

A Human Rights Framework to Address Trafficking of Human Beings

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1. Introduction

Trafficking of human beings is a widespread practice in the modern world. It has been estimated that approximately 800,000 people are trafficked all around the world each year.¹ Virtually all States are affected by the act,² and traffickers are believed to make between \$ 7 to 10 billion annually from trafficking business.³ The transnational nature of the practice and its link with organised crime prompted the international community to take urgent action, and the major step was taken with the adoption in December 2000 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (Trafficking Protocol) attached to the United Nations Convention Against Transnational Organised Crime (Organised Crime Convention).⁴

It is widely accepted by different actors, such as scholars, governments, NGOs and International Organisations that trafficking is not only a criminal justice issue, but also a human rights issue, because the practice is regarded as a serious threat to the promotion and protection of human rights.⁵ This suggests that a human rights framework to deal with the practice is also necessary. This, however, has not been fully developed to date. The Office of the United Nations High Commissioner for Human Rights has recently adopted the Recommended Principles and Guidelines on

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¹ U.S. Department of State, Trafficking in Persons Report 2004, 1 (hereinafter Trafficking Report 2004).

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Human Rights and Human Trafficking⁶ Nevertheless, these Principles and Guidelines are not legally binding and do not fully articulate human rights obligations. As a result, a human rights discourse in relation to trafficking remains without much substance.

The purpose of this paper, then, is to promote a human rights framework not only to understand, but also to address trafficking. The paper begins with an analysis of the definition of trafficking under the Trafficking Protocol. The key elements of the definition are identified in comparison with the definition of smuggling of human beings. It then illustrates some advantages of adopting a human rights framework, such as its ability to promote a victim-centred and a holistic approach to the practice. It continues with an identification of human rights issues pertinent to the causes, process and consequences of trafficking, such as poverty, torture, and slavery/forced labour. The paper then explores the following key human rights obligations applicable to all States, regardless of their status as States of origin, transit, or destination: obligations to 1) prohibit trafficking and related acts; 2) prosecute and punish traffickers; and 3) protect victims of trafficking (so-called 3P obligations). The main conclusion reached is that a human rights framework can augment global action against trafficking, and some recommendations are presented in the end.

2. Definition of Trafficking

There were five international instruments in relation to trafficking prior to the entry into force of the Trafficking Protocol.⁷ However, it was the Trafficking Protocol which adopted the definition of the practice for the first time under international law. Article 3 of the Trafficking Protocol provides that:

"Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring, or receipt of persons, by means of 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 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 the minimum,

⁶ E/2000/68/Add.1.

⁷ International Agreement for the Suppression of the White Slave Traffic, 24 UKTS 1; International Convention for the Suppression of the White Slave Traffic, 20 UKTS 269; International Convention for the Suppression of the Traffic in Women and Children, 9 LNTS 15; International Convention for the Suppression of the Traffic in Women of Full Age, 150 LNTS 431; and Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others, 96 UNTS 271.

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 removal of organs.⁸

This definition is not to be confused with that of “smuggling” of human beings. Although these two terms have been used interchangeably in the past, there is a consensus that they are different acts. According to Article 3 of the **Protocol Against the Smuggling of Migrants by Land, Sea and Air** (Smuggling Protocol), also attached to the Organised Criminal Convention, smuggling means:

The procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of illegal entry of a person into a State Party of which the person is not a national or permanent resident.⁹

The following key elements of trafficking can be identified in comparing these definitions. First, trafficking is carried out with the use of coercion and/or deception, whereas smuggling is not, indicating that the latter can be a voluntary act on the part of those smuggled. Second, trafficking entails subsequent exploitation of people, while the services of smugglers end when people reach their destination. Third, trafficking can take place both within and across national frontiers, although international movement is required for smuggling. Fourth, entry into a State can both be legal and illegal in the case of trafficking, and smuggling is characterised by illegal entry. In looking at these elements, it can be argued that trafficking of human beings is more likely to be regarded as a human rights issue, particularly because of the use of coercion and subsequent exploitation inherent in the practice.

3. A Human Rights Framework

What is a human rights framework to address trafficking of human beings? A simple answer would be that it is a framework of both analysis and action for those concerned. To begin with, a human rights framework allows one to explore and identify relevant human rights issues in relation to trafficking of human being. Once applicable human rights norms and principles are identified, a human rights framework can be used to establish a plan of action to be taken by States. This is done through articulation of legal obligations imposed upon them. It can also encourage other pertinent actors, such as NGOs and International Organisations, to work closely with States to address the human rights issues inherent in the practice.

⁸ Trafficking Protocol, *supra*

There are mainly two advantages in utilising a human rights framework to trafficking. First, it promotes better understanding of the problems experienced by those trafficked. They may be seen as victims of human rights abuses¹⁰ rather than criminals who violate national immigration laws and regulations, and therefore a victim-centred approach may be promoted. Victimisation may lead to deprivation of victims' sense of self-control and autonomy, and they can also feel isolated from their family, society and the world around them.¹¹ A victim-centred approach could rectify this situation by empowering them and restoring their dignity and self-worth.¹²

Second, a human rights framework can be used to address wider issues surrounding the practice. A most common response to trafficking at the national level has been a criminal justice one, with much emphasis on immigration and crime control. However, problems associated with trafficking will not be addressed adequately by merely promoting this. Wider issues including the causes and consequences must also be dealt with, and it is submitted that a human rights framework is particularly beneficial in this regard, because it allows us to understand pertinent issues such as poverty, violence against women and ethnic minorities, torture, and slavery/forced labour in depth, and to seek not only legal, but also political, economic and social solutions accordingly. In other words, it has the potential of promoting a holistic approach, and therefore of strengthening global action against the phenomenon.

