

“Study of a Human Right Approach for the Development of Human Trafficking In India”

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Abstract – *Human trafficking is generally understood to refer to the process through which individuals are placed or maintained in an exploitative situation for economic gain. Trafficking can occur within a country or may involve movement across borders. Women, men and children are trafficked for a range of purposes, including forced and exploitative labour in factories, farms and private households, sexual exploitation and forced marriage.*

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INTRODUCTION

Trafficking affects all regions and most countries of the world. While it is difficult to secure reliable information about patterns and numbers, our understanding about why trafficking happens has improved. Inequalities within and between countries, increasingly restrictive immigration policies and growing demand for cheap, disempowered labour are just some of the underlying causes that have been identified.

The many factors that increase individual vulnerability to trafficking include poverty, violence and discrimination. The exploitation of individuals for profit has a long history and international efforts to address it can be traced back at least a century, well before the birth of the modern human rights system. However, it is only over the past decade that trafficking has become a major concern.

During that same period, a comprehensive legal framework has developed around the issue. These changes confirm that a fundamental shift has taken place in how the international community thinks about human exploitation. It also confirms a change in expectations of what Governments and others should be doing to deal with trafficking and to prevent it. Hence, the victim-centred approach is also gathering increased support from the international community.

Human rights form a central plank of the new understanding and there is now widespread acceptance of the need for a human rights-based approach to trafficking.

As explained further in this Fact Sheet, such an approach requires understanding of the ways in which human rights violations arise throughout the trafficking cycle and of the ways in which States' obligations under international human rights law are engaged. It seeks to both identify and redress the discriminatory practices and unequal distribution of power that underlie trafficking, that maintain impunity for traffickers and that deny justice to victims.

International agreement on what constitutes “trafficking in persons” is very recent. In fact, it was not until the late 1990s that States began the task of separating out trafficking from other practices with which it was commonly associated such as facilitated irregular migration. The first-ever agreed definition of trafficking was incorporated into the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (Trafficking Protocol). That definition has since been incorporated into many other legal and policy instruments as well as national laws.

RELATIONSHIP BETWEEN HUMAN RIGHTS AND HUMAN TRAFFICKING

The links between human rights and the fight against trafficking are well established. From its earliest days to the present, human rights law has unequivocally proclaimed the fundamental immorality and unlawfulness of one person appropriating the legal personality, labour or humanity of another.

Human rights law has prohibited discrimination on the basis of race and sex; it has demanded equal or at least certain key rights for non-citizens; it has decried and outlawed arbitrary detention, forced labour, debt bondage, forced marriage, and the sexual exploitation of children and women; and it has championed freedom of movement and the right to leave and return to one's own country.

Different human rights will be relevant at different points in the trafficking cycle. Some will be especially relevant to the causes of trafficking (for example, the right to an adequate standard of living); others to the actual process of trafficking (for example, the right to be free from slavery); and still others to the response to trafficking (for example, the right of suspects to a fair trial). Some rights are broadly applicable to each of these aspects.

Trafficking as a violation of human rights As noted above, many of the practices associated with modern-day trafficking are clearly prohibited under international human rights law. For instance, human rights law forbids debt bondage: the pledging of personal services as security for a debt where the value of those services is not applied towards the liquidation of the debt or their length or nature is not limited and defined.

Many trafficked persons who enter into a debt with their exploiters (relating to, for example, placement or transport fees) find themselves in a situation of debt bondage; the debt is used as a means of controlling and exploiting them. Human rights law also prohibits forced labour, defined by Convention No. 29 concerning Forced or Compulsory Labour of the International Labour Organization (ILO) as: "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 [herself] voluntarily".

Slavery, servitude, child sexual exploitation, forced marriage, servile forms of marriage, child marriage, enforced prostitution and the exploitation of prostitution are also trafficking-related practices that are prohibited under international human rights law.

Individuals belonging to specific groups who are subject to trafficking may be in a position to claim different or additional rights. For example, international human rights law imposes important and additional responsibilities on States when it comes to identifying child victims of trafficking as well as to ensuring their immediate and longer-term safety and well-being.

The core rule is derived from the obligations contained in the Convention on the Rights of the Child: the best interests of the child are to be at all times paramount. In other words, States cannot prioritize other considerations,

such as those related to immigration control or public order, over the best interests of the child victim of trafficking.

In addition, because of the applicability of the Convention to all children under the jurisdiction or control of a State, non-citizen child victims of trafficking are entitled to the same protection as nationals in all matters, including those related to the protection of their privacy and physical and moral integrity.

Other treaties may further specify these rights. For example, the Trafficking Protocol requires certain special measures with regard to child victims, as does the Convention on Action against Trafficking in Human Beings.

THE IMPORTANCE OF A HUMAN RIGHTS-BASED APPROACH TO TRAFFICKING

While the link between human rights and human trafficking is clear, it does not necessarily follow that human rights will naturally be at the centre of responses to trafficking. For example, cross-border trafficking can be dealt with as an immigration issue, with human rights being addressed only as an afterthought. It is also possible for States to address trafficking primarily as a matter of crime or public order.

