

An exploration of the meaning of a human rights based approach to trafficking.

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Over the last years there has been increasing discussion about the need for a human rights based approach to trafficking. However, what exactly is meant by this is not always clear. This paper tries to give an impetus to further explore the meaning of such an approach in the field of trafficking.¹

Until now, defenders of a human rights based approach to trafficking have mostly focused on the protection of the human rights of trafficked persons and - to a lesser extent - on prevention. However, a human rights based approach can be conceived to also imply a number of principles that relate to the programming process or method of working. This latter aspect has been hardly systematically addressed within the trafficking debate, although some of these principles, such as empowerment and participation, are regularly put forward by NGOs working in this area. One of the fields in which this is more elaborated is the development debate. I have tried to translate some of the ideas developed in this area into the field of trafficking.²

Underlying the call for a human rights approach is the recognition that trafficking in human beings constitutes both a cause and a consequence of human rights violations. According to the former UN High Commissioner for Human Rights (UNHCHR), Mary Robinson, trafficking is a cause of human rights violation because it violates fundamental human rights, such as the right to life, the right to dignity and security, the right to just and favorable conditions of work, the right to health, the right to equality and the right to be recognized as a person before the law. It is a consequence because it is rooted in poverty, inequality and discrimination.³

Essentially, a human rights based approach integrates the norms, standards and principles of the international human rights system into legislation, policies, programs and processes.

The norms and standards are those enshrined in the range of international treaties and declarations, including the principle of non-discrimination. The principles include the recognition of human beings as subjects and holders of rights, equality and equity, standard setting and accountability, empowerment and participation.

As such, a human rights based approach offers a conceptual and normative framework that can give direction to the further development of policies in the area of trafficking. At the same time it offers a framework to monitor and evaluate anti-trafficking policies, practices and actions for their real and potential impact on trafficked persons and other groups affected, such as sex workers, domestic

¹ This article is based on a paper written by the author for the draft report for the European Experts Group on Trafficking in Human Beings, October 2004, to be found at http://europa.eu.int/comm/justice_home/fsj/crime/forum/fsj_crime_forum_en.html.

² I have used in particular the following documents: “Human rights in development, Rights based approaches”, www.unhchr.ch/development/approaches-04.html; “The Human Rights based Approach, Statement of Common Understanding”, developed at the inter-Agency Workshop on a human rights based approach in the context of UN Reform, 3-5 May 2003, UNDP, and, in the area of violence against women: “Working Paper on a Human Rights Based Approach to Implementation of the Beijing Platform for Action”, Center for Women’s Global Leadership, www.cwgl.rutgers.edu/globalcentre/approach.html.

³ See Ann Gallagher, “Trafficking and the Global Sex Industry: The need for a human rights framework”, edited extract from an address delivered by the High Commissioner on Human Rights Mary Robinson to an NGO/IGO consultation on trafficking, Geneva, June 21 1999, in: *Women’s Rights are Human Rights*, Special issue on Women’s rights – Spring 2000, OHCHR, www.unhchr.ch/html/menu2/womenpub2000.html

workers, migrants, asylum seekers, etc.

Observance of human rights norms

Under international human rights law States have a legal responsibility to protect and promote the rights of all persons within their jurisdiction. This obligation includes the duty to prevent, investigate and punish human rights violations and to provide effective remedies to victims of such violations.⁴ This duty extends to violations by both State and non-State actors.

In addition, measures should comply with existing obligations of States under international human rights law as set forth in the major human rights instruments - in particular the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination of Women and the Convention on the Rights of the Child and other standard setting documents. At a minimum they must not conflict with or otherwise undermine human rights law.

Treatment of trafficked persons

First, this implies that States have an obligation to assist and provide redress to trafficked persons as victims of human rights violations.

This is the area in which a human rights based approach is most developed in the context of trafficking. Both the former UN High Commissioner for Human Rights (UNHCHR) and the former Special Rapporteur on Violence Against Women, Radhika Coomaraswamy, have at several occasions pointed out the link between the prevention and eradication of trafficking and the protection of the human rights of trafficked persons.

Assistance and protection provisions must, at a minimum, meet basic international human rights standards. Concrete examples of a set of state responsibilities which ensure the protection of the human rights of trafficked persons are the Human Rights Standards for the Treatment of Trafficked Persons, developed by the Dutch Foundation Against Trafficking in Women, the International Human Rights Law Group and GAATW, and the Recommended Principles and Guidelines on human rights and human trafficking of the Office of the High Commissioner for Human Rights.⁵ Both contain an extensive list of assistance and protections that should be provided to trafficked persons based on international human rights law. These include access to justice, private actions and reparations; procedural protections in court cases, witness protection and legal assistance; access to temporary and, if necessary, permanent residence status; access to social, psychological and health care and help with a safe, and to the extent possible voluntary, return to their country of origin.⁶ Important to note is that the right to a safe return includes the right *not* to be repatriated if such repatriation would expose the trafficked person to a real risk of further human rights abuses, such as the risk of reprisals by the traffickers, of being re-trafficked, of oppressive or discriminatory measures from the authorities and/or of being subjected to

⁴ See *inter alia* Art. 2 ICCPR and Art. 2 and 3 CEDAW. See also e.g.: *Integration of the Human Rights of Women and the Gender Perspective, Violence Against Women*, Report of the Special Rapporteur on violence against women, its causes and consequences, ms. Radhika Coomaraswamy, on trafficking in women, women's migration and violence against women, submitted in accordance with Commission on Human Rights Resolution 1997/44, ECOSOC, Commission on Human Rights, Fifty-sixth session, 29 February 2000 (E/CN.4/2000/68).