4. Human Rights Analysis of Trafficking

Having identified advantages of utilising a human rights framework, it is now useful to explore some of the major human rights issues relating to trafficking of human beings.

4.1 Causes of Trafficking

⁹ Ibid., Annex III.

¹⁰ Smuggling and Trafficking in Persons and the Protection of Their Human Rights: Note by the Secretary-General E/CN.4/Sub.2/2001/26, para. 22; Tom Obokata, 'Trafficking' and 'Smuggling' of Human Beings in Europe: Protection of Individual Rights or States' Interests, *Journal of Current Legal Issues* (Issue 5, 2001), at <http://webjcli.ncl.ac.uk>; and Tala Hartsough, Asylum for Trafficked Women: Escape Strategies Beyond the T Visa, *Hastings Women's Law Journal* 77 (2002), p. 95.

¹¹ Naomi Roth-Arriaza, 'Punishment, Redress, and Pardon: Theoretical and Psychological Approaches,' in Roth-Arriaza (ed.), *Impunity and Human Rights in International Law and Practice* (Oxford: Oxford University Press)(1995), p. 19.

¹² Ibid. See below for measures which can be taken in this regard.

One of the common causes of trafficking is poverty,¹³ and this is particularly evident in the Mekong Sub-region. Thai people in rural areas, for instance, are often forced, through a lack of opportunities of employment, to move into larger cities such as Bangkok.¹⁴ The unstable economic conditions in the Mekong Sub-region have also contributed to the movement of people abroad.¹⁵ Poverty is a human rights issue, as it affects economic, social and cultural rights, such as rights to work, food, housing, adequate standard of health, and education.¹⁶ In addition, civil and political rights such as the rights to life, liberty and security are also affected.¹⁷ The fact that poverty has a negative impact on the enjoyment of human rights is explicit in the freedom from want¹⁸ in the Preambles of the Universal Declaration of Human Rights 1948 (UDHR),¹⁹ the ICCPR,²⁰ the ICESCR,²¹ and also recognised by UN human rights mechanisms such as the Commission on Human Rights,²² the Committee on Economic, Social and Cultural Rights,²³ a supervisory organ of the ICESCR, and the Independent Expert on Human Rights and Extreme Poverty.²⁴

Another interlinked cause of trafficking is discrimination on account of race, gender and other grounds. Racism sometimes leads to a lack of employment opportunities for people belonging to certain racial or ethnic groups, and forces them

¹³ For the link between poverty and trafficking and smuggling of human beings, see Report of the Independent Expert on Human Rights and Extreme Poverty, E/CN.4/2003/52, paras. 30-35.

¹⁴ Patricia D. Levan, *Curtailing Thailand's Child Prostitution Through an International Conscience* (3) American University Journal of International Law and Policy 872 (1994), pp. 872-873.

¹⁵ UN Inter-Agency Project on Trafficking Mekong Sub-Region (UNIAP) Newsletter Issue 2002, p. 1; and Pasuk Phongpaichit, 'Trafficking in People in Thailand,' in Williams (ed.), *Illegal Immigration and Commercial Sex: The New Slave Trade* (London: Frank Cass)(1999), p. 97.

¹⁶ Articles 6, 11, 12 and 13 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), 993 UNTS 3.

¹⁷ Articles 6 and 9 of the International Covenant on Civil and Political Rights (ICCPR), 999 UNTS 171; and General Comment No. 6 (The Right to Life)(1982), in which the Human Rights Committee, a supervisory organ of the ICCPR, touches upon the obligation of States to take positive steps to reduce instances of infant mortality and malnutrition (para. 6). *Compilation of General Comments and General Recommendations adopted by the Human Rights Treaty Bodies* (hereinafter *Compilation of General Comments*).

¹⁸ Statement Adopted by the Committee on Economic, Social and Cultural Rights, E/C12/1999/10 (hereinafter *Statement of the CESCR*).

¹⁹ GA Res 217A (1948).

²⁰ *supra*.

²¹ *supra*.

²² Commission on Human Rights Resolution 2003/24 (Human Rights and Extreme Poverty).

²³ Statement of the CESCR, *supra*. The Committee defines poverty as "a human condition characterized by sustained or chronic deprivation of the resources, capabilities, choices, security and power necessary for the enjoyment of an adequate standard of living and other civil, cultural, economic, political and social rights."

²⁴ See recent Reports of the Independent Expert on Human Rights and Extreme Poverty E/CN.4/2004/43 and E/CN.4/2005/49.

to seek employment elsewhere.²⁵ In a similar vein, gender discrimination is a reason why women turn to traffickers. They are vulnerable as they are marginalised economically, socially and politically in many parts of the world, including the Mekong Sub-region,²⁶ and therefore are unable to enjoy many basic rights enjoyed by men. This has led to the feminisation of poverty, and forced women to leave so that they can find economic opportunities abroad.²⁷ Violence against women, as well as traditional family structures, which subordinate women sexually or otherwise, also promote their movement.²⁸

Moreover, humanitarian crises also trigger movements of people. Some people may be persecuted by States of origin on account of race, religion, nationality, membership to a particular social group or political opinion, and therefore qualify as refugees.²⁹ Others escape due to international or internal armed conflicts. In Myanmar, for instance, more than 600,000 people have been displaced internally due to military conflicts, and many have sought refuge in Thailand.³⁰ A wide variety of civil and political rights such as rights to life, liberty and security, and freedom from torture, can be violated in the process.³¹ It is also apparent that a set of economic, social and cultural rights, such as rights to work, health, food and housing,³² are deeply affected. Many people have no choice but to escape their States of origin under these circumstances, and one way to do so is to seek assistance from traffickers.

