared by the international secretariat of the Global Alliance Against Traffic in Women (GAATW) based on comments prepared by GAATW members, including several that responded to the Special Rapporteur's questionnaire.

Introduction

GAATW is an international alliance of 79 autonomous organisations across six continents that work to promote the rights of trafficked persons, particularly trafficked women. The alliance is based on that belief that human rights principles and practices should be central to the anti-trafficking movement. It was instrumental in the development of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the Palermo Protocol), in which it succeeded in defining trafficking to cover all forms of exploitation. Since the adoption of the Palermo Protocol, GAATW has concentrated its efforts on centering the voices of trafficked persons and other affected communities in the anti-trafficking debate and on advocating for the integration of human rights principles into all anti-trafficking work.

GAATW has welcomed the appointment of a Special Rapporteur mandated to focus on trafficking of persons from a human rights perspective. This mechanism is a vital tool in raising international awareness of the human rights violations associated with trafficking, and for advocating for policy changes to protect the victims of trafficking. The thematic reports, in particular, are a powerful platform for bringing specific human rights situations to the attention of policy makers, scholars, activists and the broader public.

We appreciate that the Special Rapporteur has selected the demand side of trafficking for analysis in this report; this has become a prominent theme in the anti-trafficking debate which requires research and analysis. However, we are of the view that this Report will have limited impact because it has not been prepared within the terms of the Special Rapporteur's mandate. In summary, we are concerned that:

- The Report has not focused sufficiently on the human rights of trafficking victims. In particular, the analysis has not been guided by the core human rights conventions.
- The Report's conclusions are not supported by reliable factual findings
- The Report is not sufficiently impartial and objective.

We hope our expansion of these points will be taken into account in preparation of the next thematic report by the Special Rapporteur.

The Mandate of the Special Rapporteur

GAATW's comments relate to the fulfillment of the Special Rapporteur's mandate. To provide context, we restate briefly what the mandate includes.

The Commission on Human Rights decision 2004/110, made on 19 April 2004, defined the scope of the mandate as to: "focus on the human rights aspects of the victims of trafficking in persons, especially women and children". Decision 2004/110 also requires the Special Rapporteur to:

- Submit an annual report with recommendations "on measures required to uphold and protect the human rights of the victims"
- Respond, in line with current practice, to "reliable information on possible human rights violations with a view to protecting the human rights of actual or potential victims of trafficking"
- Cooperate fully with other special rapporteurs and to take full account of their contributions on this issue.
- Cooperate with United Nations bodies, regional organisations, victims and their representatives.

Special rapporteurs are independent and work autonomously to fulfill their specific mandates. However, like all special procedures mechanisms they must be guided in their work by certain principles. The meeting of Special Rapporteurs/Representatives in Geneva in 1997 highlighted that Special Rapporteurs are "[g]uided by the principles of neutrality, non-selectivity and objectivity". The meeting reaffirmed:

*The special rapporteurs and working groups perform their tasks with strict impartiality and objectivity, the only guidelines or yardsticks for analysing the situations covered by their mandates being the Universal Declaration of Human Rights, the international human rights instruments to which the States concerned are party, and other extraconventional instruments adopted within the United Nations system. Their task is to weigh the facts that come to their attention and analyse them in the light of those international instruments, and to make recommendations with a view to enabling all inhabitants of the countries under investigation to enjoy all the rights laid down in those instruments;*¹

Essential to the role of a Special Rapporteur is his or her high standing and "expertise and experience in the area of the mandate, integrity, independence and impartiality".²

In sum, the general mandate of the Special Rapporteur requires:

- "strict impartiality and objectivity"
- reliance on core human rights instruments as the sole guide for analyzing situations
- to weigh facts that come to their attention and analyze them.

"Focus on the human rights aspect"

The Special Rapporteur's obligation to apply the international human rights framework to her subject is thus contained in both the general mandate of all special procedures mechanisms,

¹ *Report of the Meeting of Special Rapporteurs/Representatives, Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and of the Advisory Services Programme*, Geneva, 20-23 May 1997, presented to the Commission on Human Rights, 54th Session, E/CN.4/1998/45, 20 November 1997.