Over the past decade, an international consensus has developed around the need for a rights-based approach to trafficking. The General Assembly and the Human Rights Council, for example, have both advocated such an approach, as have many relevant human rights mechanisms, including special procedures and treaty bodies.

A human rights-based approach is a conceptual framework for dealing with a phenomenon such as trafficking that is normatively based on international human rights standards and that is operationally directed to promoting and protecting human rights. Such an approach requires analysis of the ways in which human rights violations arise throughout the trafficking cycle, as well as of States' obligations under international human rights law. It seeks to both identify and redress the discriminatory practices and unjust distribution of power that underlie trafficking, that maintain impunity for traffickers and that deny justice to their victims.

States may sometimes be reluctant to accept legal responsibility for trafficking and its concomitant violations of human rights. They may argue, for example, that the primary wrong has been committed by private criminals and not by the State itself. They might also claim to have done everything possible to prevent the harm.

Although determining the responsibility of States can be difficult because of the complex nature of trafficking and its associated legal framework, in very general terms, States will be responsible for their own acts or omissions that breach their obligations under international law, including human rights law.

In addition, States will generally not be able to avoid responsibility for the acts of private persons when their ability to influence an alternative, more positive outcome can be established. In such cases, the source of responsibility is not the act itself but the failure of the State to take measures of prevention or response in accordance with the required standard, usually to be found in a treaty.

RESEARCH STUDY

International law is clear that the best interests of child victims of trafficking are to be a primary consideration in all decisions or actions that affect them. The Recommended Principles and Guidelines stipulate that child victims of trafficking are to be provided with appropriate assistance and protection with full account being taken of their special rights and needs (guideline 8).

In accordance with the presumptions outlined above, all persons identified as or reasonably presumed to be victims of trafficking and identified as or reasonably presumed to be under the age of 18 are entitled to this higher standard of protection and support.

Appropriate assistance and protection would include the provision of immediate support, such as security, food and safe shelter. It would also include health care, counseling and social services delivered by trained professionals. The services should be appropriate for the child's age and any special needs as well as for the child's sex, ethnic or cultural identity.

The right to a remedy is affirmed in treaties and other legal and non-legal instruments that deal specifically with trafficking. For example, the Trafficking Protocol requires State parties to ensure that their domestic legal systems contain measures that offer victims of trafficking in persons the possibility of obtaining compensation for damage suffered (art. 6.6).

The Trafficking Convention requires that victims should be provided with appropriate information, including procedures they can use to obtain compensation, as well as access to legal assistance (art. 15). The Convention specifically provides that victims have a right to monetary compensation from convicted traffickers in respect of both material injury and suffering, and requires parties to take steps to guarantee compensation of victims.

It gives examples of ways in which this obligation can be realized, including through the establishment of a special fund or initiatives aimed at social assistance or reintegration of victims. The possibility of State compensation schemes funded by the seized proceeds of trafficking is also noted. The obligation to provide effective and appropriate remedies to victims of trafficking has been repeatedly confirmed by the General Assembly and the Human Rights Council and human rights mechanisms.

The obligation on States to investigate and prosecute violence against women is now well established in international law and policy. As noted by the Special Rapporteur on violence against women in her thematic report on reparations (A/HRC/14/22), an essential part of that obligation is a legal duty to provide just and effective remedies to women subjected to such violence.

While the form and extent of remedies required for trafficking as violence against women will depend on the nature and circumstances of the breach, the Committee on the Elimination of Discrimination against Women has clarified that reparation should be proportionate to the physical and mental harm undergone and to the gravity of the violations suffered.

Other international human rights mechanisms, including the Special Rapporteur on violence against women in the report referred to above, have noted the particular issues and concerns that will arise with regard to remedies for violence against women.

CONCLUSION

Trafficked persons have an important role to play and a legitimate interest in legal proceedings against their exploiters. A human rights approach to trafficking requires that all efforts should be made to ensure victims are able to participate in legal proceedings freely, safely and on the basis of full information.

Victim involvement in legal proceedings can take different forms. Individuals who have been trafficked may provide evidence against their exploiters, either through written statements or in person, as part of a trial. They may also be called upon to provide a victim statement about the impact of the offence that could become part of a sentencing hearing.

In civil proceedings against their exploiters, trafficked persons may be applicants and/or witnesses. Even a trafficked person who is unwilling or unable to testify still has a legitimate interest in the legal proceedings.

Victims of trafficking who are involved—or potentially involved—in legal proceedings have special needs and vulnerabilities that must be addressed. Obligations that flow from this are in addition to the protection, assistance and support obligations mandated for all trafficked persons and discussed above.

For example: Trafficked persons should be provided with legal and other assistance in relation to any court or administrative proceedings in a language they understand. This should include keeping victims informed of the scope, timing and progress of proceedings and of the outcome of their cases. Trafficked persons have a right to be present and express their views during any legal proceedings.

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