

A Human Rights Based Approach to Trafficking in Human Beings

Conny Rijken

Conny Rijken is associate professor at the European and international law department of Tilburg University and research fellow of INTERVICT.

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Introduction

In an era in which, through globalisation and expanding international relations, the economic differences between countries and regions have become increasingly pronounced, the old phenomenon of slavery gains renewed attention. People are being moved inside and across borders to be exploited as money-generating commodities. These new forms of slavery and slavery-like practices are usually referred to as trafficking in human beings (hereafter THB), a crime that, without any doubt, conflicts with the human rights of its victims. The crime of trafficking is often approached from a criminal law perspective with the aim to catch the perpetrators. In this approach, attention for victims is practically only present to the extent they are relevant for law enforcement purposes. However, it is realised in a growing number of countries that victims of trafficking are particularly vulnerable and that the ordinary protection mechanisms for victims and witnesses in criminal proceedings are not suited to provide these groups with adequate protection. Many countries have adopted special protection mechanisms for victims of trafficking. These protection mechanisms generally apply to illegal aliens who are victims of THB. They can usually only make use of these special protection mechanisms if and for as long as they cooperate with the judicial authorities in the criminal proceedings. This approach is not satisfactory, and therefore an alternative form of adequate protection of victims of trafficking is the subject of this article, namely, a human rights based approach to THB. The central question in this approach is which (state) obligations can be derived from the human rights legal framework in relation to THB. After the identification of these obligations, suggestions are made to address these obligations more equally.

Trafficking in human beings: International definition

According to the first internationally agreed definition of THB, laid down in the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (hereafter: the Palermo Protocol),¹ THB is the recruitment, moving or reception, of a person under coercive or deceptive conditions for the purpose of exploitation. If a victim under the age of 18 is involved, the use of a coercive or deceptive means is not necessary in order to call such conduct trafficking. The exploitation can take place in any socio-economic sector in which labour or services might be exacted from people. Regardless of the different activities (e.g., recruitment, transfer, harbouring) and means (methods of force or deceit) that can be used in the process of THB, and irrespective of the economic branches it may be focused on, the core element of THB is exploitation. 'Exploitation' is defined in the Palermo Protocol as including, 'at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.' In later documents of regional as well as international organisations, such as the EU Council Framework Decision on Combating Trafficking in Human Beings² and the Council of Europe Convention on Action against Trafficking in Human Beings,³ this definition of THB was copied almost in its entirety.⁴

Important human rights instruments refer to THB directly. For instance, in article 5 on slavery and forced labour of the Charter of Fundamental Rights of the European Union, it is laid down that '[t]rafficking in

1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention Against Transnational Organized Crime, UN Doc. A/45/49 (Vol. I) (2001).

2 Council Framework Decision of 19 July 2002 on Combating Trafficking in Human Beings, OJ L 203, 1.8.2002, p. 1.

3 Warsaw, 16 May 2005, Council of Europe Treaty Series, No. 197.

4 The EU Framework Decision does not include the removal of organs, whereas the Council of Europe Convention explicitly mentions that it applies to all forms of THB, whether national or transnational, and whether or not connected with organised crime.

human beings is prohibited.⁵ Furthermore, Article 6 of the Convention on the Elimination of all Forms of Discrimination against Women explicitly states that States Parties ‘shall take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women.’⁶

Scope of the definition of exploitation

Although an internationally agreed definition exists, this does not necessarily mean that its scope, and thus what conduct can be understood to be THB, is fully clear. The definition does not comprise clearly defined elements and terms and thus leaves room for different interpretation. This is the consequence of the fact that the definition is the result of an international compromise. It therefore should be seen as the lowest common denominator.⁷

