

Human Trafficking: Need For An Effective Prosecutorial Response



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Introduction

Trafficking in Human beings is a process, by which people are abducted or recruited in their countries of origin, then transferred through the transit regions into the country of their destination. Trafficking is both an internal as well as external phenomenon in any country. Unfortunately, for long the international community's focus has been only on the sexual exploitation aspect of women and children while forced labour and other forms of exploitations have not been much documented in various jurisdictions.

The number of people trafficked globally is said to be between 600,000 and 800,000 per year but the exact number is hard to come by as this criminal activity is conducted clandestinely. International Labour organization {ILO} estimates that at any given time number could be 2.5 million. Of these, 1.4 million are in Asia Pacific, about 270,000 in industrialized countries, 2,50,000 in Latin America, 2,30,000 in the Middle East and North Africa, 200,000 in Countries under economic transition and 130,000 in Sub-Saharan Countries.

Trafficking in human beings is an extremely grave offence as it not only establishes control over the liberty, freedom of movement and earning capacity of an individual but such control is established and maintained in a process which results in serious violation of the physical and mental integrity of the person. Trafficking in human beings is an opportunistic form of criminal activity that takes advantages of conflicts both internal and external in any country, humanitarian crisis, failure of economic restructuring programmes, poverty and discriminations based on gender and race to flourish.

Nature of the Problem

Trafficking is "the very anti-thesis of the Universal declaration of Human Rights which remains the touch stone by which the States are judged on human rights matters". It is a well known fact Human Traffickers through their activities abuse all rights which are protected both in international as well as in national discourse. By their activities, traffickers negate the universally accepted fact that all human beings are born free and are deemed to be equal in dignity and rights; their victims are denied the freedom of movement, and the most basic freedom to have childhood especially in cases where victims are children. Human Traffickers run their illegal business and their gains are a result of illegal activities such as arbitrary detention, and infliction of degrading punishments on victims who resist them or try to escape from their clutches. Trafficking of persons in South Asia is a matter of great international concern as according to the US State Dept. about one third of all global trafficking especially of women and children takes place in this region alone. One of the prominent realities of this region is India's preponderance over all other neighbouring countries based on its geographical expanse, population, resources and development. India's centrality has special relevance to the trafficking phenomenon given India's dubious distinction of being a country of origin, transit and destination.

US Government Annual Trafficking Report of 2019 continues to place India in its Tier 2 list arguing that India has been unable to show evidence of its increased efforts in addressing human trafficking and there is also a lack of progress in framing of a comprehensive national

enforcement response to this inter-state and transnational crime.

This assessment puts India on an interim assessment before the next report; any slip to Tier 3 can prompt the US Government to withhold Non-Humanitarian and Non trade related assistance to India.

Reflection of Human Trafficking:

Human trafficking manifests itself in several areas but is not limited to the same .Conveniently it is manifested in activities such as :

Sex Trafficking - When an adult engages in a commercial sex act, such as prostitution, which is also

as the result of force, threats of force, fraud, coercion or any combination of such means, that person is a victim of trafficking. In these situations, the traffickers are not only involved in recruiting, but also transporting and soliciting, thus undertaking all activities by which a person can be held guilty of felicitating sex trafficking .

This form of trafficking can also occur through a coercion where the individuals are forced to continue in prostitution because of the unlawful “debt,” which may be incurred because of their transportation, recruitment, or even their “sale”—which exploiters insist they must pay off before they can be set free.

Child Sex Trafficking – If a child normally under 18 years of age is enticed and forced to perform a commercial sexual act, whereby even the proving of force, fraud, or coercion is not necessary for the purposes of the offense so as to be prosecuted as human trafficking. There is no exceptions to this form as no cultural or socio economic aspect can alter this fact that children who are so exploited in prostitution are trafficking victims.

It is well known fact that this form of child trafficking has serious and harmful effects on the growth of the children which manifest in issues such as long-lasting physical and psychological trauma, drug addiction, and unwanted pregnancies at times thereby restricting the overall growth and development of a child particularly females.

Forced Lab our – it is at times is also coined as labor trafficking, which in itself encompasses a wide range of activities such as not only unauthorizedly recruiting, but also transporting and using force on a person so as to coerce him to work by abusing of the legal process and compelling him to continue despite a person unwilling to continue. If any person is exploited by such means, his prior consent to work for his employer becomes legally irrelevant, so much so that the employer can be now termed a trafficker and employee a trafficking victim. This category of people are particularly vulnerable, moreover individuals also may be forced into such labor in their own countries itself.

Bonded Labour or Debt bondage –a unique way of coercion which is used by traffickers in both sex trafficking as well as forced labor is the continuous imposition of a current bond or previous debt. At times, victims continue to work for the reason that they have to pay off their family or ancestors’ debts. Traffickers or recruiters are clever enough to exploit an initial debt assumed, and the accruing interests thereof thereby having the victim bound as a term of employment.