² *Report of the Inter-Sessional Working Group on Enhancing the Effectiveness of the Mechanisms of the Commission on Human Rights* (E/CN.4/2000/112) at paragraph 7.

and her specific mandate to “focus on the human rights aspect of trafficking of women and children.”³

GAATW respects that the Special Rapporteur selected the theme of this Report on her understanding of where the most serious human rights violations occur in trafficking (although we do not agree with this understanding).⁴ However, in GAATW’s view the analysis of this theme using a right’s-based approach is inadequate. We note:

1. The Special Rapporteur has not once referred to the core human rights instruments in the Report. Although the Report frequently refers to the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, it does not refer to the rights of victims set out in the Protocol. In any case, the Protocol is not a human rights instrument but rather a crime control instrument. It is not a substitute for international human rights law and its interpretation should not contradict international human rights principles.
2. In particular, the Report interprets “demand that fosters all forms of exploitation of persons...that leads to trafficking”, the theme of the paper, without any reference to human rights principles. Instead the term “demand” is subjectively interpreted on the wording of the Protocol alone.
3. The Special Rapporteur does not explain which rights violations in particular she has found to be violated by demand and/or sex trafficking.
4. Further, the Report does not explain the relationship between demand and socio-economic rights, such as the rights to shelter, to health, to free choice of employment, to just and favorable conditions of work or to protection against unemployment. GAATW considers that a human rights approach to trafficking requires a broad understanding of the rights of trafficked persons.
5. The Report also does not analyze potential human rights impacts of activities aimed at discouraging demand. The Special Rapporteur’s main recommendation is the criminalization of the use of prostitutes. At paragraph 92 she notes possible unwanted effects resulting from this strategy, but she dismisses them immediately without evidence to support her view:

It has been claimed that criminalization, even when it is targeted only against prostitute-users, may have the unwanted effect of pushing prostitution out of sight, thus making trafficking victims more vulnerable to human rights abuses. However, it is equally true that legalization of prostitution has the effect of making human rights abuses appear as if they were simply legitimate work, thereby “hiding” such abuses in plain view.

Again, it is unclear from this paragraph which human rights abuses will be normalized if prostitution is legalized. It also does not adequately set out which human rights criminalization of prostitution intends to protect and how

³ The core human rights conventions are: the United Nations Declaration of Human Rights, the International Convention on Civil and Political Rights, the International Convention on Economic, Social and Cultural Rights, the Convention on the Elimination of Discrimination Against Women, the Convention on the Rights of the Child, the Convention Against Torture and the Convention Against All Forms of Racial Discrimination.

⁴ The Special Rapporteur has chosen demand and sex trafficking on the ground that she considers sex trafficking to be a particular form of trafficking because “the human rights of women and children are violated as women and children” (para 63). She explains that demand by those who use prostitutes is also worthy of attention because they are part of the trafficking chain and that as well as the violations inherent in trafficking, they perpetrate other violations “tantamount to rape”. They also, in her view, fuel demand.

The Special Rapporteur has failed to understand that there is a distinction between arguing for a human rights approach that provides individuals with the tools to fight exploitation and abuse, a vital component in any anti-trafficking strategy, and one that argues for or against the legalization of prostitution.

Indeed, the Special Rapporteur does not adequately explain how she understands a “focus on the human rights aspect”, given that she has not relied on the core human rights conventions. The only clarification of her mandate is near the end of the Report in the Conclusions section at paragraph 81:

At the outset, the Special Rapporteur wishes to dispel a common misconception regarding the nature of the human rights approach to trafficking. It has been wrongly assumed in some quarters that a human rights approach to trafficking is somehow inconsistent with the use of criminal law to punish prostitute-users. This conclusion can only be based on the assumed premise that men have a human right to engage in the use of prostituted persons. This premise should be rejected ... Where the human rights of trafficking victims conflict with the legal rights granted to prostitute-users, the human rights of trafficking victims must prevail. That is what counts as a human rights approach to sex trafficking.

GAATW finds this paragraph confusing and unhelpful. Again it does not explain the particular human rights of trafficking victims that must be allowed to prevail, or adequately source the vaguely phrased assumptions “in some quarters”. This does not help the reader, or the Human Rights Council, to understand the complex relationship between human rights and demand.