One of the most problematic terms in the definition is exploitation. It is a discussion in itself what conduct can be called ‘exploitation’. In its definition of ‘exploitation’,⁸ the Palermo Protocol refers to existing terms as forced labour or services, slavery, or practices similar to slavery. These terms point to rather drastic situations of dependency of a person in the power of another person. Descriptions of these terms can be found in international law, for example, treaties and conventions explicitly dealing with these issues. In the 1926 Slavery Convention, slavery is described as referring to the traditional forms of slavery, being ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.⁹ This means a narrow and traditional interpretation of the term slavery. The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery of 1957, defines servitude and serfdom in Article 1(b) as ‘the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change his status’. In Article 2(1) of the ILO Forced Labour Convention (1930) forced or compulsory labour is ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntary’. Several other human rights documents prohibit slavery, servitude, serfdom, forced and compulsory labour, conditions or situations that are connected to THB.¹⁰ In the narrow explanation of the scope of the trafficking definition, the trading of people for one of these purposes is considered to be THB.

What can be concluded at this point is that exploitation in the context of THB is a form of abuse that is excessive in nature, either as a result of the seriousness of physical or emotional manipulation (threats and violence) or as a result of a multitude of restrictions that are imposed on the victim. These excesses take

5 Charter of Fundamental Rights of The European Union, OJ, C 364, 18.12.2000, p.1.

6 UN Convention on the Elimination of All Forms of Discrimination against Women, General Assembly, 18 December 1979 (UN Doc. A/34/46).

7 The Travaux Préparatoires (A/55/383/Add.1) indicate, in this respect, ‘that the Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of others’ or ‘other forms of sexual exploitation’ are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their respective domestic laws.’

8 Article 3(a) of the Palermo Protocol.

9 Article 1(1) UN Slavery Convention, 1926. In the case of slavery, a victim is the legal property of another person and does no longer have any say about his or her own situation, whereas the victims of contemporary forms of slavery have not lost, in a legal sense, the authority over their life and thus do not belong to a ‘master’. Yet, de facto they are partly or completely at the mercy of another person and have no power to make their own decisions.

10 For instance Article 8 International Convention on Civil and Political Rights and Article 4 European Convention on Human Rights.

the form of human rights violations, in the sense that elementary rights as safeguarded by international conventions are violated or ignored. Exploitation is a limitation of the freedom of choice, movement, and independence of a person who finds him- or herself in a vulnerable position, and violates one's personal, physical, or moral integrity. Abuse of people that is not excessive in nature and does not (per se) lead to human rights violations can, of course, still constitute criminal behaviour that should be tackled, even under criminal law. However, it should not (at least not necessarily) be regarded as THB.

A human rights based approach to THB? Why is a human rights based approach to THB required?

Considering the contours of exploitation, it is generally acknowledged that THB is both a cause and a consequence of the violation of a person's human rights. In trafficking cases, a broad range of human rights can be and are violated. The most expressive violations are the violation of a person's personal and physical dignity, the right to personal freedom and security, and the principle of non-discrimination.¹¹ Since these violations cover a broad area in the social sphere and are linked to different kinds of activities (namely the recruitment, transportation and exploitation), attention to limit the chances of these violations occurring should be focused on from various perspectives. This means that an adequate response to the violation of these rights implies a multi-disciplinary approach, but with the intention of preventing the violation of a victim's human rights as a common denominator.¹² Experience has learned that, without such a holistic approach, the interests of the victims and their special position are not sufficiently taken into account. Human rights instruments place obligations on states in which these interests are taken into account in a better way.¹³ It is recognised by the High Commissioner on Human Rights that such an approach based on human rights is the only way to retain focus on the trafficked person and to prevent that the problem is simply reduced to a migration problem, a public order problem, or an organised crime problem.¹⁴

What is a human rights based approach to THB?

A human rights based approach is not a new gospel and is used in relation to other evils, for instance, poverty. In general, a human rights based approach is said to be based on some core principles: universality and inalienability; indivisibility; interdependence and inter-relatedness; non-discrimination and equality; participation and inclusion; accountability and the rule of law.¹⁵ These principles ought to give guidance to a human rights based approach but for the content of this approach we have to consult the human rights legal framework.

11 For a good indication of which rights are at stake, see Annex 3 to the Report of the EU Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004, p. 137.