Another cause is the high demand for trafficked people. The sex industry in Thailand is a case in point. Its origin can be traced back to World War II, when women from Southeast and East Asia were "forced to serve as comfort women for the

²⁵ Report of the Asia-Pacific Regional Seminar of Experts on Migrants and Trafficking in Persons with Particular Reference to Women and Children, UNCONF.189/PC.2/3 (2001), paras. 9, 12, 18, 71, 83 and 85 (hereinafter Asia Report). See also Response to the Report "Draft Guidelines: A Human Rights Approach to Poverty Reduction Strategies", CERD/C/62/Misc.22 (2003).

²⁶ Asia Report, *ibid.*, para. 44. See further, Concluding Observations of the Committee on the Elimination of Discrimination Against Women, Thailand and China A/54/38 (1999); Myanmar, A/55/38 (2000); and Vietnam, A/56/38 (2001).

²⁷ Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on Trafficking in Women, Women's Migration and Violence against Women, E/CN.4/2000/68.

²⁸ *Ibid.*, paras. 54 and 57.

²⁹ Article 1 of the Convention Relating to the Status of Refugees, UNTS 150, as revised by the Protocol Relating to the Status of Refugees, UNTS 267.

³⁰ Written Statement Submitted by Asian Legal Resource Centre (ALRC), E/CN.4/2003/NGO/151, paras. 4 and 6. See also Written Statement Submitted by Society for Threatened Peoples E/CN.4/2003/NGO/256, which reports on sexual violence against Myanmar nationals committed by the military personnel; and Written Statement Submitted by Minority Rights Group International E/CN.4/2003/NGO/157.

³¹ Articles 6, 7, and 9 of the ICCPR, *supra*

³² Articles 6, 11 and 12 of the ICESCR, *supra*

Japanese military."³³ The sex industry in Thailand was further expanded by the presence of the United States armed forces during the Indochinese War. During that period, the governments of the United States and Thailand signed a treaty which allowed American soldiers stationed in Vietnam to visit Thailand on "rest and recreation leave."³⁴ This treaty was said to be a factor which promoted prostitution in Thailand.³⁵ Sexual exploitation of women and children has long been regarded as constituting violations of their human rights.³⁶

4.2 Process of Trafficking

Various human rights issues arise during the process of trafficking. For instance, families and relatives in States of origin become indebted to traffickers because they sometimes share the cost of transportation.³⁷ A lack of official means to obtain loans is evident in many States of origin, and this is said to create informal networks of lenders who charge a high rate of interest.³⁸ Consequently, many lose their house, land and other property,³⁹ and become susceptible to slavery and bonded labour.⁴⁰

The process of recruitment and transportation also raises a set of human rights concerns. In some cases, people are forcibly recruited. Traffickers use violence, intimidation and other tactics to traffic people internally or internationally.⁴¹

Abduction or kidnapping of children for adoption, organ extraction, or participation in

³³ Maya Raghu, *Sex Trafficking of Thai Women and the United States Asylum Law Response* Georgetown Immigration Law Journal 145 (1997), p. 153.

³⁴ Levan, *supra* p. 880.

³⁵ *Ibid.*, p. 880. The sex industry was further expanded in the 1970s when the government, with the co-operation of such institutions as the World Bank, started promoting tourism for economic gain. Margaret M. Healy, *Prosecuting Child Sex Tourists at Home: Do Laws in Sweden, Australia and the United States Safeguard the Rights of Children as Mandated by International Law?* *International Law Journal* 1852 (1995), p 1865. For further information on sex trafficking in Thailand, see Siriporn Skrobanek, Nattaya Boonpakdee and Chutima Jantateero, *Traffic in Women: Human Realities of the International Sex Trade* (London: Zed Books Ltd)(1997); Elizabeth Rho-Ng, *The Conscription of Asian Sex Slaves: Causes and Effects of U.S. Military Sex Colonialism in Thailand and the Call to Expand U.S. Asylum Law* *Asian Law Journal* 103 (2000); and Jeremy Seabrook, *Travels in the Skin Trade: Tourism and the Sex Industry* (London: Pluto Press)(2001).

³⁶ Article 6 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), 1249 UNTS 13; Articles 19 and 34 of the Convention on the Rights of the Child (CRC), A/RES/44/25; and Susan Jeanne Toepfer, and Bryan Stuart Wells, *The Worldwide Market for Sex: A Review of International and Regional Prohibitions Regarding Trafficking in Women* Michigan Journal of Gender & Law 83 (1994).

³⁷ Report of the Special Rapporteur on Migrants (2002), E/CN.4/2002/94, para. 34.

