

TRAFFICKING IN PERSONS: A CONTEMPORARY THREAT TO HUMAN DIGNITY

Dr. Roberta Avellino¹

Introduction

The ease of movement of people across borders has repeatedly been heralded as a significant milestone in diplomatic and political history. Every year, thousands of migrants cross borders in pursuit of an improved quality of life, work opportunities and better chances at leading a dignified lifestyle. However, a substantial number of migrant women and children fall prey to the impediments and pitfalls of extensive recruitment within the framework of migration, and many hopeful victims end up in prostitution and other forms of modern slavery, either of their own free will or as a result of any form of coercion.² Ebbe holds trafficking in persons to be ‘an attack on the dignity of the human race’.³ The most vulnerable of citizens are drawn to what they perceive as safety or security due to political, economic and social hardships such as poverty, wars, famine and any other disturbances within a country’s history and traditions.

The causes of trafficking are complex. However, as noted by Kelly, the globalisation of transport, the market economy, the labour needs of the anguished, economic transition and conflict are among the factors which have caused the drastic increase of human trafficking in recent years.⁴ Furthermore,

¹ Dr. Roberta Avellino read Law at the University of Malta in 2004 whence she graduated as Doctor of Laws in November 2010. She is further pursuing her studies, reading for a Masters in International Law at the University of Malta. This article is based on her thesis entitled ‘The Suppression of Trafficking in Persons under International Law’, submitted in partial fulfilment of the degree of Doctor of Laws, as well as research carried out for her thesis entitled ‘Trafficking in Persons – Specific Issues under International Law’, to be presented in partial fulfilment of the degree of LL.M. in International Law in September 2011. Acknowledgements are due to Prof David Attard LL.D.,D.Phil.(Oxon.) and Dr Patricia Cassar Torregiani B.A.,LL.D.,B.C.L.(Oxon), PhD (IMLI).

² Anette Brunovskis and Guri Tyldum, ‘Crossing Borders: An Empirical Study of Transnational Prostitution and Trafficking in Human Beings’ (2004) Fafo Report 426, 57.

³ Obi N. I. Ebbe, *Global Trafficking in Women and Children* (CRC Press, Taylor and Francis 2008) vii.

⁴ Liz Kelly ‘Journeys of Jeopardy: A Commentary on Current Research on Trafficking of Women and Children for Sexual Exploitation within Europe’ (2002) Research and Publications Division, International Organization for Migration 15.

economic liberalisation has also created a much more productive environment for transnational crimes carried out by transnational organised criminal networks. Increased personal mobility and global trade also correspond with the prosperity of organised crime. As a result of globalisation, boundaries are vanishing, allowing ample opportunity for cooperation between governments and law enforcement personnel to unite against the global phenomenon. Regional and international cooperation are essential to the protection and assistance of trafficked victims and the prosecution and punishment of the offenders.

Article 3 paragraph (a) of the Protocol to Prevent, Suppress and Punish Trafficking in Persons⁵ defines 'trafficking in persons' as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs;

This definition sets out three constituent elements of trafficking in persons, namely the 'act', being the recruitment, transportation, transfer, harbouring or receipt of persons; the 'means', which refers to the threat or use of force, coercion, abduction, fraud, deception, abuse of power or vulnerability, or of the giving of payments or benefits to a person in control of the victim; and the 'purpose' of exploitation, which includes sexual exploitation forced labour or services, slavery or other practices similar to slavery, servitude or removal of organs. The UNHCR Guidelines on International Protection show that it is important that this definition of trafficking is understood as a 'process comprising a number of interrelated actions, rather than a

⁵ Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the UN Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, UN GAOR, 55th Sess., UN Doc. A/55/383 (Nov, 15, 2000).

single act at a given point in time'.⁶ Whilst these actions can all take place within one country's borders, they can also take place across borders with the recruitment taking place in one country and the act of receiving the victim and the exploitation taking part in another. Nonetheless, whether or not an international border is crossed, the intention to exploit the individual concerned underpins the entire process.

Moreover, it is imperative to point out that while trafficking in persons shares common elements with the crime of smuggling of migrants, these are two separate and distinct instances of grievous assault upon the fundamental human rights and freedoms of the victims. Both trafficking and smuggling are dependant upon recruitment and transportation mechanisms set up by networks in organised crime. The arranged ways of transport are a result of weak links in border control measures, corruption, and links between local and international organisers. The same organisations can be involved in both smuggling and trafficking and they often co-operate both nationally and internationally in order to facilitate their activities. Although trafficking in persons for sexual exploitation is one of the most researched, there are various other forms of exploitation, which often vary according to the victim's gender and age. The most common forms of exploitation are sexual exploitation, early and forced marriages, labour exploitation, child trafficking and trafficking in human organs.