12 See also the Report of the EU Experts Group on Trafficking in Human Beings, Brussels, 22 December 2004, pp. 62-65. The need for a holistic and integrated approach means that such an approach builds on the respect and promotion of human rights as its foundation.

13 See also United Nations High Commissioner for Human Rights Principles and Guidelines on Human Rights and Trafficking, E/2002/68/Add.1(2002).

14 Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime, Fourth session, Vienna 28 June – 9 July 1999.

15 Statement of Common Understanding of a Human Rights-Based Approach to Development Cooperation, also: 'Poverty Reduction and Human Rights, A Practice Note, UNDP, June 2003.

When considering the human rights legal framework, four core obligations can be identified:¹⁶

- the obligation to criminalise THB;
- the obligation to investigate and prosecute THB with due diligence;
- the protection of and assistance to victims of THB;
- and, to address the root causes of THB.

If we look at the counter-trafficking measures taken at the national, regional and international levels we can conclude that these measures are mainly concerned with the first and second obligations, that more efforts are now being taken to also address the protection of victims, and that the fourth obligation of addressing the root causes of THB is still not taken seriously. Therefore, in the further course of this article the main focus will be on the protection of victims and addressing the root causes of trafficking and not on the criminal aspects of THB. The core principles of a human rights based approach indicated above seem to be reflected in the four obligations.

These obligations are derived from international human rights documents which are concluded between state parties and, in principle, lay down obligations for the state.¹⁷ In the context of this article, this means that the state may not bring people into a situation of THB. Of course, it can occur that a state or a state organ takes part in THB, but THB is usually committed by private individuals. Apart from the fact that the perpetrator of a crime may be found liable for harm to the victim of that crime, the question arises whether the occurrence of THB and thus the fact that human rights have been violated may also lead to specific obligations of the state in which the trafficking took place.¹⁸ It has been established that states do not merely have negative obligations (an obligation to refrain from violations) in relation to the human rights but have positive obligations as well. This was made clear in the tripartite typology which indicates that for each human right States have an obligation to respect, to protect and to fulfil.¹⁹ Furthermore, in relation to the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) the monitoring committee in relation to domestic violence has stated that States have an obligation to act with due diligence to prevent domestic violence from taking place.²⁰ In these cases it recognised that 'States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation'. This positive obligation has been recently confirmed by the European Court of

16 T. Obokata (2006), *Trafficking of Human Beings from a Human Rights Perspective, Towards a Holistic Approach*. Leiden: Martinus Nijhoff Publishers, and A. Gallagher (2006), *Human Trafficking: International Law and International Responsibility*. Dissertation, Utrecht, not published.

17 T. Obokata, 'A Human Rights Framework to Address Trafficking in Human Beings', 24 *Netherlands Quarterly of Human Rights* 3 (2006), pp. 387-398.

18 *Ecrthr*, case no. 73316/01, 26 July 2005, *Siliadin v. France*.

19 Proposed in 1980 by Henry Shue. The obligation to respect is to refrain from any measure that may deprive individuals of the enjoyment of their rights, the obligation to protect is to prevent violations of the rights of individuals by third parties, and the obligation to fulfil is to take measures to ensure opportunities to obtain satisfaction of the basic need as recognised in human rights instruments, which cannot be secured by personal efforts.

20 *A.T. v. Hungary*, CEDAW Communication no. 2/2003, *Vienna Intervention Centre v. Austria*, CEDAW Communication no. 6/2005.

Human Rights in the case *Opuz v. Turkey*.²¹

An important instrument adopted within the Council of Europe in which an effort is made to adopt this human rights based approach into a legally binding instrument, is, the Convention on Action against Trafficking in Human Beings. Paragraph 5 of the Preamble to this Convention explicitly states that the respect for the rights and protection of victims must be the paramount objectives of the fight against THB.²² An adequate response cannot only be found in repressive measures, but must also include preventive, assisting, and protective measures.