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Report of the Working Group on Contemporary Forms of Slavery, E/CN.4/Sub.2/2000/23.

armed conflicts are practices evidenced in some parts of the world.⁴² In addition, many of those trafficked are forced to travel in overcrowded trucks and shipping containers for long periods of time.⁴³ Because of these conditions, many people suffer from exhaustion, dehydration and malnutrition.⁴⁴ Moreover, it has been reported that many traffickers, as well as smugglers, abandon people during the course of their journey and sometimes use physical and sexual violence as a means to demand more money for their services.⁴⁵ All of these practices can amount to torture or other cruel, inhuman or degrading treatments.⁴⁶ Finally, the right to life is relevant as there are cases where people lose their lives. In 2001, for instance, an overcrowded ship with migrants on board sank off the coast of Indonesia, and 356 people died as a result.⁴⁷

4.3 Consequences of Trafficking

In States of destination, those trafficked are, by definition, exploited. Many of them are exploited by transnational corporations, farmers, restaurant owners and others, and forced to work long hours with minimal pay,⁴⁸ raising the issues of slavery and forced labour.⁴⁹ A related issue is the conditions in which they are held. Those working in the agricultural sector, for instance, are exposed to dangerous chemicals, and their health is affected as a result.⁵⁰ The right to just and favourable conditions of work, therefore, is commonly denied.⁵¹ Because of their illegal status, such people are unable or unwilling to seek medical assistance due to a fear of enforcement actions.⁵² Moreover, instances of physical, mental or sexual abuse, especially against

⁴¹ Report of Special Rapporteur on Violence against Women: Mission to Bangladesh, Nepal and India E/CN.4/2001/73/Add.2, para. 14.

⁴² Report of the Special Rapporteur on Sale of Children, Child Prostitution and Child Pornography E/CN.4/1999/71, paras. 57, 75, 76, 85, and 86.

⁴³ Written Statement Submitted by Human Rights Advocates International E/CN.4/2002/NGO/45, paras. 12-13.

⁴⁴ Report of the Special Rapporteur on Migrants Mission to the Border between Mexico and the United States of America E/CN.4/2003/85/Add.3, para. 4.

⁴⁵ *Ibid.*, para. 19.

⁴⁶ Convention against Torture and Other Inhuman or Degrading Treatment of Punishment A/RES/39/46.

⁴⁷ Special Rapporteur on Migrants (2002), *supra* para. 32.

⁴⁸ Special Rapporteur on Women (2000), *supra* para. 66; and Report of the Special Rapporteur on Migrants Workers E/CN.4/2001/83, para. 54.

⁴⁹ Article 8 of the ICCPR, *supra*

⁵⁰ Human Rights Advocates (2002), *supra* para. 3.

⁵¹ Article 7 of the ICESCR, *supra*

⁵² Special Rapporteur on Migrants (2002), *supra* paras. 36 and 50.

migrant women, have been reported.⁵³ Furthermore, freedom of movement⁵⁴ is often restricted. Traffickers may take identity documents away from those trafficked as a way to gain control over them,⁵⁵ lock them in sweatshops, factories and brothels, and threaten them by hinting at the possibility of enforcement action and retaliation against their family members.⁵⁶

Moreover, racism and xenophobia are serious human rights issues in States of destination. It has been noted, for instance, that racism and xenophobia have made it easier for people to justify the exploitation of those trafficked in sex and other industries.⁵⁷ The term “illegal immigrants,” which applies to many of those trafficked, has negative connotations in many societies, and this sometimes leads to instances of violence and racism.⁵⁸ These illegal immigrants are also blamed for deficiencies in the health, education and social security systems in States of destination.⁵⁹ Once again, their illegal status makes it difficult for them to report instances of racism and violence, and therefore perpetrators are rarely punished.⁶⁰

Finally, law enforcement practices raise a set of human rights issues. For instance, some enforcement officers ask for money or sexual favours in return for release from arrests, and refusal to do so may result in prolonged detention.⁶¹ A concern has also been raised in relation to the conditions of detention. Detention centres in which trafficked people are held are often unhygienic,⁶² and instances of torture⁶³ have been reported. Furthermore, other rights, such as the right to be informed of charges being made against them, access to the judicial processes, interpreters, legal advice, and consular assistance are also restricted or non-existent.⁶⁴

⁵³ Report of the Secretary-General on Violence against Women Migrant Workers, E/CN.4/2000/76; Report of the Special Rapporteur on Migrants: Mission to Philippines, E/CN.4/2003/85/Add.4, paras. 15 and 16; and the Report of the Working Group on Contemporary Forms of Slavery E/CN.4/Sub.2/1998/14, para. 28.

⁵⁴ Article 12 of the ICCPR, *supra*.

⁵⁵ Report of the Special Rapporteur on Migrants, E/CN.4/2000/82, para. 63; and King, T, *The Modern Slave Trade* 8 U.C. Davis Journal of International Law and Policy 293 (2002), p.309.

⁵⁶ Special Rapporteur on Women (2000), *supra*, para. 39.

⁵⁷ Bridget Anderson and Julia O’Connell Davidson, *Is Trafficking in Human Beings Demand Driven? A Multi-Country Pilot Study* (Geneva: IOM)(2003), p. 42.

⁵⁸ Special Rapporteur on Migrant Workers (2001), *supra* para. 67.

⁵⁹ *Ibid.*, para. 69.

⁶⁰ *Ibid.*, para. 68.

⁶¹ Report of the Special Rapporteur on Migrants, E/CN.4/2003/85, para. 22; and Report of the Special Rapporteur on the Rights of Non-Citizens, E/CN.4/Sub.2/2002/25/Add.3, para. 4.

⁶² Special Rapporteur on Migrants, *ibid.*, paras. 58 and 61; and Written Statement Submitted by the Organization for Defending Victims of Violence (ODVV), E/CN.4/2002/NGO/104, para. 4.

⁶³ Special Rapporteur on Migrant Workers (2001), *supra* para. 82.

⁶⁴ Special Rapporteur on Migrants (2003), *supra* paras. 22, 27, 29, and 30.

From all of this, it seems apparent that trafficking of human beings entails a wide variety of human rights issues.