Most importantly, this paragraph makes clear that the Report narrows the “focus on human rights” to an argument for or against the criminalization of those who engage prostitutes. The Special Rapporteur makes an extraordinary claim that the promotion of the human rights of women and others to fight exploitation and abuse that render them vulnerable and lead to trafficking, amounts to a support of a man’s human right to engage prostituted persons. The claim is both incomprehensible and inconsistent with the mandate of the Special Rapporteur to support and facilitate the human rights of all those affected by trafficking. This includes ensuring that such rights are not violated by anti-trafficking interventions.

GAATW submits that any approach to trafficking cannot be confined to an analysis of the criminalization and legalization of sex work. It must begin from a human rights based approach, sound research and dialogue with all stakeholders, including prostitutes themselves. Theoretical suppositions that are didactic and based on confusing and conflating issues of sex work, prostitution, demand and trafficking are not helpful and do not add any clarity to the issue demand.

“Weighing the facts and analyzing them”

The OHCHR has stated that the purpose of the special procedures is to ensure that the Commission on Human Rights (now the Human Rights Council) is “constantly engaged on an issue of concern throughout the year”⁵:

The work of these experts has provided a much needed analysis on how human rights principles are applied in reality. It has formed the basis for an informed and substantive debate...it has given a voice to the often silenced victims and offered a basis for dialogue with Governments on the concrete measures to be taken to enhance protection. (P. 4)

⁵ Officer of the High Commissioner for Human Rights, “Special Procedures of the Commission on Human Rights”, at www.ohchr.org/english/bodies/chr/special/index.htm.

The Special Rapporteur is mandated to bring reliable information of human rights abuses suffered by trafficked women and children to the attention of the international community. Again, GAATW considers that the Report has not fulfilled this aspect of the mandate.

In particular, we note:

1. The Report states that it is based on the replies to a questionnaire from 35 countries, IOM and UNICEF offices in several countries, and from 31 NGOs and individuals. Unfortunately, a copy of the questionnaire is not provided with the report, no detail of the questions is provided and no systematic analysis of the responses is made. Only one questionnaire response is cited in one footnote to the Report, but that response was in fact a quote from a secondary source. Other questionnaires are cited in the Conclusions section, but no reference is given and often not even a name of the source is provided.
2. No specific case examples have been provided to substantiate the Special Rapporteur's position.
3. The Report quotes empirical research in only one place.
4. Victims of trafficking or individuals vulnerable to trafficking apparently have not been interviewed or given an opportunity to complete a questionnaire for the Report. This is despite a specific mandate to "cooperate...with victims".
5. The basis for the Special Rapporteur's conclusions are "her experience and investigations as Special Rapporteur" (par 48, fn 7) and her "experiences as a legal advocate for prostituted women in Bangladesh" (fn 7). No explanation is provided of the nature of these experiences and investigations, or what she learned from them.
6. The Special Rapporteur justifies many of her key statements phrases such as there is "good reason to believe" or "little reason to believe" (paras 59, 60, 63, points 4 and 5, 88, fn 14) that an asserted statement is true. None of the reasons are set out, however, to assist the reader anxious to understand the human rights situation on the ground for victims of trafficking. Nor are the assertions based on any sound legal reasoning.
7. In the Conclusions section of the Report, the Special Rapporteur has drawn attention to the policy and legislative approach of a number of states. Again however, she does not provide an analysis of the success or otherwise of these approaches. Rather, she states that she "believes" that the obligation to discourage demand "can be effectively met through criminalization of the use of prostituted persons" (para 88).
8. At paragraph 89 the Special Rapporteur makes the central claim that "there is no doubt that criminalization serves as a clear and effective means of discouraging the activity." In GAATW's view this requires strong substantiation given the long-standing debate about the effectiveness of criminalization as a deterrent. In any case this claim is no substitute for a sound and grounded human rights approach to the issue of demand, which is ostensibly the mandate of the Special Rapporteur.

Finally, as a note on structure, GAATW finds the approach to analysis used in the Report highly problematic. The main body of the Report is based on subjective legal interpretation and the personal opinion of the Special Rapporteur. No case examples or submissions have been used until the Conclusions section of the Report. At this point, the examples are used to support the conclusions after they have been reached.

"Objectivity and Independence"

Perhaps the most essential elements of a Special Rapporteur's role are impartiality, objectivity and independence. In the highly politicized context of discussing trafficking, and on these themes in particular, the need for the United Nations appointed Special Rapporteur to be impartial and objective is all the more pressing.