⁵ OHCHR, United Nations, New York and Geneva, 2002.

⁶ See for a comprehensive survey of the necessary safeguards: *Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report of the High Commissioner for Human Rights to the Economic and Social Council*, 20 May 2002 (E/2002/68/Add.1); and *Human Rights Standards for the Treatment of Trafficked Persons* (1999), developed by the Global Alliance Against Trafficking in Women, the Foundation against Trafficking in Women and the International Human Rights Law Group (online available: <http://www.inet.co.th/org/gaatw/|SMR99.htm>).

inhuman or degrading treatment.

Prevention

Secondly, it means that States not only have a duty to prevent trafficking - that is to address the root causes -, but also must ensure that anti trafficking measures do not undermine or adversely affect the human rights of trafficked persons or other affected groups, e.g. the freedom of movement, the right to leave one's country, the right to legally migrate or the right to privacy. To this aim safeguards should be incorporated in the development of all instruments and measures. This is particularly relevant in the area of trafficking as the prevailing anti-immigration and law-and-order approach, adopted by most Governments to combat trafficking, easily risks infringement upon the rights of the groups involved, in particular trafficked persons, female migrants and sex workers.

Thus anti-trafficking instruments should not only be consistent with the respect for, and the protection of, human rights but should also be careful not to create or exacerbate existing situations that cause or contribute to trafficking by instituting policies and practices that further undermine or adversely affect the human rights of persons, in particular the rights of trafficked persons, female migrants, asylum seekers and sex workers. For this reason, any measures that can add to the marginalisation or stigmatisation of the concerned groups must be rejected.

This is, for example, reiterated by the UNHCHR, where she urges for the integration of human rights into the analysis of the problem of trafficking and the development of an effective international legislative response, as, in her view, that is the only way "(...) to ensure that well-intentioned anti-trafficking initiatives do not compound discrimination against female migrants or further endanger the precariously held rights of individuals working in prostitution".⁷

Principle of Non-discrimination

A fundamental rule of international human rights law, which is of special importance to the situation of irregular or illegal migrants and other vulnerable or marginalised groups, including sex workers, is respect for the principle of non-discrimination.⁸

Following this principle, it should be ensured that anti-trafficking measures, especially, but not only, those aiming at prevention, cannot be used to directly or indirectly discriminate against women or other groups. Moreover, it must be ensured that trafficked persons are not subjected to discriminatory treatment in practice or law and that protections for trafficked persons are applied without discrimination, particularly with respect to gender, ethnicity, immigration status, and/or the fact of a trafficked person's having been trafficked formerly or having participated in the sex industry.

Elements of a human rights based approach thus are:

- the obligation of States to investigate and punish trafficking and to provide assistance, protection and redress to its victims. Assistance and protection should, at a minimum, meet basic international human rights standards;

⁷ *Message from the UN High Commissioner for Human Rights, Mary Robinson, to the Ad Hoc Committee on the Elaboration of a Convention Against Transnational Organized Crime*, Fourth session, Vienna 28 June-9 July, 1999

⁸ See *inter alia* Art. 2 and 7 UDHR, Art. 2 and 26 ICCPR and Art. 2 ICESR, but also the Statute of the International Criminal Court, Art. 21 (3).

- the obligation to ensure that anti trafficking measures comply with the legal norms and standards enshrined in human rights instruments, including the principle of non discrimination;
- the obligation to address the root causes of trafficking;
- the obligation to ensure that measures do not undermine or adversely affect the human rights of the groups concerned.

Apart from the above discussed human rights norms, a human rights approach implies a number of principles that are relevant for the way policies, programs and measures are developed and implemented. These include standard setting and accountability, the recognition of human beings as subjects and holders of rights, empowerment, participation and the integration of a gender and ethnic perspective. Moreover, human rights should inform all phases of the process of policy development, including assessment and analysis, planning and design (setting goals, objectives and strategies), implementation, monitoring and evaluation.

Standard setting and accountability

In a rights based approach human rights determine the relationship between individuals and groups with valid claims (rights holders) and the corresponding duty bearers. While the primary responsibility under the human rights system lies with individual States, also non state-actors, including NGOs and international institutions, are duty bound. Obligations include both positive obligations (to promote, protect and provide) and negative obligations (to abstain from violations).