Traffickers, together with the labor agencies, in both the country of origin and in the destination country at times continue to hold their victims in a perpetual system of debt bondage by charging workers recruitment fees and exorbitant interest rates, thereby making it difficult, if not impossible, for the victims to pay off the debt, thereby victims are left with no option but to continue working.

Domestic Servitude is a newer form of trafficking where victims are initially brought to work in private residences, creating a unique situation of vulnerability for them. At times, they are now not free to leave their employment and if are unpaid or underpaid later they do not have much of the legal recourse left, for them as they are in an alien surroundings and unknown place. Labor department officials generally do not have the authority to inspect employment conditions in private residences and these workers, especially women, are subjected to various forms of abuse and harassment, which includes sexual exploitation

at times. If an employer of a domestic worker is having a diplomatic status thereby enjoys immunity from civil and/ or criminal jurisdiction, the vulnerability of the victim and subsequent redressal becomes more difficult.

Forced Child labour -At times, children are engaged forcefully to do works forcing them into slavery or slavery-like situations. Certain well known indicators of forced labor of a child include situations in which the child is in the effective control and custody of a non-family member who may require the child to perform works such as forced begging or labour, which financially benefits someone outside the child's family, a common example is debt bondage.

Recruitment and Use of Child Soldiers – In recent times, due to an overall increase of armed conflict situations and regions, the unlawful recruitment or use of children by the armed militia, rebel groups, para military forces, and even by the government forces by means such as force, fraud, and coercion has seen a dramatic rise. Children are forcibly abducted to be used not only as combatants but at times assist or are made to work as porters, cooks, guards, servants, messengers, or spies. The position of girls remains all the more vulnerable as they may be forced to “marry” and can be subjected to sexual violence, which results in devastating physical and psychological consequences for these children.

Legal Responses

The response of the International community to this transnational crime has been slow and varied. The first formal instrument which for the first time condemned the slave trade was the 1815 Declaration Relative to the Universal Abolition of the Slave trade. However, the first legal instrument which addressed this problem was the International agreement for the Suppression of White Slave Traffic formed during 1904-10 which for the first time had acknowledged the problem of Trafficking in White Women for Prostitution in Europe.

It was replaced with the Trafficking in Women and Children Convention of 1921 and with the efforts of the League of Nations a Convention for

Suppression of the Traffic in Women of Full age was adopted in 1933 thereby establishing a distinction between adult women and female children.

The establishment of the United Nations Organization {UNO} in 1945 and the subsequent adoption of the Universal Declaration of Human Rights {UDHR} in 1948 provided a further impetus to address this grave matter of human rights concern. The early Anti-Trafficking Conventions were consolidated into the Convention on Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 1949 which can be the first major step taken by the International community in addressing this transnational crime.

A series of other International instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women {CEDAW}, Convention on the Rights of the Child {CRC}, and its Optional Protocol on Sales of Children, Child Prostitution and Child Pornography also address this crime.

Regionally, the Charter of Fundamental Rights of the European Union, Council of Europe Convention on Action against Trafficking in Human Beings, the American Convention on Human Rights {ACHR}, the Inter-American Convention on International Traffic in Minors, SAARC Convention on Prevention and Combating Trafficking in Women and Children for Prostitution, and ASEAN Declaration Against Trafficking in Persons are some of the pertinent International legal instruments which address the issue of Human trafficking both globally and regionally.

However, the transnational nature of this criminal practise together with its link with the aspect of organized crime prompted the international community to take urgent action against this crime. In 2000, the United Nations adopted the Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children {Trafficking protocol}, supplementing the United Nations Convention against Organized

Crime{UNOTOC}. At the same time the Protocol against the Smuggling of Migrants by Land, Air, and Sea {Smuggling Protocol} supplementing the United Nations Convention against Trans-national Organized Crime was also adopted. The two protocols are also known as Palermo Protocols, after the city in which they were adopted.

The Palermo Protocol uses “trafficking in persons” as a wide umbrella term which in itself covers a wide variety of offenses, such as maintaining someone in forced labor or recruiting someone for compelled commercial sexual exploitation. Importantly, it has been successful in providing for a much needed foundation and a platform for the governments to start building policies which criminalize trafficking, ensure measures to hold traffickers accountable, protect victims, prevent victimization, and promote bilateral cooperation among countries. Thus, three elements are needed to establish the crime of human trafficking under Palermo protocols—the trafficker’s action, the means of force, fraud or coercion, and the purpose of exploitation have been taken care of.

As of 10 th July 2020, according to the United Nations Treat Series, there are 178 parties which have ratified, while 168 countries have passed domestic legislation criminalizing human trafficking according to this framework. Additionally, a number of best practices in protection for victims have emerged worldwide pursuant to the protocol including the importance of a victim-centered and trauma informed approach in both law enforcement and service providers.

