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Addressing Trafficking in Persons in the Human Rights Framework

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CONTENTS

1. Introduction 1
2. The Human Rights Framework 1
3. State Accountability 2
4. Direct Accountability 3
5. Indirect Accountability 3
6. An Internationally Accepted Definition of Trafficking: Human Rights or Crime Prevention? 5
7. The “Human Rights” Definition 6
8. The “Crime Prevention” Definition 7
9. Shortcomings of the Trafficking Protocol 8
10. Good Practices 8
11. International Principles 9
12. Prevention of trafficking 10
13. For example, Prevention strategies in the human rights framework could be 10
14. Conclusion 11

This paper is in fact a summary of "Human Rights and Trafficking in Persons: A Handbook", (Global Alliance Against Trafficking in Women, 2001). This is a comprehensive and practical guide to addressing Trafficking in persons from a human rights perspective, and highly recommended for policy makers as well as practitioners.

Introduction

Trafficking in persons is a many faceted phenomenon and the concept and understanding of it has taken many twists and turns throughout the last century, according to the moral, social and political concerns of specific times in history. In the last 50 years, with the development of international consciousness and efforts to concretize and operationalise the "human rights framework" to address the many issues facing humankind, trafficking in persons has emerged as a complex, but clear issue involving multiple violations of basic human rights.

Trafficking occurs in situations where already many basic human rights deprivations are prevalent, and can involve men, women and children. Specific physical and psychological violations are committed by traffickers, which often have far-reaching and long lasting consequences for the lives of their victims. Even after a person has escaped from traffickers she requires protection against eventual reprisals from the traffickers, as well as measures which ensure that the authorities responsible for addressing the different aspects of the problem do not further jeopardize her rights as she seeks redress and tries to put her life together again.

Trafficking is historically linked with prostitution, but today encompasses all non-consensual, economic-exploitative, slavery-like conditions and relations of work and life at any stage in the migration process. It can be defined as a distinct crime, which occurs in the context of migration, both within and across national boundaries.

Taking action against trafficking – especially action to prevent trafficking - means taking action to defend and promote the basic economic and civil rights of women, men and children, as well as action to reform and improve the government and legal institutions and systems which should protect and guarantee access to and enjoyment of these rights by all, without any form of discrimination.

The Human Rights Framework

Instruments and mechanisms

Substantially, the 'human rights framework' draws on the international human rights standards and principles, which have been encoded in the international treaties, covenants and protocols which are promulgated and monitored by the United Nations system, and its mechanisms.

These encoded rights – the UN Treaties and Conventions - offer a framework and a tool for analyzing any human issue, including trafficking. The most (directly) relevant ones regarding trafficking are:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons attached to the Convention Against Transnational Crime (2000)
- Convention on the Protection of All Migrant Workers and their Families (1990)
- Convention on the Elimination of Discrimination against Women (CEDAW, 1979)
- Convention on the Suppression of Trafficking and the Exploitation of the Prostitution of Others (1949)

But taking into account the principles of universality, indivisibility and non-discrimination which are the bases of the human rights framework, an analysis of the causes and consequences of trafficking must, in actuality, include all economic, social and cultural factors as well as the civil and political contexts of the places and communities where trafficking occurs. All these factors must also be considered in any strategy to combat and especially to prevent trafficking, at any level.

Next to these convention-based mechanisms, there are extra-conventional mechanisms of the UN, which have the tasks of:

- Investigating and reviewing cases which have been brought to their attention
- Communication with the government concerned to hear its side
- Determining whether a human rights violation has been committed and if the government is legally responsible
- Making recommendations for redress or future protection against such violations.

Regarding trafficking, the most relevant of these mechanisms are:

- Commission on Human Rights
- Office of the High Commissioner for Human Rights (OHCHR)
- Special Rapporteur on Violence against Women
- Special Rapporteur on Human Rights of Migrants
- Sub-Committee on Prevention of Discrimination and Protection of Minorities
- Working Group on Contemporary Forms of Slavery
- UN Specialized Agencies: ILO, UNIFEM, UNDP, UNICEF

State Accountability

Practically, the human rights system holds governments accountable for respecting, protecting and promoting the human rights of all peoples in their territory – citizens and non-citizens, migrants and visitors alike.