5. Human Rights Obligations in Relation to Trafficking of Human Beings

Having identified some of the relevant human rights norms and principles applicable to trafficking, it is now necessary to examine the extent of obligations which can be imposed upon States, the primary subjects under international human rights law. The development of international human rights law reveals that they can be held accountable even when they do not directly violate human rights, and it will be shown that this is applicable to the trafficking of human beings. This paper examines so-called 3P obligations: 1) to prohibit trafficking and related acts; 2) to prosecute and punish traffickers; and 3) to protect victims of trafficking. All of these are enshrined in the Recommended Principles and Guidelines⁶⁵ issued by the Office of the High Commissioner for Human Rights, and it will be demonstrated that they are firmly established under international human rights law.

5.1 Obligation to Prohibit Trafficking of Human Beings and Related Acts

Prohibition of trafficking of human beings through national legislation is one obligation imposed upon States under international human rights law. While the exact wording varies, some of the existing human rights instruments explicitly require States to do so. They include the Convention for the Suppression of the Traffic in Persons and the Exploitation of the Prostitution of Others (1949 Convention),⁶⁶ the CEDAW,⁶⁷ the CRC,⁶⁸ and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography 2000.⁶⁹ In Asia, the Convention on Preventing and Combating Trafficking in Women and Children for Prostitution 2002 was adopted by States belonging to the South Asian Association for Regional Cooperation (SAARC).⁷⁰ More appropriately, the Heads of States and Governments of the Association of Southeast Asian Nations (ASEAN) in November 2004 adopted the

⁶⁵ *supra*

⁶⁶ Articles 1-4, *supra*

⁶⁷ Articles 6 and 12, *supra*.

⁶⁸ Article 35, *supra*

⁶⁹ Articles 1-3, A/RES/54/253.

⁷⁰ Member States are Bangladesh, Bhutan, India, Maldives, Nepal, Pakistan and Sri Lanka.

ASEAN Declaration against Trafficking Persons Particularly Women and Children⁷¹

Other related acts are also prohibited under international human rights law. As noted earlier, many of those trafficked are coerced into the process by traffickers, and may experience acts amounting to torture, inhuman or degrading treatment. States are placed under a clear obligation to also prohibit these acts.⁷² It is now settled that the prohibition of torture is part of customary international law⁷³ and *jus cogens*⁷⁴. Moreover, the prohibition of slavery and forced labour is a clear obligation established under human rights instruments such as the Slavery Convention⁷⁵, the ICCPR,⁷⁶ the ICESCR,⁷⁷ and the International Convention on Rights of All Migrant Workers and Members of Their Families⁷⁸ (Migrant Workers' Convention).⁷⁸ Similar to torture, the prohibition of slavery is also part of customary international law and constitutes *jus cogens*.⁷⁹ Thus, States' obligation to prohibit trafficking and related acts is clearly established under international human rights law.

5.2 Obligation to Prosecute and Punish Traffickers

Another legal obligation imposed upon States is to prosecute and punish non-State actors, including traffickers, with "due diligence." This is established by jurisprudence of international human rights law. One important case which touches

⁷¹ Available from <http://www.aseansec.org/16793.htm>. It has to be noted, however, that the Declaration is not legally binding. Member States of the ASEAN are Brunei, Cambodia, Laos, Malaysia, Myanmar, Philippines, Singapore, Thailand and Vietnam.

⁷² Convention against Torture, *supra* Article 5 of the UDHR, *supra* and Article 7 of the ICCPR, *supra*

⁷³ See, for example, *Filartiga v. Pena-Irala* 630 F.2d 876 (1980); *Prosecutor v. Delalić* Case IT-96-21-T, Trial Judgement, 11 November 1998, para. 459; and General Comment No. 24 (Issues Relating to Reservations Made upon Ratification or Accession to the Covenant or Optional Protocols) (1994) of the Human Rights Committee, para. 8. Compilation of General Comments, *supra*.

⁷⁴ *Prosecutor v. Furundžija* Case IT-95-17/1, Trial Judgment, 10 December 1998, para. 153; and General Comment No. 24, *ibid.*, para. 10. Article 53 of the Vienna Convention on the Law of Treaties 1969, 1155 UNTS 33, provides that *jus cogens* is "a peremptory norm of general international law" which is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

⁷⁵ 60 LNTS 253.

⁷⁶ Article 8, *supra*

⁷⁷ Article 10 (3), *supra*

⁷⁸ Article 11, 30 ILM 152.

⁷⁹ For prohibition of slavery as *jus cogens*, see, among other things; Restatement of the Law (Third): Foreign Relations Law of the United States, American Law Institute (1987), p. 167; M. Cherif Bassiouni, *Enslavement as International Crime*, 28 New York University Journal of International Law and Politics 445 (1991); and A. Yasmine Rassam, *Contemporary Forms of Slavery and the Evolution of the Prohibition of Slavery and the Slave Trade Under Customary International Law*, Virginia Journal of International Law 303 (1999).

upon this obligation is that of *Velasquez Rodriguez v. Honduras*⁸⁰ In this case, it was held by the Inter-American Court of Human Rights that:

The State is obliged to investigate every situation involving a violation of rights under the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognised in the Convention⁸¹

This obligation has also been endorsed by other UN human rights mechanisms including the Human Rights Committee⁸² and the Special Rapporteur on Violence against Women.⁸³ The first step which must be taken to fulfil this obligation is to enact legislation and establish criminal jurisdiction over the offence of trafficking.