Trafficking in Persons as a Violation of Human Rights under International Law

In 1997, Wijers and Lap-Chew⁷ identified a range of different approaches which underpinned markedly different strategies to target potential victims of human trafficking. These may be designated as the 'human rights approach', the 'law and order approach', the 'migration approach', the 'moral

⁶ United Nations High Commission for Refugees, *The Application of Article 1A (2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked* (UNHCR Guidelines on International Protection 2006) 4.

⁷ M. Wijers and L. Lap-Chew, 'Trafficking in Women, Forced Labour and Slavery-Like Practices in Marriage, Domestic Labour and Prostitution' (1997) Foundation Against Trafficking in Women, Netherlands.

approach' and the 'labour approach'.⁸ Each perspective advocates different strategies, policies and action plans so as to tackle trafficking in persons and thus, requires different criteria to assess the success of the measures taken.⁹ It is imperative that the focal point of all anti-trafficking measures and monitoring mechanisms remains the protection and promotion of human rights and not adversely affecting such human rights.

The United Nations

The problem of trafficking in persons was among the key issues addressed by the newly formed United Nations in 1945 and, as Whitaker outlines, Article 1(3) of the Charter makes an indirect reference to the abolition of slavery in its affirmation of the UN's mission to promote respect for human rights and fundamental freedoms without distinction based on race, sex, language and religion.¹⁰ In 1949, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others¹¹ was adopted, excluding terms such as "white slave traffic", while the victims of trafficking in persons were no longer restricted to "women", earmarking this Convention as the first which made use of language which is not discriminatory on the basis of race and gender.

Nonetheless, the approach adopted within this Convention was very narrow in scope and failed to address other issues which are central to the crime of trafficking in persons. Farrior argues that little protection was afforded to the rights of women who were trafficked, while it completely ignores the socio-economic causes of trafficking for prostitution.¹² This Convention was also lacking in its enforcement mechanisms and procedures, since the extent of the

⁸ Global Alliance Against Traffic in Women, *Collateral Damage, The Impact of Anti-Trafficking Measures on Human Rights around the World* (2007) 5.

⁹ UNICEF and Terre des Hommes, *Action to Prevent Child Trafficking in South Eastern Europe: A Preliminary Assessment*, (2006) 15.

¹⁰ Charter of the United Nations (adopted 26 June 1945, entered into force 24 October 1945) 3 Bevans 1153, Art 1(3); Whitaker Report (n 35) 27 [118].

¹¹ Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Dec. 2, 1949, 96 UNT.S. 271 (entered into force July 25, 1951).

¹² Stephanie Farrior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) *Harvard Human Rights Journal*, Vol. 10, 217.

implementation process only came as close as self-reporting by the signatory States while a victim of trafficking has no private remedy against his/her procurers. However, the 1949 Convention was in fact the most detailed convention to date, as the explicit mention of “traffic” and “prostitution” in the title to the Convention clearly shows that the 1949 Convention focused on both the international and domestic aspects of trafficking in persons for the purposes of prostitution, with references to its transnational characteristic.

In 1998 an *ad hoc* committee was appointed to work upon the draft of the Convention Against Transnational Organised Crime and, following a suggestion proposed by Greece during a session of the Commission on Crime Prevention and Criminal Justice, it was agreed that the parameters of the convention were to include all forms of trafficking and exploitation.¹³ It was also agreed that this specific instrument dealing with trafficking in persons be implemented as an Optional Protocol to the Convention Against Transnational Organised Crime. On the 15th of November 2000, at its 62nd plenary meeting, the United Nations General Assembly adopted the United Nations Convention Against Transnational Organised Crime and its complementary Protocols on Smuggling and Trafficking.¹⁴

Prior to the adoption of the UN Protocol, anti-trafficking legislation was usually included as part of the Criminal Code and therefore, trafficking in persons was treated solely as a criminal offence. It further follows that, since the nature and scope of criminal law is simply to determine the punishments to the listed crimes, victim protection was very often ignored and not included among these laws.¹⁵ This has led to a situation where trafficking in persons was not recognised on its own as a specific crime but was frequently interwoven with other related offences such as abduction, kidnapping and deprivation of liberty. While it is correct to note that these offenses are at times also part of the trafficking process,

¹³ Melanie Holman, ‘The Modern-Day Slave Trade: How the United States Should Alter the Victims of Trafficking and Violence Protection Act in Order to Combat International Sex Trafficking More Effectively’ (2009) *Texas International Law Journal* Vol. 44:99, 108.