Governments are directly accountable for the violations which they or their agents commit; they are also (indirectly) accountable for failing to eliminate gender discrimination, to punish traffickers and to address the needs of trafficked persons who have escaped.

Direct Accountability

Trafficked persons are vulnerable to arrest, detention and deportation because destination countries are unwilling to recognize that they are victims of crimes. Destination countries view trafficked persons as undocumented migrants who entered illegally and/or worked illegally. Trafficked persons are particularly subject to arrest, detention and deportation if they were trafficked into the sex industry. Trafficked persons often do not have the chance to lodge complaints, seek damages, assess whether it is safe to return home, collect their belongings or apply for asylum. In these cases, the trafficked person is treated more like a criminal than a victim

The following case illustrates how states directly violate the rights of victims of trafficking.

Case of Dinah

Dinah, a Cambodian woman moved to Thailand to work in a sewing factory. An agent promised her good wages and assured of the legality of work in Thailand. Upon arrival in Bangkok with the agent, she was taken to a factory where she was forced to work 12 hours every day except Sunday, was given no freedom to go outside and never received any wages. Dinah was 'rescued' during a police raid on a factory, but soon after at the police station was arrested for her illegal status (working without a permit). Her employer was arrested for the illegally low salary she paid the workers, but not for the abuses she inflicted upon them e.g. illegal confinement. During investigations, Dinah was provided with no translator, which meant the investigation took longer. During this time she was held in a detention center, slept on the floor and only received 2 meals per day. At the court hearing Dinah was found guilty of working without a permit. The fine was \$US100 but since she did not have money, she had to stay in jail for 3 months instead. Then she was sent to the detention center for deportation. The court trial for the employer began after Dinah's deportation, so she had no ability to participate in the proceedings.

(Source: *Human Rights and Trafficking in Women: A Handbook*, GAATW 2001)

The human rights of trafficked persons are violated extensively by governments. It is a common misunderstanding that traffickers harm victims and governments rescue and protect them. Although trafficked persons suffer serious criminal violations at the hands of traffickers, more often than not, once they are released from the slavery-like or forced labor conditions, they are subject to serious human rights violations at the hands of the government, as we can see in the case above, where the trafficked person is treated more like a criminal than a victim.

Indirect Accountability

The following table illustrates the specific rights that are violated in the context of trafficking and for which governments can be held (indirectly) accountable:

Criminal Violations	Right	International Instrument
1. Torture, rape, beating, - physical can also be mental/ threat of violence, psychological	Right not to be tortured or submitted to cruel and/or degrading treatment	Art 5 UDHR Art 7 ICCPR CAT entire convention
	Right to be free from physical violence (rape, sexual assault, domestic violence, forced prostitution, trafficking)	Art 3 UDHR Art 6 ICCPR CEDAW entire convention especially Art 2,5,15 & 16.
2. Forced drug or substance abuse	Right to personal autonomy	Para 97 BPFA
	Right to enjoy psychological, physical and sexual health	Art 12 ICESCR
3. Threat of reprisals to family members back home	Right to personal autonomy	Art 12 UDHR
4. Forced abortion, no access to contraceptives; women's rights of reproduction and control of her body being denied	Right to personal autonomy	Para 97 BPFA
5. Deprivation of food, malnourishment, lack of access to medical and health services	Right to enjoy psychological, physical and sexual health	Art 25 UDHR Art 12 CESC
6. Physical Confinement, confiscation of passport/identity papers, isolation (prohibited from engaging in social contact, interception of letters)	Freedom of choosing residence and moving within own country	Art 13(1) UDHR Art 12(1) ICCPR
7. Overwork, long hours, no rest	Right to work - freedom from forced labor	Art 8(3) ICCPR ILO Convention No 29 - entire convention
	Right to just and favorable conditions	Art 23(1)UDHR
8. bad conditions of work, poor health & safety measures	Right to safe and healthy working conditions	Art 23(1) UDHR Art 7 CESC Art 11(f) CEDAW
9. no payment, delayed payment,	Right to just and favorable remuneration	Art 23(3) UDHR
10. extraction of big fees, payment, debt-bondage	Freedom from slavery	Art 4 UDHR Art 8 ICCPR UNSC entire convention UNSCAS entire convention
	Right to be free of imprisonment for debt or failure to fulfill a contact obligation	Art 11 ICCPR
11. Violation of contract by employers	Right to equal pay for equal work	Art 23(2) UDHR