5.3 Obligation to Protect Victims of Trafficking

The development of international human rights law reveals that States have an obligation to protect victims of trafficking of human beings. The human rights instruments specifically related to the practice such as the 1949 Convention⁸⁴ and the Optional Protocol to the CRC⁸⁵ contain provisions on protection of victims.⁸⁶ In relation to other human rights instruments, the obligation to protect can be inferred from a general duty to secure, ensure, or restore rights, and to provide remedies.⁸⁷ Article 2(3)(a) of the ICCPR for instance, provides that States are under an obligation to ensure that “any person whose rights and freedoms as herein recognised are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”⁸⁸ Even though the wording

⁸⁰ 28 ILM 294 (1989).

⁸¹ *Ibid.*, para. 176 (Emphasis added). See also, Dinah Shelton, *Private Violations, Public Wrongs, and the Responsibility of States* 33 Fordham International Law Journal 23 (1989).

⁸² General Comment No. 7 (Torture, Inhuman or Degrading Treatment and Punishment)(1982), of the Human Rights Committee, paras. 1-2. Compilation of General Comments, *supra* and *Herrera Rubio v. Colombia* Communication No. 161/1983, CCPR/C/31/D/161/1983, para. 11.

⁸³ Special Rapporteur on Women (2000), *supra* paras. 51-53. See further, Rebecca Cook, *State Responsibility for Violation of Women's Human Rights* 115 Harvard Human Rights Journal 125 (1994).

⁸⁴ Articles 16, 17 and 19, *supra*

⁸⁵ Articles 8, 9, and 10, *supra*

⁸⁶ Although it does not mention trafficking, Article 16(2) of the Migrant Workers' Convention, *supra* is pertinent. It provides that “migrant workers and members of their families shall be entitled to effective protection by the State against violence, physical injury, threats and intimidation, whether by public officials or by private individuals, groups or institutions.”

⁸⁷ Jennifer Moore, *From Nation State to Failed State: International Protection from Human Rights Abuses by Non-State Actors* 15 Columbia Human Rights Law Review 81 (1999), pp. 92, 93 and 96.

⁸⁸ *supra*

may be different, a similar obligation is also established by such instruments as the ICESCR,⁸⁹ the CRC⁹⁰ and the Migrant Workers' Convention.⁹¹

There is no precise list of protection measures which State are required to provide or implement. However, some are worth noting. One example is the observance of the principle of *non-refoulement* or non-return. This principle applies in particular to refugees.⁹² This principle is also relevant to cases where people are likely to face torture, inhuman or degrading treatment perpetrated by non-State actors,⁹³ such as traffickers. Moreover, it has also been held in the past that expulsion of a person to a State where he/she would be subjected to slavery or forced labour might raise issues under the obligation to prohibit torture.⁹⁴ One measure which should be taken to secure the principle of *non-refoulement* is to issue temporary residence/work permits so that those trafficked can legally reside and work in a given State. It is worth noting in this regard that Thailand in 2001 took an initiative to register illegal migrants from Laos, Myanmar and Cambodia and to legalise their status so that they can remain and work.⁹⁵

In addition, an effective investigation into cases of trafficking, leading to the prosecution and punishment of traffickers, is to be regarded as a form of redress available to victims.⁹⁶ This corresponds to the duty of States to prosecute and punish as illustrated earlier. An integral part of this redress is the right of victims to participate in the investigation and judicial processes against traffickers. Participation of victims is important from a human rights perspective. It allows them to have their voice heard, and this has a therapeutic value.⁹⁷ It also assists them in handling their anger and trauma in a constructive way, and this can lead to the restoration of their sense of control, dignity, and self-worth.⁹⁸

There are several steps which must be taken in order to secure this right of victims to participate. Many of them are afraid to co-operate with law enforcement

⁸⁹ Article 2, *supra*

⁹⁰ Articles 2 and 3, *supra*

⁹¹ Article 7, *supra*

⁹² Article 33 of the Refugee Convention, *supra*.

⁹³ See *Bensaid v. United Kingdom* (App. 44599/98), Judgment of 6/2/01, para. 34 (European Court of Human Rights).

⁹⁴ *Barar v. Sweden* (App. 42367/98) (unreported – European Court of Human Rights). Case Comment, 3 *European Human Rights Law Review* 330 (1999).

⁹⁵ UNIAP Newsletter Issue 13 (2003), p. 1.

⁹⁶ Roht-Arriaza, *supra* p. 34.

⁹⁷ *Ibid.*, p. 21.

⁹⁸ *Ibid.*, p. 19.

agencies due to a fear of enforcement action, as stated above. An important measure to be taken, then, is to ensure that they can remain in a State at least while criminal investigations or proceedings are under way. States should also secure effective witness protection to protect the identities of victims, coupled with such measures as free access to interpreters and legal advice. A right of all people to equal treatment before national tribunals is established under international human rights law,⁹⁹ and States therefore must take positive steps to secure an effective right of access to the judicial system.¹⁰⁰ Further, instances of corruption among law enforcement agencies have been noted in the Mekong Sub-region,¹⁰¹ and this must be addressed in order to promote effective law enforcement.

Moreover, as aliens, there is nothing more important for trafficked people than an opportunity to seek assistance from their own governments. Therefore, access to consular assistance must be secured. States of destination have the duty to provide such access, while those of origin have the right to communicate with their own nationals to provide assistance in accordance with the Vienna Convention on Consular Relations.¹⁰² Although the Vienna Convention is not a human rights instrument *per se* the International Court of Justice, in the *LaGrand* Case (Germany v. United States) stated that Article 36 of the Vienna Convention creates individual rights.¹⁰³ The Inter-American Court of Human Rights went further to state that consular assistance, as part of minimum due process guarantees, is recognised under Article 14 of the ICCPR.¹⁰⁴ This jurisprudence is reflected more appropriately in the Migrant Workers' Convention, which provides that "[m]igrant workers and members of their families shall have the right to have recourse to the protection and assistance of the consular or diplomatic authorities of their State of origin or of a State representing the interests of that State whenever the rights recognized in the present Convention are impaired."¹⁰⁵

⁹⁹ Article 14 of the ICCPR, *supra* General Comment No. 13 (Equality before Courts)(1984) of the Human Rights Committee. Compilation of General Comments, *supra* and Article 18 of the Migrant Workers' Convention, *supra*

¹⁰⁰ *Airey v. Ireland* (App. 6289/73), Judgment of 9/9/79, para. 25 (European Court of Human Rights).