¹⁴ United Nations Convention Against Transnational Organized Crime, G.A. Res. 55/25, Annex 1, UN Doc A/RES/55/383 (Nov. 15, 2000).

¹⁵ Mohamed Y. Mattar, ‘Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention’ (2006) *14 Tulane Journal of International and Comparative Law*, 357, 6.

trafficking in persons is still a distinct offence, which merits specific attention, especially with regard to the victims of trafficking and exploitation.

The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children (Palermo Protocol) attempted to meet the needs of an aspect of trafficking, which was noticeably lacking in previous conventions, that is, the protection of the victims of trafficking within a human rights approach. The main purpose of the protocol is:

- (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
- (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
- (c) To promote cooperation among States Parties in order to meet those objectives.¹⁶

Furthermore, trafficking in persons is only punishable when the recruiters make use 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 payment or benefits to achieve the consent of a person having control over another person'.¹⁷ This definition of trafficking in persons excludes voluntary prostitution and the element of consent as punishable under the Palermo Protocol. Almost 80 nations signed the convention at the Signing Conference in Palermo, Italy in 2000. However, Nelson 2002 argues that the Optional Protocol cannot be effective without the passage of domestic law.¹⁸ One may conclude that the UN Convention against Transnational Organized Crime and its accompanying Trafficking Protocol has only perceived trafficking in persons from a criminal point of view and fails to pay particular attention to the victims' human rights and the merited protection and assistance, which is in fact mentioned in only three provisions of the Protocol. On the other hand, this area may be supplemented by UN soft law instruments, which make up for the absence of effective and far-reaching human rights measures in the Trafficking Protocol.

¹⁶ Palermo Protocol, Article 2.

¹⁷ Ibid 3.

¹⁸ Kathryn E. Nelson, 'Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches' (2002) 24(3) *Houston Journal of International Law* 551, 578.

Soft Law

Soft Law has in many instances proved to be quite ‘a source of inspiration for those willing to make their national laws conform to the principles they promote’.¹⁹ Despite their ‘unbinding’ effect, soft law may eventually be recognised as international customary norms that would in turn benefit from binding effect on States once the required elements for customary law are fulfilled, namely the consistent and widespread conduct of the majority of States (*diuturnitas*) and the belief and conviction that the given behaviour is required by the States either by law or by a social norm (*opinio iuris sive necessitatis*).²⁰

The UNHCR Recommended Principles and Guidelines on Human Rights and Human Trafficking

The UNHCHR Principles and Guidelines on Human Rights and Human Trafficking were adopted in May 2002, targeting refugees who have been victims of trafficking. The Principles and Guidelines have been developed for better policy-based guidance on the prevention of trafficking and the protection of victims with a strong emphasis on the primacy of human rights.

The Guidelines adopt the same definition of trafficking in persons as applied within the Trafficking Protocol to the UN Convention on Transnational Organised Crime. The primacy of human rights, the prevention of trafficking, the protection and assistance of victims of trafficking and the criminalisation, punishment and redress are the chief principles embedded within the Recommended Guidelines and Principles.

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power

The UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power was adopted in 1985 and embodies the most fundamental basic rights of justice for victims of crime and abuse.

¹⁹ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 73.

²⁰ B. Conforti, ‘Diritto Internazionale. Editoriale Scientifica’ (2006) 32-3.

Among others, the Declaration recognises the victims' rights to present their views and evidence at appropriate stages of the judicial proceedings concerning their cases, to be legally aided and represented throughout the legal proceedings and to make use, when appropriate of informal mechanisms for dispute resolution. Victims are defined within this Declaration as

persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.²¹

The UN Special Procedures

The Special Rapporteur on Trafficking in Persons, especially Women and Children and the Special Rapporteur on Violence against Women, its Causes and Consequences are special mechanisms established by the UN Commission on Human Rights. On the 28th September 2007, a new Special Rapporteur on Contemporary Forms of Slavery was appointed by the Human Rights Council to replace the Working Group on Contemporary Forms of Slavery,²² which was appointed by the Sub-Commission on Prevention of Discrimination and Protection of Minorities in 1974.