Both Trafficking and smuggling are issues which effect the territorial integrity of any country as they felicitate the illegal crossing of borders and remaining in a state in violation of the national criminal laws. They also undermine the aspect of rule of law and political foundations of a state as they resort to violence and corruption as a means to advance their criminal activities. But the issue of Human trafficking has to be understood in a more broader context today as it is not a problem of criminal law only but also involves issues such as

structural inequalities in societies, culturally sanctioned outdated practises, poverty, organ trade and issues of Labour which have been least debated in the academic and policy forums.

Nevertheless, the Palermo Protocol for the first time helped in reaching a common platform for member states to address the issue together with its emphasis on the 4 P’s : Prevention, Protection, Prosecution and Policy to address the issue of human trafficking today. The present paper focuses on the aspect of successful Prosecution of the traffickers which has till date not been provided much priority.

A Human Rights Framework

A human rights framework can be said to be a framework of action for those concerned or effected by this problem. The framework allows to explore and identify various human rights issues in relation to trafficking. The major causes of trafficking such as poverty, discriminations based on gender and humanitarian crisis are all matters of human rights concern worldwide.

In relation to trafficking, various coercive measures such as abduction are a common method of recruitment employed by traffickers. Trafficked people are also placed under inhuman and degrading conditions during their journey and forced to travel in overcrowded modes of transportation. Further, after reaching their destinations they are exploited by employers who force them to work for long hours with minimum of pay thereby raising the issues of forced labour. Other human rights issues include physical and mental abuse, restriction on freedom of movement and malpractices by the law enforcement agencies against the trafficked people. These and other relevant human rights issues can be more effectively dealt through a human rights framework. States can accordingly develop a plan of action which would get support from the various obligations as already established under the International human rights law. Thus, the legal obligation so imposed upon States to investigate, prosecute and punish traffickers can also be done

in accordance with international human law principles already established.

Human trafficking, today is also to be understood under the broader issue of Human Security as underlined by the United Nations Development Report 1994 which refer human security as which involves human life and dignity together with the report on “Human security Now” as promulgated by the Commission on Human Security {CHS}

The CHS report specifies the three freedoms as of “human security” as of ‘freedom from fear’ “freedom of want” and freedom to live in dignity” The debate continues but nevertheless becomes a focal point for addressing the issues of human trafficking also.

In addition, the Recommended Principles and guidelines on Human Rights and Human trafficking as developed by the UN{ United Nations Trafficking Principles and Guidelines, 2002 & 2010} together with Council of Europe Convention on Action against Trafficking{European Trafficking Convention 2005}the Guidelines on the Protection of the Rights of Child Victims of Trafficking of the United Nations Children’s fund{UNICEF}2006 reflect the growing concern and thinking that any fight against human trafficking should be within the evolving human rights jurisprudence only.

The centrality of human rights in preventing and combating trafficking is also reflected in Article 28 of the Universal Declaration of Human Rights 1948 provides that “{e}very one is entitled to a social and international order in which the rights and freedoms set forth in the declaration can be fully realized”. States therefore must not only respect human rights and ensure their compliances also.

References

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“trafficking in persons” respectively. Article 3 of Trafficking Protocol & Article 4 of Council of Europe Trafficking Convention 2005 have similar definitions of human trafficking.

2. See generally UNGIFT Trafficking an overview. UN 2008, p.1. ILO: A global alliance against forced labour,2005. ILO global estimate of forced labour: results and methodology (2012) p.13.The exact figure as on date would certainly be on a higher side, the problem of data collection and the resultant contemporary developments have been discussed later in the paper.
3. Article 6, 1979, 1249 UN Treaty Series 13.
4. Article 35, CRC 1989
5. Articles 1-3 UN Doc. A/RES/54/263/ 25 May 2000.
6. Article 5(3) OJ C 364/1 18 Dec. 2000.
7. 2005, ETS No.197, 2005.
8. Article 6, 1969 1144 UN Treaty Series 123.
9. Article 7, 1994.
10. South Asian Association for Regional Cooperation; Trafficking Convention 2002.
11. Regional Organization of South East Asian Countries; Trafficking Convention 2017.
12. India has signed and ratified the Convention and subsequent protocol in 2011.
13. Entered into force on 29 Sept. 2003 in accordance with Article 38.
14. Entry into force on 28 January 2004.
15. Special Rapporteur Report on Sales of Children, Child prostitution, UN Doc. E/CN.4/1999/7 Paras 57,75,76,85 and 86.
16. Convention Against Torture CAT UN Doc. A/RES/39/46 1984; Article 5 UDHR 1948; Article 7 ICCPR; 1966; Article 3 ECHR 1950, Article 11 Migrant Workers Convention 1990.

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17. CHS was established by Japan and chaired jointly by Sadako Ogata { Former UN High Commissioner for Refugees & President, Japan International Cooperation Agency JICA and Prof. Amartaya Sen. Also see Okiko Fukushima, East v. West? Convergence on Human security, in East Asia: Challenges for Collaborative Action 48-49 (Sorpong Peou ed., 2009)

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