¹⁰¹ Trafficking Report 2004, *supra* pp. 89, 90, 98, 109, and 111.

¹⁰² Article 36, 596 UNTS 261.

¹⁰³ ICJ Report 2002, para. 77.

¹⁰⁴ The Right to Information on Consular Assistance in the Framework of the Guarantees of the Due Process of Law Advisory Opinion OC-16/99, Ser. A, No. 16 (1999), paras. 80, 83, 84, 87, and 122-124.

¹⁰⁵ Articles 23, *supra*

If victims wish to return, then voluntary repatriation must be facilitated. Instances of forced repatriation by States of destination¹⁰⁶ as well as a refusal to accept victims in States of origin¹⁰⁷ have been reported, and these practices can constitute violations of human rights. Voluntary repatriation is closely linked to one's right to freely return to his/her State of origin¹⁰⁸ and is enshrined in international human rights instruments such as the ICCPR,¹⁰⁹ the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD),¹¹⁰ and the Migrant Workers' Convention.¹¹¹ These instruments serve as a legal basis to facilitate voluntary return. When States of destination decide to expel people in accordance with domestic law, international human rights law also stipulates that they must provide an opportunity to appeal against the decision to expel,¹¹² and that collective expulsion is prohibited.¹¹³ Once these people are returned voluntarily and safely, States of origin should ensure that victims are re-integrated into society, by providing continuing physical and psychological support, education and training, and protection from retaliation by traffickers.¹¹⁴ In this regard, Cambodia has recently started rehabilitating and reintegrating its nationals who have been trafficked into other part of the Mekong Sub-region.¹¹⁵

Finally, compensation is an important form of remedy. States of origin bear the primary responsibility in this regard, as the fact of people being trafficked illustrates their failure to prevent traffickers from abusing the human rights of those trafficked. However, this obligation can also be imposed upon States of transit and

¹⁰⁶ Trafficking Report 2004, *supra* p. 109; and Written Statements Submitted by Federation of Associations for Defense and Promotion of Human Rights, E/CN.4/2003/NGO/43.

¹⁰⁷ See for instance, Report of the Special Representative on Internally Displaced Person: East Timor E/CN.4/2000/83/Add.3, para. 48; and Situation of Human Rights in Cambodia: Note by the Secretary General A/57/230 (2003), paras. 49-54.

¹⁰⁸ The Return of Refugees' or Displaced Persons' Property: Working Paper E/CN.4/Sub.2/2002/17, paras. 22-28.

¹⁰⁹ Article 12 (4), *supra* and General Comment No. 27 (Freedom of Movement)(1999) of the Human Rights Committee. Compilation of General Comments, *supra*

¹¹⁰ Article 5(d)(ii), 660 UNTS 195, and General Recommendation No. 22 (Refugees and Displaced Persons)(1996) of the Committee on the Elimination of Racial Discrimination, a supervisory organ of the ICERD. Compilation of General Comments, *supra*

¹¹¹ Article 8, *supra*

¹¹² Article 13 of the ICCPR, *supra* and General Comment No. 15(Position of Aliens under the Covenant)(1997) of the Human Rights Committee. Compilation of General Comments, *supra*

¹¹³ Article 22 of the Migrant Workers' Convention, *supra*

¹¹⁴ Kelly E. Hyland, Protecting Human Victims of Trafficking: An American Framework, *Berkeley Women's Law Journal* 29 (2001), pp. 59-61. See also The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violations of Human Rights and Fundamental Freedoms: Final Report of the Special Representative E/CN.4/2000/62.

¹¹⁵ Trafficking Report 2004, *supra* p. 90.

destination, when they fail to fulfil pertinent human rights obligations illustrated above. The Committee on the Elimination of Racial Discrimination elaborates upon the general duty to provide compensation in the following terms:

(T)he right to seek just and adequate reparation or satisfaction for any damage suffered as a result of such discrimination, which is embodied in article 6 of the Convention, is not necessarily secured solely by the punishment of the perpetrator of the discrimination; at the same time, the courts and other competent authorities should consider awarding financial compensation for damage, material or moral, suffered by a victim, whenever appropriate.¹¹⁶

The Inter-American Court of Human Rights adopted the same line of reasoning in the *Velasquez Rodriguez* Case by stating that the obligation to ensure the free and full exercise of those rights includes provision of compensation.¹¹⁷ In a similar vein, when the right to life or prohibition against torture is involved, the European Court of Human Rights has held that the payment of compensation might be required.¹¹⁸ These human rights norms are pertinent to trafficking of human beings as noted earlier. In view of all of this, it seems reasonable to sustain that obligations to prohibit trafficking, punish traffickers and protect victims are firmly established under international human rights law.

5. Conclusion

The purpose of this paper was to analyse trafficking of human beings with the application of a human rights framework. It began with an examination of the definition of trafficking of human beings. It then highlighted the advantages of using a human rights framework. The paper continued with an analysis of pertinent human rights issues, followed by an identification of three key human rights obligations to prohibit trafficking, punish traffickers and protect victims. The main conclusion reached is that a human rights framework can usefully supplement global action against the practice, as it can put more pressure on States to act and facilitate co-operation between different members of the civil society.