The Special Rapporteur on Trafficking in Persons, especially Women and Children

The Commission on Human Rights appointed the Special Rapporteur on Trafficking in Persons, especially Women and Children for a three-year period by the adoption of decision 2004/110 during its sixtieth session with a strong mandate to focus upon the rights of victims of trafficking in persons from a human rights perspective. The Economic and Social Council endorsed the Commission on Human Rights' decision 2004/110 by its decision 2004/228.

²¹ UNGA Res 40/34, Annex (29 November 1985) UN Doc A/Res/40/34 [1].

²² UNHRC Res 6/14 (28 September 2007).

The first annual report of the Special Rapporteur was presented to the United Nations Human Rights Council on the 22nd of December 2004 by the first appointed Special Rapporteur Sigma Huda. Huda constructed her report upon two basic principles namely:

... (a) that the human rights of trafficked persons shall be at the centre of all efforts to combat trafficking and to protect, assist and provide redress to those affected by trafficking; and (b) that anti-trafficking measures should not adversely affect the human rights and dignity of the persons concerned.²³

On the 12th March 2009 Joy Ngozi Ezeilo submitted her report to the Human Rights Council entitled, 'Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights'.²⁴ This report has been described as giving a holistic and global outline of trafficking in persons and its surrounding factors such as common trends and the most common types and forms. The report details that:

As far as the mandate of the Special Rapporteur is concerned, the real challenge is not just in adopting strategies that will effectively lead to catching the perpetrators and punishing them. Rather, it is preferable to put in place strategies that will focus equally on the victim by recognizing and redressing the violations suffered, empowering the victim to speak out without being doubly victimized, jeopardized or stigmatized, while at the same time targeting the root causes of human trafficking²⁵.

Anti-Slavery Conventions

Trafficking in persons, sometimes also referred to as 'modern slavery' is also dealt with under anti-slavery treaties as slavery is an explicit and manifest violation of human rights.

²³ United Nations, *Report of the Special Rapporteur on Trafficking in Persons, especially Women and Children* (n 152) [11] (2004).

²⁴ Ezeilo J. Ngozi *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development* (Report submitted by the Special Rapporteur on Trafficking in Persons, especially Women and Children A/HRC/10/16 2009).

²⁵ *Ibid* 25.

The Slavery Convention of 1926²⁶ is the first international law instrument which defines both the institutions of slavery and the slave trade as ‘the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised’.²⁷ The definition fits the circumstances of victims of trafficking in persons perfectly since at the point of destination, victims are forced into prostitution under severe restrictions and limitations to their fundamental rights and freedoms.

In 1956, the United Nations adopted the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,²⁸ which includes debt bondage, serfdom and any other institution or practices similar to slavery. The sore point of this Convention is the mild form of self-reporting by the State signatories who

...undertake to communicate to the Secretary-General of the United Nations copies of any laws, regulations and administrative measures enacted or put into effect to implement the provisions of this Convention.²⁹

The Convention on the Elimination of All Forms of Discrimination Against Women

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) was adopted by the General Assembly on the 18th of December 1979,³⁰ following the adoption of a Declaration on the Elimination of All Forms of Discrimination Against Women in 1967.

Article 6 of CEDAW deals specifically with trafficking in persons and requires States parties ‘to take all appropriate measures, including legislation, to suppress all forms of traffic in women and exploitation of prostitution of women’.³¹

²⁶ Slavery Convention of 1926, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253 (entered into force 9 March 1927).

²⁷ Ibid art. 1(1).

²⁸ 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, entered into force Apr. 30, 1957, 266 UNTS. 40.

²⁹ Ibid art. 8(2).

³⁰ Convention on the Elimination of All Forms of Discrimination Against Women (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 (hereinafter CEDAW).

³¹ Ibid art. 6.

For the first time and contrary to the 1949 Convention, CEDAW recognized the rights of the victims of trafficking in persons, especially those who were forced into prostitution, within a rights based approach to the phenomenon of trafficking.³² An analysis of the provisions of CEDAW concludes that trafficking in persons for forced prostitution fits in well within the definition of discrimination under this convention as discrimination against women is set out as

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.³³

The implementation in legislation and measures initiated to protect women's rights as set out in CEDAW is evaluated by means of a self-reporting enforcement mechanism, whereby States are required to submit reports to the Secretary-General of the United Nations on the 'legislative, judicial, administrative, or other measures which they have adopted to give effect to the provisions of the present Convention and on the progress made in this respect'³⁴ within one year after ratifying the convention and at least every 4 years thereafter. Subsequently, the reports are analyzed by the Committee on the Elimination of Discrimination Against Women, which is the primary mechanism for enforcement under this convention. However, there are no set deadlines for the States' implementation of legislation and administrative measures in line with the convention. Should signatory States fail to present their reports in time, the Committee cannot issue any sanctions, rendering this Committee very hollow in scope and authority.