List of abbreviations of international instruments:

UDHR: Universal Declaration of Human Rights

ICCPR: International Covenant on Civil and Political Rights

ICESCR: International Covenant on Economic, Social and Cultural Rights

BPPA: Beijing Platform for Action

CAT: Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

CEDAW: Convention on the Elimination of All Forms of Discrimination Against Women

CRC: Convention on the Rights of the Child

ILO No 29: International Labor Organization Convention No. 29 Concerning Forced Labor

ILO No 105: ILO No 29: International Labor Organization Convention No. 105 Concerning Abolition of Forced Labor

UNSC: United Nations Slavery Convention

UNSCAS: Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.

(Source: *Human Rights and Trafficking in Women: A Handbook*, GAATW 2001)

Utilizing the human rights framework means, in the long run, working for the entitlement of all those who have been deprived of any of these rights, through any kind of action, negligence or accident. For the victims of trafficking it means working to obtain redress for the crimes committed against them, and working to gain access to the resources they need to put their lives together again. In order to reduce the danger of falling into the trap of traffickers, we must work to ensure that those who are in vulnerable positions are strengthened and empowered, and can enjoy all the economic, social, cultural, civil and political rights to which they are entitled.

It is not possible in this paper, to discuss in detail, the contents and effectiveness of all these mechanisms and agencies. In the last 20 years, with the realization that the existing instruments were no longer adequate to address the contemporary manifestations of trafficking, there has been much debate and searching for new instruments and strategies. The crucial question revolved around the concept and (legal) definition of trafficking. A working consensus has now been achieved, contained in the Protocol on Trafficking, supplementary to the Crime Convention, and in the Reports and Recommendations of the Special Rapporteur on Violence against Women to the Commission on Human Rights. These are discussed in the next section of this report.

An Internationally Accepted Definition of Trafficking: Human Rights or Crime Prevention?

In the last 2 decades, the most important developments in the work to address trafficking has been in obtaining clarity on these issues, and evolving a definition of “trafficking in persons” which would be in accordance with human rights principles and be globally acceptable.

This is necessary in order to develop strategies which would also work towards real enhancement of the rights of the people involved, and be effective in preventing trafficking.

The “Human Rights” Definition

The United Nations addresses trafficking in persons as an issue of human rights. The Special Rapporteur on Violence against Women, Radhika Coomaraswamy is mandated by the UN Commission on Human Rights (CHR) to investigate and report on trafficking in women, its causes and consequences and to suggest strategies to eliminate trafficking globally. In her last report to the CHR, (E/CN.4/2000/68, 29 February 2000), she elaborated the need for a new and unambiguous definition of trafficking which is based on respect and defence of the human rights of all persons. She proposed a definition of trafficking, which should comprise the following elements:

17. *In order to address the exigencies of modern manifestations of trafficking in women, the definition of trafficking focuses on “forced labor or slavery-like practices”, rather than narrowly focusing on prostitution or sexual exploitation. Documentation on trafficking patterns reveal that trafficking is undertaken for numerous purposes, including but not limited to prostitution or other sex work, domestic, manual or industrial labor, and marriage, adoptive or other intimate relationships.*

The common elements found in all of the trafficking patterns are:

- (i) the lack of consent;*
- (ii) the brokering of human beings;*
- (iii) the transport; and*
- (iv) the exploitative or servile conditions of the work or relationship.*

Thus, any definition of trafficking must capture these elements.