Strategies focus on raising the levels of accountability by States and relevant non-state actors to all involved stakeholders. Steps within such a strategy are: the identification of the human rights of rights-holders and the corresponding human rights obligations of duty-bearers, assessment of the capacity of rights-holders to claim their rights and of duty-bearers to fulfil their obligations, followed by the development of strategies to strengthen these capacities.

Accountability can more easily be determined by the translation of human rights commitments into concrete standards and by setting out goals and specific targets and benchmarks, along with indicators by which progress can be measured. An example is the development of standards of treatment to which all trafficked persons are entitled.

Moreover, mechanisms should be established to monitor and evaluate the human rights impact of anti-trafficking laws, policies and programs, both in terms of processes and outcomes. NGOs and grassroots organisations can play an important role in this process.

Recognition of human beings as subjects and holders of rights

Human beings are seen as subjects and holders of rights. A human rights approach thus opposes the instrumentalising of trafficked persons. The right to protection, assistance and redress of trafficked persons, for example, is considered a right in its own based on international human rights law, and is not made contingent upon the willingness or capacity of the trafficked person to co-operate in legal proceedings and/or to give evidence.

By definition such an approach is incompatible with policies, measures or programs that have the effect of violating rights. There is no trade off between combating trafficking and rights.

Moreover, human beings are seen as active actors in changing their own situation, rather than as passive recipients of services or victims “in need of rescue”. Corresponding strategies aim for empowerment, participation and self-organisation of the people concerned.

Empowerment

Strategies and measures should work towards strengthening the capacities of rights holders to claim their rights. They aim at giving them the power, capacities, capabilities and access needed to change their situation, to speak up for their own rights and, in the case of trafficked persons, to take back control of their lives.

As a consequence, preventive measures should primarily aim at strengthening the position of the affected groups and at providing them with the (legal) instruments to defend themselves against human rights abuses, along with the right to be defended by the state against coercion and exploitation

Moreover, preventive strategies must be based on an analysis of the factors that increase vulnerability to trafficking, including economic factors such as poverty, unemployment and indebtedness; social and cultural factors such as violence against women, gender discrimination and other forms of discrimination; legal factors such as a lack of appropriate legislation and corruption in the public sector; and international factors such as the growing feminisation of labour migration on the one hand and the increasingly restrictive immigration policies of recipient countries on the other hand in combination with a demand for cheap, unprotected and exploitable migrant labour and services.

Participation and inclusion

Human rights based approaches require a high degree of participation and cooperation of all stakeholders, both as a means and a goal. Stakeholders include relevant sectors of civil society (e.g. national human rights institutions and NGOs dealing with trafficked persons), as well as the groups that are affected by trafficking (directly, through their advocates and through organisations of civil society). Participation of the groups affected is seen as conditional to the development of effective change strategies.

An important aspect of participation is accessibility, including access to policymaking processes, information, resources and redress or complaint mechanisms. Building links and partnerships between governmental agencies, relevant sectors of civil society and international organisations forms an essential part of the development, implementation and evaluation of anti-trafficking measures.

Integration of a gender and ethnic perspective.

Particular attention is given to discrimination, equality, equity and marginalised groups. Although trafficking affects both men and women, it is not a gender-neutral phenomenon. Women are affected in different ways than men in terms of the sectors into which they are trafficked, the forms of abuse they suffer and the consequences thereof. To understand the specific ways in which women are affected, trafficking should be placed in the perspective of gender-inequality, traditional female roles, a gendered labour market and the worldwide feminisation of poverty and labour migration. Also in other aspects, trafficking is not a “neutral” phenomenon, but is closely related to and generated by discriminatory practices and unequal power relations, including those based on race or ethnic background. The integration of a gender and ethnic perspective is therefore essential for the analysis of trafficking, the development of counter policies and the provision of protection and assistance.

The above adds the following elements to a human rights approach

- human rights should inform all phases of the process of policy development, including assessment and analysis, planning and design (setting goals, objectives and strategies), implementation, monitoring and evaluation;
- standard setting and accountability: mechanisms should be in place to hold duty bearers answerable for the observance of human rights and to monitor and evaluate the human rights impact of anti-trafficking laws, policies and programs;
- express linkage to rights: trafficked persons and other stakeholders are seen as subjects accorded with rights. This implies, among other things, the identification of minimum standards of treatment to which all trafficked persons are entitled, regardless of their assistance to or value for the prosecution;
- strategies aim for empowerment, emancipation and participation of trafficked persons and other affected groups;
- the integration of a gender and ethnic perspective.

Human Rights impact assessment

While policies and measures to combat trafficking have mushroomed, up until now instruments to assess the human rights impact of anti-trafficking measures have been lacking. This is the more serious because of repeated reports of anti trafficking measures violating human rights and contributing to the further marginalisation and stigmatisation of, in particular, sex workers. My hopes are that this paper will contribute to remedy this gap.