In this regard, Ulrich contends that CEDAW has been 'largely ineffective'.³⁵ Moreover, a number of industrialised nations

³² Stephanie Fariior, 'The International Law on Trafficking in Women and Children for Prostitution: Making it Live Up to its Potential' (1997) *Harvard Human Rights Journal*, Vol. 10 213, 219.

³³ CEDAW (n 39) art. 1.

³⁴ *Ibid* art. 18(1).

³⁵ Jennifer L. Ulrich, 'Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?' (2000) 7 *Ind. J. Global Legal Studies* 629, 640.

refrained from signing CEDAW because it is legally binding, while, according to Rehman,³⁶ CEDAW has ‘attracted more reservations than any other human rights treaty’ The Optional Protocol adopted by the UN General Assembly in 1999³⁸ was an attempt to confront the enforcement procedural weaknesses under CEDAW as it undertakes more prominent and direct communication with States which are signatory to the Convention. An individual or group of individuals may also bring forward a complaint alleging a violation of the rights set out in the Convention by presenting communications in writing to the Committee. Subsequently, Article 5 of the Optional Protocol provides the Committee with the power to

...transmit to the State Party concerned for its urgent consideration a request that the State Party take such interim measures as may be necessary to avoid possible irreparable damage to the victim or victims of the alleged violation.

This newly bestowed capacity upon the Committee is also highlighted within Article 8 of the Optional Protocol, whereby the Committee may ‘invite the State Party to cooperate in the examination of the information’ and submit observations upon any data which is deemed to be ‘reliable information indicating grave or systematic violations by a State Party’ by the Committee. Despite the new attributes attempting to strengthen the enforcement mechanisms provided by CEDAW, Nelson still believes that this Optional Protocol presents various obstacles and burdensome procedures to the victims of trafficking.³⁹ For starters, victims of trafficking may only complain of an alleged violation of human rights if ‘all available domestic remedies have been exhausted unless the application of such remedies is unreasonably prolonged or unlikely to bring effective relief’.⁴⁰ Undoubtedly, this requirement might prove too difficult to accomplish since research has demonstrated that victims of trafficking are often criminalised because they are

³⁶ Javaid Rehman, *International Human Rights Law, A Practical Approach* (Longman 2003) 374.

³⁸ Optional Protocol to the Convention on the Elimination of Discrimination Against Women (adopted 10 December 1999, entered into force 20 December 2000) 2131 UNTS 83.

³⁹ Kathryn E. Nelson, ‘Sex Trafficking and Forced Prostitution: Comprehensive New Legal Approaches’ (2002) 24(3) *Houston Journal of International Law* 551, 578.

⁴⁰ Optional Protocol to CEDAW (n 39) art. 4(1).

only considered as ‘illegal aliens’ and ‘prostitutes’ by the local authorities. Clearly, this a deterrent to victims in exhausting remedies under domestic law in order to be eligible to seek redress under CEDAW.

The European Union

On a European level, the situation in Europe has prompted Member States and non-governmental actors alike to take action and address the surrounding issues, which very often trigger the crime of trafficking such as poverty and the social exclusion of minority groups. Yet, what is hindering the full implementation of European policies and international legal instruments? How are traffickers cheating the European law enforcement authorities? How can Europe strengthen cooperation among Member States and with other third countries of origin? Are victims of trafficking sufficiently protected? The European Conference on Preventing and Combating Trafficking in Human Beings in 2002 ‘paved the way for a radical change in EU policy in the field of trafficking in persons’, which also led to the appointment of the European Commission Experts Group on Trafficking in Persons in 2003 according to Scarpa.⁴¹

The Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings⁴² and the Council Directive 2004/81/EC⁴³ about the eligibility of third country nationals who are victims of trafficking to apply for a residence permit are the two main legislative instruments, with specific reference to trafficking in persons. The main elements covered by the Council Framework Decision 2002/629/JHA are a definition of trafficking which is derived from the definition established by the United Nations 2000 Protocol, provisions for minimum penalties and protection and assistance afforded to the victims of trafficking. In March 2009, the European Commission adopted a proposal for a Framework Decision on preventing and combating trafficking in human beings, and protecting victims, repealing Framework Decision 2002/629/JHA. The proposal has been endorsed by the European Parliament and is now awaiting formal adoption by the Council to enter into

⁴¹ Silvia Scarpa, *Trafficking in Human Beings: Modern Slavery* (Oxford University Press 2008) 195.