Within the Organisation for Security and Cooperation in Europe (the OSCE) THB has been on the agenda for many years but has received renewed attention since 2003 with the action plan on THB. Following this action plan a special representative for combating THB was appointed in 2004 with its own office. The representative works closely with the Office for Democratic Institution and Human Rights (ODIHR) with a strong emphasis on the victims. The three main points of ODIHR in relation to THB are to support the establishment of multi-agency anti-trafficking structures that develop human-rights-based policy and practice in anti-trafficking; to improve the identification and assistance of trafficked persons; and to strengthen access to remedies and rights by raising awareness of rights amongst trafficked persons, vulnerable groups and civil society.²³

Protection and assistance to victims of THB

The third obligation in a human rights based approach concerns the protection of and assistance to victims of THB. The attention for victims of THB came only with the realisation that testimonies of victims seem to be indispensable when bringing a suspect of THB before the court and that the testimonies of victims play a decisive role in a successful prosecution of the perpetrators, as other hard evidence is often not available. At the same time, it was realised that victims are in a particularly vulnerable position, as the perpetrators often know the victims and their relatives very well, which makes them an easy target for reprisals if the victims testify. The victims are made dependent on the traffickers and if they come from abroad, they do not know the country and generally do not trust the police. Moreover, when they come from abroad, they usually do not have a valid residence permit. This makes them even more reluctant to report to the police and testify against the traffickers or to seek help, because they are afraid, and have often been threatened to that effect by the traffickers, of being expelled. Because of this illegal status a temporary residence permit is often granted to victims if and for as long as they cooperate with the authorities in criminal proceedings. Connected to this residence permit are the protecting and assisting measures.

On the European level, the interwoven relation between criminal and migration law is visible in the directive dealing with these protective measures, viz., the Directive on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or who have been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities.²⁴ The protection that can be obtained under this directive is rather elaborate, apparently based on Article 6 of the Palermo Protocol; it includes social, financial, legal, psychological, and medical aid. According to point 16 of the Preamble and

21 ECtHR, case no. 33401/02, 9 June 2009, *Opuz v. Turkey*.

22 Explanatory report to the Convention on Action against Trafficking in Human Beings, Warsaw 16 May 2005, ETS 197, point 46.

23 <http://www.osce.org/odihr/13475.html>.

24 Council Directive 2004/81/EC of 29 April 2004, OJ L 261, 6.8.2004, p. 19.

Article 11, victims are allowed to work and to receive education as soon as an application for a temporary residence permit has been submitted. The third-country nationals concerned must be granted access to special programmes set up for reintegration, either in the country of origin or the country of residence, and to their recovery of a normal social life (Article 12). According to Article 6 of the Directive, a reflection period must be granted to the victims allowing them to recover and escape the influence of the perpetrators and to consider whether they want to cooperate with the competent authorities. During this period, it is not allowed to expel the victim from the country.

Disconnect migration and criminal law

The effect of a criminal law perspective in fighting THB is that victims lose their residence permit and the right to make use of the assistance and protection mechanisms once the case is decided or dismissed, regardless of whether the victims are in need of this protection or not. This effect is undesirable and does not take into account the vulnerable position of the victims. Currently, the protection of the victims takes a subordinate role in criminal proceedings and is primarily acknowledged when it is in the interest of the prosecution. In general, when the victim is no longer needed for the criminal case, the temporary residence permit ends and the victim in principle will have to leave the country. This means that the granting of the residence permit is primarily to serve the criminal procedure; the aim of assistance and protection to the victim plays only a subordinate role. This is not in line with the intention of putting in place a victim protection regulation and can be regarded as a violation of the victim's dignity and trust. When taking the human rights based approach seriously, the assistance and protection given to a victim should not depend on whether or not she is necessary for the criminal procedure.²⁵

What is needed in this regard is to disconnect victim protection from migration law and criminal law.²⁶ This means that the application of migration law and, consequently, assistance and protection measures, is not made dependent on whether a victim cooperates with the law enforcement authorities or not. The mere fact that a person is a (possible) victim of THB should be enough to provide the victim with assistance and protective measures, including a (temporary) residence permit on humanitarian grounds, if needed.²⁷ To disconnect migration law from the criminal procedure has the advantage that the protecting and assisting measures are not influenced by a (negative) outcome in the criminal proceedings (for instance, a dismissal). In a criminal procedure, many factors not necessarily related to the individual case can be decisive in not prosecuting the alleged trafficker, such as limited financial and human resources, priorities, (a perceived) lack of evidence, etc. It seems unfair vis-à-vis the victim to make these factors decisive in the question of whether or not she or he can get a residence permit and whether or not she or he can make use of protective measures.

