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TRAFFICKING IN HUMAN BEINGS AND FORENSIC MEDICAL EXAMINATION

English summary of 'Mensenhandel en medisch onderzoek', *Migrantenrecht* 2008/10, pp. 343-350, available at www.humantrafficking.info

Introduction

The aim of the article 'Mensenhandel en medisch onderzoek' is to raise awareness of the psychological and physical health problems of victims of trafficking for sexual exploitation in relation to legal truth-finding. These problems play a role in identifying victims, in criminal proceedings, and in requests for residence permits.

The author suggests to offer every possible victim a forensic medical examination based on the Istanbul Protocol and to see an independent physician or psychologist before any legal decision is taken.

A health problem

Trafficking in human beings for sexual exploitation seriously damages the health of victims.¹ Victims are threatened, drugged, molested, raped and physically and psychologically abused in other ways. Physical health problems range from bruises and burn marks to affected reproductive organs. Psychological problems make up a severe and complex range, including anxiety, depression and Posttraumatic Stress Disorder (PTSD).² Cognitive and emotional capabilities are often affected, which negatively influences a victim's ability to provide a full and accurate account of her experiences. That, while telling the story of what has happened is of utmost importance in legal truth-finding.

Victims are frequently distrustful and not willing or capable to declare what has happened to them as a consequence of their trauma, because they fear retaliation or because they fear the authorities if they seek assistance. Victims of severe (sexual) violence often forget traumatic experiences as a coping and survival mechanism and develop, for example, dissociative amnesia. As a result thereof victims will only re-

¹ Cathy Zimmerman et.al 2006, *Stolen Smiles: a summary report on the physical and psychosocial health consequences of women and adolescents trafficked in Europe*, The London School of Hygiene & Tropical Medicine 2006. www.lshtm.ac.uk/genderviolence; Zimmerman et.al 2003, *The health risks and consequences of trafficking in women and adolescents, findings from a European study*, The London School of Hygiene & Tropical Medicine 2003; Djordje Alempijevic et.al 2007, 'Forensic Medical Examination of Victims of Trafficking in Human Beings', *Torture*, Vol. 17 Number 2/2007, p. 117.

² Zimmerman et. al 2006.

member their experiences if they feel safe and protected. Physicians are often amongst the first people, even if male, that victims trust enough to tell their experiences.³ They are also the first to examine whether a victim can be questioned or testify at all.⁴

A legal problem

Defective memory systems will negatively influence the reliability of a victim's statement or testimony, whether in criminal or immigration procedures. It will be hard to convict traffickers in court if the victim's crucial testimony is absent or not reliable,⁵ or too meagre to meet the burden of proof. Likewise it will be hard to prove humanitarian circumstances that make the stay of the victim necessary.

The lack of an adequate assessment of the underlying causes of the inconsistencies and time gaps in a victim's story, may therefore work to the detriment of legal truth-finding in criminal proceedings. Such a lack may also work to the detriment of victim protection in the long run as in most European countries the assignment of (temporal) residence permits depends on the cooperation of victims with the authorities. For example, in the Netherlands a residence permit is issued when the victim's cooperation results in a trial with an irrevocable conviction or when the criminal proceedings last more than three years.

If there are reasonable grounds to believe that someone is a victim of trafficking, state parties are obliged by the European Convention on action against trafficking to offer her a reflection period of at least one month. Within this period the victim has to decide whether she will cooperate with the competent authorities and eventually act as a witness.⁶ In the Netherlands the reflection period is three months. The aim of a reflection period is for victims to recover and to take an informed decision. However, given the severity of health problems, one or even three months is a very short period to make such far-reaching decisions.

A victim that does *not* cooperate with the authorities⁷ and wishes to stay in the Netherlands, may apply for a residence permit on humanitarian grounds. In that case medical circumstances may be taken into consideration *in combination* with other humanitarian circumstances, such as the risk of retaliation or her chances of re-integration on return. In the Netherlands such a residence request is practically only

³ Istanbul Protocol, par. 270 (see para. 1.1.2); M. Tankink 2006, *Silence as a means of controlling the explosive nature of sexual violence*, paper presented at Care Full, medico-legal reports and the Istanbul Protocol in asylum procedures, 15 November 2006 (Tankink 2006), p. 7.

⁴ Bourdon-Wiersma-test for the examination of concentration problems, the Harvard Trauma Questionnaire (HTQ) for the examination of possible PTSS and the Brief Symptom Inventory (BSI) for measuring symptoms of psychopathology.

⁵ Compare the judgment of the District Court Middelburg, The Netherlands of 3 April 2007, docket nr. 12/715105-07. A victim who lodged a complaint herself was accused of a false notification.

⁶ From Zimmerman's and other research it appears that the memory of most victims functions better after three months, most probably due to professional and adequate treatment.

⁷ Or, in the Netherlands, when the criminal proceedings prematurely come to an end.

granted when a real risk of retaliation can be proven and the victim cannot invoke protection in the state of return.⁸

A victim may also base her request for a residence permit first and foremost on her medical condition. In that case she has to file a (new and) different request based on medical criteria. One of these criteria is whether the Netherlands is the most assigned country for treatment. This extra procedure does not only affect the victim's legal certainty, one may also question whether such an approach seriously assesses the health problems of victims as related to the severe crime they were subjected of.

A medical examination and report may also help a victim in these residence permit procedures. A victim's health condition may be so poor, that her stay is necessary, either from a humanitarian or legal perspective.⁹

Article 16 of the Convention on action against trafficking states that repatriation of victims shall be with due regard for the rights, safety and dignity of a person. A duty to assess a persons health conditions may not be derived directly from the article. However, repatriation of a severely traumatised person will be in contradiction with the ratio of the article and the Convention in general. Repatriation without adequate health assessment may place a victim at risk of revictimisation and may constitute a breach of a Member State's obligations under Article 3 and 4 of the European Convention on Human Rights (ECHR).

Medical examination: Istanbul Protocol

Examination of possible victims should preferably be based on the Istanbul Protocol (1999), the Manual on Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. The Istanbul Protocol is a United Nations official document and the first set of international guidelines to investigate and assess cases of alleged torture and to report findings to the judiciary and any other investigative body. The documentation methods contained in the Protocol are also applicable in other contexts.¹⁰

"The purpose of a written or oral testimony of the physician is to provide expert opinion on the degree to which medical findings correlate with the patient's allegation of abuse and to communicate effectively the physician's medical findings and interpretations to the judiciary or other appropriate authorities."¹¹

⁸ Such a request may also be based on the United Nations Convention Relating to the Status of Refugees (Refugee Convention).

⁹ One may possibly file a request based on refugee - or humanitarian ground.

¹⁰ Introduction, Istanbul Protocol.

¹¹ Istanbul Protocol, para. 122.

Conclusion

Trafficking in human beings for sexual exploitation is a health problem. Victims of trafficking for sexual exploitation often suffer from severe mental and physical health problems that may interfere with legal truth-finding. Therefore, when there are reasonable grounds to believe a person has been a victim of trafficking, she should be offered a (forensic) medical examination. The results of this medical examination could be used (with informed consent of the victim) to the benefit of both legal proceedings and the protection of victims. Such an examination might be used as supporting evidence in criminal and residence permit proceedings. It may also be considered the first step towards proper treatment.

This article provides a first legal guidance for medical examination and trafficking in human beings as part of a need for further research and increased awareness of competent authorities and policy makers.