⁴² Official Journal L 203 of 01.08.2002.

⁴³ 2004/81/EC of 29 April 2004 OJ L 261 06/08/2004 P.0019-0023.

force. The new Framework Decision builds upon the 2000 United Nations Protocol and caters for substantive criminal law provisions, prosecution of offenders, victims' rights and support in criminal proceedings, prevention of trafficking in persons and monitoring mechanisms through the establishment of National Rapporteurs.

Subsequent to the Framework Decision, the Council Directive 2004/81/EC⁴⁵ discusses the residence permit which may be issued to third world country nationals who are victims of trafficking but who, above all, decide to cooperate with law enforcement personnel. The key features of the subject matter of this directive is that of providing victim protection by way of a reflection period, allowing victims time to think and decide whether they are willing to cooperate with the authorities. Should victims decide to collaborate, they will be issued a short-term residence permit.

The Council of Europe

The Council of Europe has also been very active in the fight against trafficking in human beings. It is well known that the protection and promotion of fundamental human rights is the primary mission of the Council of Europe. Thus, it may be argued that since trafficking is a grave violation of human rights, the Council of Europe is the

...natural home for activities aiming to combat a phenomenon that constitutes a violation of people's dignity and integrity, their freedom of movement, as well as, in some cases, their right to life.⁴⁶

The Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol 11, entered into force on the 3rd of September 1953. Despite the absence of an explicit reference to trafficking in persons, Article 4 of the Convention prohibits slavery and forced labour and holds that:

- 1 No one shall be held in slavery or servitude.
- 2 No one shall be required to perform forced or compulsory labour.

⁴⁵ 2004/81/EC of 29 April 2004.

⁴⁶ Council of Europe, *Action in the Field of Trafficking in Human Beings for the Purpose of Sexual Exploitation: An Emphasis on Victim Protection* (Report 2002).

Moreover, a private individual must first raise his claim under national law, in most instances, by express reference to the Human Rights Act 1998. Nonetheless, the victim is still entitled to seek redress by means of an application to the Strasbourg court. Governments are also burdened with a positive obligation to adopt criminal law provisions which penalize the practices referred to in Article 4.

At a later stage, the Convention on Action Against Human Trafficking (CETS) No 197 was adopted on the 12th of May 2005 and it entered into force on the 1st of February 2008. The Convention sets out in implementation steps for States, which came into force on the 1st of April 2009. The Council of Europe Convention aims at dealing with trafficking in persons with a holistic approach enshrining three key elements, namely,

- Preventing Trafficking;
- Protecting the Human Rights of the victims; and
- Prosecuting the traffickers.

Furthermore, there is no limitation on what constitutes the profile of a victim, since the Convention covers all forms of trafficking, whoever the victim is and whatever form the exploitation takes. This ‘frees the definition from its moorings in transnational organized crime’, according to Drew.⁴⁸

Trafficking as a Threat to International Security

On an international level, States are challenged by the constant steady movement of people, voluntary or forced, its multiple aspects and implications. Consequently, the development of an appropriate policy and management response has become a core necessity within inter-State relations. ‘There is no such model constitution, but there are elements of constitutionalism that any constitution must reflect.’⁴⁹ This evaluation is also relevant to the prevention, suppression and punishment of trafficking in persons. ‘Any comprehensive and effective national anti-trafficking legislation must include certain elements that mainly reflect

⁴⁸ Sandra Drew, *Human Trafficking - Human Rights - Law and Practice* (Legal Action Group 2009) 51.

⁴⁹ Louis Henking, ‘Elements of Constitutionalism’ (2004) Columbia University Ctr. for the Study of Human Rights, Occasional Paper Series 10.

criminalization of the act of trafficking and protection of the victim of trafficking'.⁵⁰ The fight against human trafficking entails a coordinated and multi-dimensional approach due to the fact that trafficking in human beings is

at the very intersection of contemporary anxieties concerning the global political economy, population growth, gender and ethnic stratification, transnational crime and human rights abuses and the in/ability of States, groups of States and international agencies to control any of these effectively.⁵¹

While a number of States have implemented such international legislation in domestic law, unfortunately, some others are still lagging behind due to hindrances which very often range from lack of resources, a lack of political will and worse, cases of corruption of members of the authorities. Other obstacles include the lack of operational capacity and knowledge and expertise on the crime of trafficking in persons in order to assess the effectiveness of current strategies and propose alternatives.