The Special Rapporteur has chosen to discuss the definition of "trafficking" and the role played by demand in trafficking, especially sex-trafficking. These are among the most contested issues in this field. It is simply not the case that international opinion is settled within the human rights community, the women's rights discourse or the anti-trafficking debate on these issues. Different views are important for healthy debate but impartiality requires canvassing the various views. If one is to be preferred, the Special Rapporteur should explain clearly, based on the human rights conventions, why that view is being adopted. Instead, the Special Rapporteur has actively advocated for a particular side of the debate and not even acknowledged that other views exist.

The Question of Demand

For example, the Special Rapporteur has advocated for a particular understanding of demand in section II(B) "What does 'demand' mean?". To do so, she has centered her discussion on constructing the Protocol definition of "trafficking" in a way to lay responsibility for stimulating demand on prostitute-users. This has been done by interpreting "receipt" of trafficked persons to include those who purchase sex with a trafficked person. This makes those who purchase sex a trafficker under the Protocol, supporting the argument that those who engage prostitutes should be prosecuted. Such an interpretation of the definition is not made on the face of the document but rather through the imputation of political views on the nature of specific kinds of sexual conduct. Indeed, there is nothing in the Protocol to suggest singling out those who purchase sex from those who purchase other services or goods produced by trafficked persons. The Special Rapporteur's interpretation is open to serious challenge and debate but the discussion under section II(B) does not even acknowledge other views.⁶

The definition of trafficking

GAATW has similar concerns with the Special Rapporteur's main discussion of the definition of trafficking. We agree with her statement that the "protocol definition of trafficking stands today as the accepted international definition" (para. 32). We reject, however, that the Special Rapporteur's interpretation promoted in this Report is the only one in currency.

The definition of trafficking, like the concept of demand, has been highly controversial. It was crafted, as the Special Rapporteur acknowledged, in the context of "deeply divided views" about prostitution.⁷ As a compromise, the wording of the definition was left deliberately vague by the Ad Hoc Committee to allow States to adapt it to their individual positions on this topic.⁸ No authoritative interpretation of the definition has ever been made at the international level. It is simply untrue to assert that the Special Rapporteur's interpretation is made "[a]s a matter of legal interpretation" (para 37) or that "it should now be clear" (para 38) that her interpretation is the right one.

⁶ There are numerous publications addressing the demand side of trafficking. See for example: Bridget Anderson and Julia O'Connell Davidson, *Trafficking – a Demand Led Problem?* GAATW 2004; Working Group on the legal regulation of the purchase of sexual services (Ministry of Justice and the Police -Norway-): Purchasing sexual services in Sweden and The Netherlands. Legal Regulation and Experiences (2004); ILO: Demand Side of Human Trafficking in Asia: Empirical Findings, 2006; Janice G. Raymond: Prostitution on Demand, Legalizing the Buyers as Sexual Consumers. CATW, 2004; Petra Ostergren, Sex workers Critique of Swedish Prostitution Policy.

⁷ See for example, Anne Gallagher, "Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis", *Human Rights Quarterly* (2001) vol. 23(4), pp. 975-1004.

⁸ *Ibid* at p. 14.

To illustrate the seriousness of this point, we note:

1. At paragraph 37 it is stated that it is simply “a matter of legal interpretation” to interpret the consent provision (Article 3(b)) as intended to “significantly expand” Article 3(a). In response GAATW notes that other feasible interpretations of Article 3(b) have been made by international legal experts. For example, the International Human Rights Law Group says of Article 3(b):

This provision merely restates international legal norms. It is logically and legally not possible to consent when any of the following are used: ‘force, coercion, abduction, deception, abuse of power or actions taken while one is in a state of vulnerability or while one is in the control of another person’...Real consent is only possible and legally recognizable when all the relevant facts are known and a person is free to consent or not.⁹

In other words, it is strongly arguable that Article 3(b) does not expand the definition in 3(a) at all. Rather, the reference to the irrelevance of consent in article 3(b) has the effect only of denying consent as a defence to a charge of trafficking.¹⁰