The definition, which Coomaraswamy proposed and which was accepted by the CHR, is:

13. *“Trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harboring or receipt of persons:*
- (i) by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of:*
 - (ii) placing or holding such person, whether for pay or not, in forced labor or slavery-like practices, in a community other than the one in which such person lived at the time of the original act described in (i).”*
14. *Subsection (1) of the definition covers all persons involved in the trafficking chain: those at the beginning of the chain, who provide or sell the trafficked person, and those at the end of the chain, who receive or purchase the trafficked person, hold the trafficked person in forced labor and profit from that labor. Criminalizing the activities of all parties involved throughout the process of trafficking would facilitate efforts to both prevent trafficking and punish traffickers.*

The “Crime Prevention” Definition

In November 2000, the *UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime*, adopted by the UN General Assembly.

It is one of two Protocols attached to the Crime Convention; the other one deals with smuggling in persons. The Convention and the Protocol are clearly focussed on crime control. Their strong law enforcement provisions will help governments to organise and share information about organised crime, increasing their ability to find and prosecute traffickers

The stated purpose of the trafficking protocol is: (art. 2):

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote co-operation among States Parties in order to meet those objectives.

The definition in the Protocol is as follows:

“(a) ‘Trafficking in persons’ shall mean the recruitment, transportation, transfer, harboring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability (interpretative note {63}) or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation (interpretative note {64}), forced labor or services, slavery or practices similar to slavery (interpretative note {66} on illegal abortions), servitude or the removal of organs (interpretative note {65});”

Interpretative note (63): “The travaux préparatoires should indicate that the reference to the abuse of a position of vulnerability is understood to refer to any situation in which the person involved has no real and acceptable alternative but to submit to the abuse involved.”

Interpretative note (64): “The travaux préparatoires should indicate that this Protocol addresses the exploitation of prostitution and other forms of sexual exploitation only in the context of trafficking in persons. The terms ‘exploitation of the prostitution of other’ or ‘other forms of sexual exploitation’ are not defined in the Protocol. The Protocol is therefore without prejudice to how States Parties address prostitution in their respective domestic laws.”

“(b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) shall be irrelevant where any of the means set forth in subparagraph (a) have been used (interpretative note {68})”

Interpretative note (68): The travaux préparatoires should indicate that Subparagraph (b) should not be interpreted as imposing any restriction on the right of accused persons to a full defence and to the presumption of innocence. They should also indicate that it should not be interpreted as

imposing on the victim the burden of proof. As in any criminal case, the burden of proof is on the State or public prosecutor, in accordance with domestic law (...).”

Shortcomings of the Trafficking Protocol

This “crime prevention” definition of trafficking contains all the human rights elements explicated by the Special Rapporteur (above), but its crime prevention focus detracts from the concern for the basic rights of the victims. All of the provisions of the Convention apply to the Trafficking Protocol. The two instruments together contain numerous provisions to protect and assist trafficked persons who agree to become witnesses. However, they do almost nothing to protect the rights of trafficked persons who are NOT witnesses or complainants in a trafficking case. In fact, the law enforcement provisions of the Protocol are mandatory state obligations while the protection and assistance provisions in the Protocol are only discretionary. Governments that sign the Protocol “shall consider measures” or “shall endeavor to” provide protections and assistance “in appropriate cases”. The protection provisions are so weak because in the negotiations, governments were almost unanimous in their opposition to mandatory language regarding rights protections.

To date this protocol has been signed by more than 80 governments, and they are then bound to integrate the provisions of this Protocol, in the framework of the Provisions of the Crime Convention, into domestic legislation, and to implement the recommendations contained therein.