In the light of an ever-changing international arena, it is crucial to assess the current international legal framework and strategies as adequate response tools to the contemporary 'needs' and development of trafficking in persons. Undoubtedly, this should be carried out within the backdrop of current international security scenarios. Firstly, one must identify and define the parameters of the national security sector, which would allow for a comparative analysis of the interdependence and interrelation of States for the achievement of international security.

Schroeder points out that the term 'security sector governance', alongside the concept of security may be perceived differently by different actors and, due to the diverging ways in which States have governed their security sectors, one may not identify one 'single model of security sector governance that applies to all security sectors

⁵⁰ Mohamed Y. Mattar, 'Incorporating the Five Basic Elements of a Model Anti-trafficking in Persons Legislation in Domestic Laws: From the United Nations Protocol to the European Convention' (2006) 14 *Tulane Journal of International and Comparative Law*, 357, 2.

⁵¹ Joanna Apap, Peter Cullen, and Felicita Medved, 'Counter Human Trafficking: Protecting the Victims of Trafficking' (2000) Centre for European Studies (CEPS) 3.

worldwide'.⁵² Therefore, on a general note, it may be agreed that the main actors within the security sector include:

- The core executive security actors of a State; and
- The civil authorities responsible for democratic oversight.

As a matter of fact, the United Nations Secretary General's Report on Security Sector Reform emphasised that 'security sector' 'is a broad term often used to describe the structures, institutions and personnel responsible for the management, provision and oversight of security in a country' and stressed that

security, the development and human rights are interlinked conditions for sustainable peace ... the development of effective and accountable security institutions on the basis of non-discrimination, full respect for human rights and the rule of law is an essential element if a peace process is to be maintained.⁵³

Since trafficking in persons many a time involves the participation of an organised network and the corruption of law enforcement and State officials, this may very understandably be considered a serious breach of international safety and security, as the traffickers' operations undermine the rule of law. Lobasz appropriately describes the crime of trafficking in persons as a 'threat to borders and orders',⁵⁴ Consequently, trafficking in persons also poses a challenge to state sovereignty due to the States' failure⁵⁵ to provide for a safe and secure environment. This unstable environment offers the ideal circumstances for

⁵² Ursula C. Schroeder 'Measuring Security Sector Governance – A Guide to Relevant Indicators' (2010) Geneva Centre for the Democratic Control of Armed Forces, Occasional Paper No. 20, 5-11.

⁵³ United Nations General Assembly Security Council, *Securing Peace and Development: The Role of the United Nations in Supporting Security Sector Reform* (Report of the Secretary General A/62/659-S/2008/39 2008) 1.

⁵⁴ Jennifer K. Lobasz, 'Beyond Border Security – Feminist Approaches to Human Trafficking' (2009) *Security Studies* 18, 319-344.

⁵⁵ Martin Doornbos, Susan Roque and Silvia Woodward, 'Failing States or Failed States?' (2003) *Foreign Affairs* 82, no. 5.

networks of organised crime to thrive in their operations as they obtain *de facto* control⁵⁶ over the particular territory.

Henceforth, the contribution of the security sector to the prevention and prosecution of the crime of trafficking in persons must not be undermined. However, this will only be possible through solid multilateral collaboration among States, in view of the transnational nature of both the specifications of trafficking in persons and the organised crime out of which it stems. Certainly, a study of the anti-trafficking security governance system will facilitate transnational and multi-disciplinary cooperation, resulting in proper policy, networking and intervention.

Despite the abovementioned issues, which have a direct effect on States, one must not depart from the primary understanding that the crime of trafficking in persons is first and foremost a violation of fundamental human rights and an offence against the integrity and dignity of the person. Hence, these various dynamics of the crime must be combined into one comprehensive and holistic approach, since trafficking is a crime which must be prosecuted and punished, but above all, it is a human rights concern and requires specialised, sensitive and immediate attention.

Conclusion

Undoubtedly, much has been done to combat trafficking in persons, however there seems to be a missing component in the link between legislation and implementation, between theory and the reported increasing numbers of victims of trafficking. The majority of the legislative instruments do not deal exclusively with human trafficking, as this crime is often interwoven with other related crimes and placed in a much broader context, such as that of transnational organised crime. Many a time, this has led to this crime being treated with the same general assessment and management afforded to other crimes, which, although also grave in nature, do not require the sensitivity and protection of victims which is so crucial to dealing with the offence of trafficking in persons as a human rights violation.