2. The Report claims that it should “now be clear” that Article 3(b) refers to the Convention against Slavery of 1949 (para 40). No grounds whatsoever are given for this claim and GAATW notes that the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, makes no mention of the 1949 Convention.
3. The Report equates child and adult prostitution at paragraph 41. GAATW rejects this interpretation. Even from a legal perspective, the two are not treated in the same way. Child prostitution is universally deplored and outlawed in several international instruments, as well as in most domestic legal systems. In the Protocol, trafficking of children is treated separately in that it is not required to prove the means, namely threats or use of force or coercion (paragraph 3(c)). Adult prostitution is treated differently in various contexts and is not regulated by international law. It is addressed in the Protocol only to the extent that it occurs in a trafficking situation, namely without consent and in a situation of forced labor, servitude or slavery.¹¹
4. Also at paragraph 41, the Report claims that it is the responsibility of states to “abolish all forms of adult prostitution in which people are trafficked” to meet their Protocol obligations. However, the Protocol merely requires states to take measures “to prevent and combat trafficking in persons” (Article 2(a)). That is, it is not prostitution that States must abolish, but trafficking (the use of threats or force in the recruitment, transportation, harbouring or receipt of persons for the purpose of exploitation). For example, it would be nonsensical to abolish all forms of garment manufacturing in which people are trafficked; rather, states must monitor recruitment practices, protect labour rights of garment workers, ensure occupational health and safety and like measures.

⁹ International Human Rights Law Group, *The Annotated Guide to the Complete UN Trafficking Protocol* (2002) at p. 11.

¹⁰ See also the Conference of the Parties to United Nations Convention against Transnational Organized Crime, *Implementation of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime: Analytical report of the Secretariat*, 14 September 2005, CTOC/COP/2005/3, which states at para. 25 in relation to Article 3(b) of the Palermo Protocol that: “Most States responding to the questionnaire confirmed that their legislation was in line with that requirement, thus ensuring that traffickers could not use consent as a defence against trafficking charges”

¹¹ Interpretive Notes (*travaux préparatoire*) for the official records of the negotiation of the United Nations Convention against Transnational Organized Crime and the Protocols thereto, UN Doc. A/55/383/Add.1 at 64.

5. The Special Rapporteur claims in essence that prostitution is equal to trafficking because “prostitution as actually practiced in the world usually does satisfy the elements of trafficking” (para. 42). Whether this statement is true or not, to imply that all prostitution is thus effectively trafficking is an analytical leap that has been strongly and publicly contested. If the required principle of “strict impartiality and objectivity” are to be upheld then all other shades within this debate should at least be acknowledged and the specific position promoted in this report should be substantiated on the basis of clear evidence and serious research.
6. Paragraph 43 states that governments that legalize prostitution “have a heavy responsibility to ensure” that trafficking does not occur in the industry. GAATW would argue that all states, whether they criminalize or legalize prostitution, have an ongoing responsibility to ensure that their laws do not contribute to the violation of human rights.
7. No supporting evidence is provided for the statement that States with legalized prostitution “are far from satisfying this obligation” (para 43). We take this as a personal opinion of the Special Rapporteur, rather than an objective statement based on all of the facts.

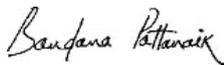
From the above, it appears to GAATW that the Report has been unnecessarily politicized. This is clearly not the mandate of the Special Rapporteur.

Conclusion

While fully acknowledging that the Special Rapporteur is an independent expert and enjoys the right to assert the autonomy of her report, she is at the same time bound by certain principles which govern her mandate; these include “strict impartiality and objectivity, the only guidelines or yardsticks for analyzing”, reliable information, and cooperation with other Special Rapporteurs, regional organizations, victims and their representatives. These principles in our view have not been fully respected in this particular exercise. This neglect raises questions about the utility of the report.

All comments by GAATW on the report in question are intended to contribute to a balanced understanding of the complex phenomenon of human trafficking and the important role of a Special Rapporteur in this field. All of us share the concern that the human rights of the victims of trafficking must be protected and promoted, that these rights should remain at the centre of all anti-trafficking initiatives, and that the demand side of human trafficking be better understood. All of us recognize as well that much work remains to be done on all fronts to address human trafficking and we look forward to contributing further to this process.

Sincerely,



Bandana Pattanaik
On behalf of GAATW