NGO’s who had followed the negotiation process and worked hard in lobbying governments for better provisions and clear language in the definition came away with mixed feelings. The many compromises made to come to a conclusion, makes it necessary for human rights advocates to understand fully the background to the language in the definition used in the protocol. The main positive features of the Protocol are:

- it takes a different approach from that of the out-dated Convention on the Elimination of Trafficking and the Exploitation of the Prostitution of Others (1949),
- it distinguishes between ‘forced’ and ‘voluntary’ prostitution
- it addresses “exploitation of others and other forms of sexual exploitation” ONLY in the context of trafficking in persons.
- the terms “forced labor or services, slavery and practices similar to slavery, servitude” covers all situations, including forced labor in the sex industry

Good Practices

Basic principles for Human Rights Action are ‘participation’ and ‘self-representation’.

The Human Rights Framework is essentially a framework for action. In general, strategies and actions, which will work to assert and enhance the human rights of trafficked persons, should adhere to the fundamental human rights principle of participation of the concerned persons in the action.

Rights remain theoretical, and become real and concrete only when people become conscious of their entitlement, and are able to act to secure or exercise that right. Truly human rights enhancing actions are those undertaken by the affected persons themselves, wherever possible.

While in the initial stages of addressing any issue, advocates can act as channels for, and in solidarity with, those in dire need or in severely repressed positions, the best strategies are those which enable the affected persons to express their own grievances, to undertake actions of their own design and to organize, form alliances and obtain the necessary expertise and resources in order to act on their own behalf.

International Principles

The UN High Commissioner for Human Rights, Mrs. Mary Robinson, in an address to the International Abolitionists' Federation Conference on Trafficking in Women "*Breakdown of Borders*", Copenhagen, 2 December 1999, enumerated 10 basic principles in the combat against trafficking:

"In developing detailed responses to each stage of the trafficking cycle it is essential that we keep certain very basic policy principles in mind - guiding principles which can also provide us with a way of measuring the success of anti-trafficking initiatives. In the spirit of advancing the debate on trafficking to the level of the practical and the achievable, my office is in the process of formulating such principles which I would like to present to you for your consideration:

First: The protection of human rights and the dignity of trafficked persons and persons in prostitution must be given the highest priority.

Second: governments must accept responsibility for the problem of trafficking and for the development and implementation of appropriate responses. It is not enough to contend that trafficking is a private wrong - this is an injustice, which involves and implicates us all.

Third: the definition of the term "trafficking" in laws, policies and programs should not be restricted to sexual exploitation but should be extensive enough to cover other identified purposes without ambiguity, such as bonded or forced labor and other slavery-like practices.

Fourth: Traffickers and their collaborators must be prosecuted and adequately penalized - paying full attention to due process rights and without compromising the rights of the victims.

Fifth: Trafficked persons should not be criminalized for the coerced illegality of their entry or residence in countries of transit and destination, or for the coerced activities they perform as a consequence of their status as trafficked persons.

Sixth: Victims of trafficking including those with "irregular" immigration status should be granted protection and necessary physical and mental care by the authorities of the receiving country.

Seventh: Victims of trafficking should be provided legal and other assistance in the course of any criminal, civil and other actions against traffickers/exploiters. Government authorities should be encouraged to provide temporary or permanent residence permits and safe shelter during legal proceedings.

Eighth: The safe return of victims, instead of automatic repatriation, should be ensured, particularly in cases of organized criminal involvement.

Ninth: Women and children should be not treated the same in the identification, rescue and repatriation process. Children have special rights and special needs, which must be recognized and protected

And finally: Efforts must be made to address the root causes of trafficking, including poverty, inequality, discrimination and racism.

Prevention of trafficking

In the light of the above, in the human rights approach, the objective of prevention is to stop the deception, coercion and violence that forms the essence of trafficking. In other words, to prevent

the violation of rights.

The objective of prevention strategies should be to prevent women and girls from leaving their villages, not to stop migration.

In the long run, real "prevention" is achieved through (legal) measures for the improvement of women's status and through enabling women to claim their rights, including the right to inherit and own property and the right to work under fair and just conditions. This implies action for changes in economic, legal and social systems and for justice and democracy within and between states.