For a long time, trafficking in persons was left to the realms of domestic criminal law. It was only at a later stage that the

⁵⁶ Fred Schreier, 'Trends and Challenges in International Security – An Inventory' (2010) Geneva Centre for the Democratic Control of Armed Forces (DCAF), Occasional Paper No. 19, 108.

international community recognised the transnational nature of human trafficking and tried to address the problem in a collaborative manner within a human rights framework. On the other hand, it is important to point out that a highly contentious debate has always undermined anti-trafficking activities and initiatives. The issue of whether 'voluntary prostitution' should be included within the definition of trafficking and whether States should prevent trafficking by safeguarding their border and tightening immigration controls were always hot issues which diverted attention and segregated signatory States.⁵⁷ Unfortunately, such issues shall always 'impede collaborative efforts among governments and anti-trafficking advocates to effectuate a coordinated legal response' according to Chuang.⁵⁸

One must also address the lack of implementation of legislation related to trafficking, which may also shed light upon cases of corruption of high officials and other personnel which facilitate the recruitment and exploitation carried out by the traffickers and which denote major financial profits and may even become more profitable than the trafficking of drugs since 'women can be reused and resold more easily than needles'.⁵⁹ The lack of information and data is also a huge concern which hinders proper investigations and the prosecution of traffickers, who benefit from the shelter and interdependence of organised criminal networks. Former Austrian Minister Dr Helga Konrad is adamant that

what is required in the fight against human trafficking is more and better desegregated information, appropriate legislation, an adequate law enforcement response, the protection of trafficked persons, improved coordination among countries of origin, transit and destination – and, last but not least: political will.⁶⁰

⁵⁷ Bridget Anderson and Julia Davidson O'Connell, 'Trafficking - A Demand Led Problem?' (2002) Save the Children, Sweden 17.

⁵⁸ Janie Chuang, 'The United States as a Global Sheriff: Using Unilateral Sanctions to Combat Human Trafficking' (2006) Michigan Journal of International Law, Vol 27:437 Winter 443.

⁵⁹ Susan W. Tiefenbrun, 'Updating the Domestic and International Impact of the U.S. Victims of Trafficking Protection Act of 2000: Does Law Deter Crime?' (2007) Case Western Reserve Journal of International Law. Vol. 38 TJSJ Legal Studies Research Paper No. 1020214, 249.

⁶⁰ Helga Konrad, 'The Ugly Face of Europe' (2002) Stability Pact for South Eastern Europe, Task Force on Trafficking in Human Beings, European Conference on Preventing and Combating Trafficking in Human Beings, Global Challenge for the 21st Century.

The setting up of national referral mechanisms with the purpose of targeting and profiling potential victims is a must and this was also one of the proposals brought forward by non-governmental organisations.⁶¹ The assessment and monitoring of the implementation of national and international trafficking legislation and policies is also an urgent necessity, accompanied by an analysis of migration policies to establish whether increasing human trafficking is in any way a consequence of the failings of migration laws and policies.⁶² International monitoring mechanisms such as IOM, OSCE, ILO and INTERPOL are the primary runners in the fight against trafficking in persons on a national, European and international level since these entities catalyse States to take action and promote awareness of the current scenario.

The impacts of trafficking may be classified into three categories, which although separate ‘cannot be so readily compartmentalized’⁶³ namely the impact of global security in the international arena, the impact on the rule of law, and the political implications, which include aspects such as border control and the shaping of migration policies. Perhaps, the most lacking element within the fight against trafficking in persons is political will and the national initiative to conform with international norms and standards. The impact of the crime of trafficking in persons is as multi-faceted as the causes of the crime itself, as trafficking infiltrates all sectors and classes of society. In the words of Voltaire, ‘Every man is guilty of the good he did not do.’⁶⁵

⁶¹ M. Van Doominck and Thomas Bibatua N. *NGO Priority for 2009 EU Anti-Trafficking Day: Focus on Human Rights* GATTW, La Strada (2009).

⁶² Mike Dottridge, ‘Measuring Responses to Trafficking in Human Beings in the European Union: An Assessment Manual’ (2007) 17.

⁶³ United Nations, *An Introduction to Human Trafficking: Vulnerability, Impact and Action* (2008) 82.

⁶⁵ Voltaire, November 21, 1694 - May 30, 1778.