Victim agency with a Victim Assistance and Protection Package (VAPP)

The fact that a person is a (possible) victim of trafficking is serious enough to apply assisting and protective measures. In order to meet the specific needs of victims of THB, there should be one package of assisting

25 See also Recommended Principles and Guidelines on Human Rights and Trafficking of the High Commissioner on Human Rights, E/2002/68/Add.1 (2002), guideline 6, points 1 & 4.

26 For the Dutch situation see Advice of the Advisory Committee of Migration Affairs, 'De mens beschermd de handel bestreden', February 2009, <http://www.acvz.com/publicaties/Advies-acvz-NR28-2009.pdf>.

27 T. Obokata, 'EU Council Framework Decision on Combating Trafficking in Human Beings: A Critical Appraisal', 40 *Common Market Law Review* 4 (2003), pp. 930-932.

and protective measures for victims of trafficking which includes those measures that are recognised in international instruments.²⁸ The granting of a residence permit is one of these measures, but irrespective of whether the person testifies and it should not (at least not automatically) be limited to the period in which the criminal case is pending. In order to obtain some consistency in the assistance and protective measures, such a victim assistance and protection package should preferably be developed at the EU level.

As soon as there is an indication that a person is a victim of THB, that person must be informed of her or his rights. Protection to victims from the very first moment entails that the victim must be provided with accommodation in a safe house. If a victim of trafficking has no valid residence permit, she or he should be granted a residence permit on humanitarian grounds, simply because she or he is a victim of THB and not because she or he cooperates or intends to cooperate with the authorities. Expulsion must not be enforced. A reflection period is no longer required if a person is immediately granted a residence permit. Victims should be directly referred to a specialised NGO which arranges the accommodation, assistance, and aid. Victims of trafficking must be provided with specialised medical care as well as legal aid, especially concerning the juridical consequences of filing a complaint and testifying. For victims of THB, it is extremely important that they are immediately and adequately informed on the criminal procedure and the decisions that are taken in that regard. It is, for instance, important for them to know whether the accused will remain in detention or not and what kind of restrictions she or he has in custody. Special attention should be paid to possible threats to relatives of the victim. Assistance should be given in providing safety and security for relatives. The VAPP should also contain measures with regard to leisure, training, and work, as well as a standard risk analysis in the event of (voluntary) return to the country of origin or a third country. The decisive factor is being a victim of the crime of THB, not the legal position in the country nor the form of the exploitation or the characteristics of the traffickers, nor the cooperation with the authorities in a criminal procedure. In this approach it is decisive to be recognised as a victim of THB. This needs to be done carefully and based on objectified indicators. The development of these indicators will be the greatest challenge of this approach.

Addressing the root causes of trafficking in human beings

The fact that THB occurs is for a large part a question of supply and demand, for labour, for services, or for organs, in combination with an unequal distribution of wealth, chances, and opportunities for people.²⁹ Both the situation in the country or region of origin and the situation in the country or region of destination play a role in the occurrence of THB. Apart from victims that are kidnapped or sold by others and brought into a situation of exploitation, in many cases, people more or less make themselves available to others that turn out to be traffickers, because of their desire to escape from push factors in their region of origin and because of the existence of pull factors in the region of destination. Most often, there is a very subtle interplay of factors and, of course, the victims never had the intention to expose themselves to exploitation.