In the short and middle term, a prevention strategy must include:

- Human rights education for women and girls;
- Advocacy for development of economic opportunities, including opportunities for legal migration for work;
- Elimination of discrimination against women in all spheres, especially in the labor market
- Reform of restrictive immigration policies and laws and creation of legal channels of labor migration for women.

For example, Prevention strategies in the human rights framework could be:

1. To prevent trafficking for prostitution:

- * understand and accept sex work as legitimate occupation
- * do information and education work on the rights of sex workers
- * recognise the agency of women and girls
- * strengthen political and civil rights of those in sex work
- * increase range of choices of women in prostitution, by increasing access to resources, training, jobs
- * mobilise and organise sex workers for self-representation and participation at all levels -policy formation, working conditions, social environment, etc..

Possible results:

- + growth of self-esteem of sex workers
- + increase of autonomy
- + safer and better working conditions

2. Prevention in the sphere of Crime Prevention:

- * develop a clear and unambiguous legal definition of trafficking, and decriminalize all other acts, which do not constitute the crime of trafficking (e.g. consensual sex work)
- * help women to understand their rights - civil and in criminal processes
- * set up comprehensive victim assistance programmes, including legal support
- * organise for self-protection / defence
- * carry out class action

Possible results:

- + the interests of victims are looked after
- + growth in self-confidence
- + brings cases out of the individual sphere and informs and politicises public

3. Prevention of trafficking of migrant workers:

- * create possibilities for legal migration for all kinds of work, including sex work
- * make immigration procedures simpler and transparent
- * respect rights of migrants irrespective of legal status
- * acknowledge and give just remuneration for work done by migrant women
- * accord independent residence status for (immigrant)partners of nationals / resident immigrants
- * recognise the need for and contribution of migrant workers, esp. women, in the globalised economy, including in the sex and service industries
- * regularise worker status and rights of migrant women in all sectors
- * ensure safe and just working conditions in all sectors
- * carry out civil and worker rights education among (women) migrant workers of all sectors
- Facilitate organisation of (women) migrant workers in all sectors for self-representation and advocacy

Possible results:

- + widens choices for work sites for migrant workers
- + strengthens rights and (legal) status of migrants, especially women
- + reduces the power of the middle-men and “traffickers”
- + reduces role of middlemen and corrupt officials and unjust employers
- + higher efficiency and productivity, gain for the host country
- + justice for women migrant workers

Conclusion

The Human Rights Framework for addressing trafficking is none other than the human rights framework that is applied to other human rights issues everywhere in the world. The

complicating / aggravating factors concerning work to prevent and combat trafficking are the issues confronting many governments today, especially in Asia - the basic questions of lack of adequate sources of livelihood in home communities and countries, and the need to move elsewhere to find this livelihood.

Whether one approaches the issue as one of violence against women, of labor migration or of transnational crime, it will always be possible to develop strategies which respect, promote and protect the human rights of all involved: both the victims and the perpetrators (in the legal process).

The crucial indicator for human rights actions, at any level, is the participation of the people involved. Discrimination – of migrants and migrant workers, of workers in a particular industry, on the basis of occupation - is the basic obstacle to this participation.

Discrimination

- reduces the sectors of industries in which migrants can obtain legal employment;
- denies workers in these restricted sectors occupational health and safety standards
- prevents access to health and other (legal) services
- creates fear of identification or retribution, thus limiting access to legal remedies;
- causes difficulties in securing the necessary commodities to operate own businesses or work
- leads to crimes against the discriminated community not being taken seriously.
- leads to criminalisation of the migrant community;
- causes deterioration of personal relationships due to fear of “guilt by association” on the part of friends and associates.
- leads to isolation, due to restrictions to participation in community activities,
- obstructs the exercise of the right of association and expression, in joining trade unions, self-interest groups, etc.,

The right to freely choose one’s employment, and to act to protect it, is a fundamental human right. The right to work free from discrimination is articulated, e.g. in the Universal Declaration of Human Rights:

Article 23 states:

“Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favorable remuneration ensuring for himself/herself and his/her family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the rights to form and to join trade unions for the protection of his/her interests.” ■