There are several steps which should be taken at the national, regional and international levels so as to facilitate a human rights framework. At the national level, States bear the primary responsibility to promote a human rights framework to trafficking. Relevant human rights issues raised throughout this paper should be

¹¹⁶ General Recommendation No. 26 (Article 6 of the Convention)(2000). Compilation of General Comments, *supra*

¹¹⁷ *Velasquez Rodriguez Case*, *supra* paras. 166, 174 and 175.

carefully considered and addressed through national legislation. This is essential because legislation makes obligations imposed upon those concerned, including the law enforcement authorities, clear, and serves as a basis for holding them legally accountable for non-compliance.

The enforcement of human rights norms and principles at the national level can also be strengthened through the independent national human rights commissions.¹¹⁹ They have the potential not only to monitor the implementation of relevant human rights obligations relating to trafficking, but also to address complaints arising from non-compliance. The appointment of a National Rapporteur on Trafficking within these commissions and/or other governmental bodies may be beneficial in this respect. This has already been done in Nepal,¹²⁰ Belgium, Sweden, and the Netherlands.¹²¹ In the Mekong Sub-region, Thailand, through the Asia Pacific Forum of National Human Rights Institutions, has assigned a member of its National Human Rights Commission as a national focal point for trafficking.¹²² Other governments in the Mekong Sub-region should follow such an example. These rapporteurs and focal points can not only co-ordinate activities with other governmental bodies, but also facilitate co-operation with other actors regionally and internationally.

The role of actors other than governments should not be underestimated. In addition to reporting the cases of trafficking and putting more pressure on governments to act, the involvement of NGOs and International Organisations, such as the GAATW and the United Nations Inter-agency Project on Trafficking in the Mekong Sub-region (UNIAP), is essential in educating the general public about trafficking. Promotion of a human rights framework will be more effective and meaningful when the citizens of the Mekong Sub-region, including the potential victims, are empowered through education and participation in global action against the act.¹²³ This can be done if these actors are able to establish a good working relationship with the local media and journalists who are better suited to disseminate information. In addition, legal practitioners have an important role to play. They can

¹¹⁸ *Z and Others v. United Kingdom* (App. 29392/95), Judgment of 10/5/01, paras. 108 and 109 (European Court of Human Rights).

¹¹⁹ Recommended Principles and Guidelines, *supra* p. 5.

¹²⁰ National Human Rights Commission of Nepal at <http://www.nhrc-nepal.org/?ID=203&AFD=0>.

¹²¹ Monika Smit, (Bureau of the Dutch National Rapporteur on Trafficking), *Trafficking in Women: A Dutch Country Report* (April 2003).

¹²² Asia Pacific Forum of the National Human Rights Institutions at <http://www.asiapacificforum.net/activities/trafficking.htm>.

¹²³ Recommended Principles and Guidelines, *supra* p. 5.

contribute by taking cases of trafficking before national courts and tribunals, so that traffickers are punished and victims are protected.

At the regional and international levels, International Organisations must move beyond merely studying and reporting the cases of trafficking. They should be more proactive in addressing the act with the application of human rights norms and principles. The development of jurisprudence on trafficking may be a useful starting point. Such principles as prohibition against torture and slavery/forced labour may reasonably be brought before the treaty monitoring mechanisms such as the Human Rights Committee and the Committee Against Torture. Regionally, the organisations such as the ASEAN and the UNIAP should take concrete steps to facilitate a human rights framework so as to boost the regional solidarity and to implement a holistic approach to the practice.

In promoting a human rights framework, the inclusion of potential or actual victims of trafficking is essential. The root causes of the practice cannot be adequately addressed without understanding the conditions in which those at risk of being trafficked live. The preferred forms of protection may also vary among victims. In addition, the development of jurisprudence at the national, regional and international levels requires participation of victims in civil, criminal and human rights litigations. In sum, different actors must incorporate the wishes and the voices of these people in order to seek more effective promotion and implementation of a human rights framework in relation to trafficking of human beings.

Will a human rights framework contribute to global action against the practice? This is a question rather difficult to answer, given that it has not been widely promoted or implemented at the national, regional and international levels at this current moment. Therefore, it will take some time to judge its potential. Nevertheless, the benefits of a human rights framework have clearly been illustrated throughout this paper, and it is hoped that different actors start using the framework to address this evil of the contemporary world.

ANNEX

Table of Ratification/Accession to Major International Human Rights Treaties

(As of April 2005)

	ICCPR	ICESCR	ICERD	CAT	CRC	CEDAW	MWC
Cambodia	26/5/92	26/5/92	28/11/83	15/10/92	15/10/92	15/10/92	
China		27/3/01		4/10/88	2/3/92	4/11/80	
Laos			22/2/74		8/5/91	14/8/81	
Myanmar					15/7/91	22/7/97	
Thailand	29/10/96	5/9/99	28/1/03		27/3/92	9/8/85	
Vietnam	24/9/82	24/9/82	9/1/82		28/2/90	17/2/82	

(Source: UN Office of the High Commissioner for Human Rights)

- ICCPR: International Covenant on Civil and Political Rights
- ICESCR: International Covenant on Economic, Social and Cultural Rights
- ICERD: International Convention on Elimination of All Forms of Racial Discrimination
- CAT: Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- CRC: Convention on the Rights of the Child
- CEDAW: Convention on the Elimination of All Forms of Discrimination against Women
- MWC: International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families