The motives for people to migrate generally stem from the desire to provide for a better life for themselves and their relatives in their care. In a world of increasing economic and social inequality, rising unemployment and

28 Such as Articles 6-8 Trafficking Protocol to the UN Convention against Transnational Organised Crime, Articles 12-16 of the Council of Europe Convention on Action against Trafficking in Human Beings, and the Council Directive 2004/81/EC on the Residence Permit Issued to Third-Country Nationals who are Victims of Trafficking in Human Beings or who have been the Subject of an Action to Facilitate Illegal Immigration, who Cooperate with the Competent Authorities, especially Articles 6, 7, 9, 11, 12.

29 Ruggiero, 'Trafficking in Human Beings: Slaves in Contemporary Europe', 25 *International Journal of the Sociology of Law* (1997), pp. 231-241.

a growing gap between rich and poor countries, there exists a large population of aspiring migrants who are willing to enter into more developed states. However, the possibilities to migrate legally and to find a job in the regular labour market are limited, especially for persons with limited or no education or vocational training. Consequently, low-skilled migrant workers easily become targets for smugglers and traffickers who offer illegal routes and make migrants dependent on them.

They become even more vulnerable to these practices in view of the increasingly restrictive migration policies of developed countries. Push factors concern living conditions, but also the person of the potential victim. Living conditions are largely determined by the economic situation and perspectives in the country of origin of the victim, such as an unequal distribution of wealth, unequal opportunities on the labour market, and geographical or political circumstances. Personal circumstances and motives of the person also play an important role. This concerns such circumstances as an unstable family situation, an adventurous attitude, the urge to earn a lot of money, or simply the need to survive. Especially for women in many countries, there are additional push factors based on such historically or culturally determined factors as a subordinate position and having fewer rights than men, owning less capital (e.g., less land, lower incomes), and getting fewer chances on the labour market (for example, they are the first to lose their jobs in periods of economic recession, there are culturally or religiously determined obligations to take care of children or parents).³⁰

Regions of destination are mostly in the more developed and richer parts of the country or the world. Their economic and political systems offer attractive and inviting circumstances to those in search of a better life. This includes factors such as a better economic situation in the destination region, demand for (often cheap) labour, and better rights and opportunities, at least for nationals, but not necessarily for those looking for new opportunities, as many of them soon find out upon arrival. Besides, there is also the market for labour and services that may very well and easily be offered under exploitative conditions.³¹ The most prominent example is of course the sex industry, but low-skilled labour in the informal economy and in labour-intensive sectors that meet tough economic competition are also vulnerable branches. Sheer financial gain forms the motive for exploitation, but not necessarily by the actual employer; in some cases, he or she may not even be aware of the exploitative conditions under which his employee is living or working through intermediaries. In those cases, these intermediaries, such as middlemen, pimps, or temp agencies, are the real traffickers.

With regard to the prevention of THB, which is the aim of addressing the root causes, there are two options; prevention on the supply side and prevention on the demand side in the country of destination. Prevention on the supply side concerns development policy and eradicating discrimination and inequalities in countries of origin. This of course, is a difficult task and takes a long way. Addressing the demand side in the countries of destination is probably even more difficult. As long as there is a need for cheap labour and there are inequalities between the different states, people from the poor countries will be vulnerable to be exploited. This vulnerability can be diminished by strengthening the legal position of these migrants, for instance, by enlarging the possibilities to provide temporary migrant workers a work permit. This will, as well, reduce the push factors when these migrants return to their home country with their money earned, as they are able to improve their living standard and the living standard of their relatives. In this way it cuts both ways.

30 H. Konrad, 'Trafficking in Human Beings – the Ugly Face of Europe', *Helsinki Monitor* 3 (2002), pp. 260-271.

31 L. Lap-Chew and M. Wijers, *Trafficking in Women, Forced Labour, and Slavery-Like Practices in Marriage, Domestic Labour, and Prostitution*, (Foundation against Trafficking in Women, Utrecht, 1997), p. 41-109.



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Netherlands Helsinki Committee
Het Nutshuis
Riviermarkt 4
2513 AM The Hague
The Netherlands

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