

Establishing a Bill of Rights for Victims of Trafficking in Persons: How It Can Become a Possibility

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On behalf of victims of trafficking and from Rome, Italy, the site of the International Conference on the "21st Century Slavery-Human Rights Dimension to Trafficking in Human Beings," I would like to propose a "Bill of Rights for Victims of Trafficking."

We, the victims of trafficking in persons, are entitled to:

- The right to safety
- The right to privacy
- The right to information
- The right to legal representation
- The right to be heard in court
- The right to compensation for damages
- The right to medical assistance
- The right to social assistance
- The right to seek residence
- The right to return

We are entitled to be treated with dignity, fairness, compassion and respect for our human rights."

These are "basic rights," "fundamental rights," so the concept of Bill of Rights is really not a new idea.

- The U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power provides for the rights of a victim of a crime
- The European Convention on the Compensation of Victims of Violent Crimes provides for the rights of a victim of a crime
- The United States' Victims of Crime Act, Victims Rights and Restitution Act, Victim and Witness Protection Act, and the Victim Rights Clarification Act all provide for the rights of a victim of a crime

So, the concept of the rights of a victim of crime is really not a new idea.

What I would like to do today is to extend and expand upon these rights to include victims of trafficking.

Such an extension or expansion is not easy and most legal systems have a difficult time accepting it.

Why?

The first reason is that you have to recognize trafficking in persons as a crime.

- It is recognized as a crime under the United Nations Protocol to Prevent, Suppress, and Punish Trafficking in Persons, especially Women and Children.
- And it is even recognized as a crime against humanity by the International Criminal Court

However not all domestic laws would consider trafficking in the same way.

- In most countries of the world trafficking in persons is still prohibited as a prostitution related activity
- In most countries of the world, trafficking is still prosecuted as a form of:
 - Kidnapping

- Wrongful confinement
- Alien smuggling
- Or fraud
- In most countries of the world
 - marriages of convenience or mail order brides,
 - illegal adoption or baby trafficking, and
 - domestic service or the maid trade

Are NOT considered forms of trafficking.

A second reason for why a Bill of Rights for victims of trafficking is not widely accepted is that you have to recognize trafficking not only as a crime BUT a SERIOUS crime.

Why?

Because if you only recognize trafficking as a crime, and not as a serious crime, you would not be able to apply many of the protections granted to victims of trafficking by the legal system.

Let me give you two examples.

One is, The witness protection program.

- This program does not apply except when a witness is testifying in cases involving serious crimes.
- The witness protection program under the United States Victim and Witness Protection Act provides for protection of a witness in proceedings concerning "an organized criminal activity or other serious offense."
- So, the United States Trafficking Victims Protection Act of 2000, had to recognize trafficking as "an organized criminal activity or other serious offense" for the purpose of applying the witness protection program to the victims of trafficking

Victims of trafficking are entitled to the right to safety

This is also true regarding the application of the money laundering laws of the different countries.

Because the proceeds of serious crimes are to be confiscated under money laundering laws, countries like Spain, Thailand and Cyprus had to expand the scope of the offense of money laundering from one exclusively related to goods arising from drug trafficking to one related to proceeds derived from trafficking in persons as a serious crime.

A third reason why a Bill of Rights for victims of trafficking is not widely accepted is that you have to recognize trafficking as a crime against a person, not as a crime against the state. And that is why we distinguish between alien smuggling and trafficking in persons. Alien smuggling is a crime against the state while trafficking in persons should constitute a crime against a person.

What difference does it make?

It makes a great difference.

Let me give you an example.

In granting a victim of trafficking an immigration status, the question is

Should granting such status be contingent upon the condition that the victim shall serve as a potential witness to such trafficking?

This is the US model as it appears in the T-Visa regulation in the 2000 Act which requires not only a demonstration that the victims would suffer extreme hardship if they were removed from the United

States, but also that they have complied with any reasonable request for assistance in the investigation and prosecution of acts of trafficking in persons

This is also the rule in other countries, such as Germany, the Netherlands and Belgium.

Or should we grant such a status to the victims of trafficking on humanitarian basis regardless of whether the victim would or would not testify?

Your answer to the question would depend on whether you consider trafficking in persons as a crime against the state or a crime against a person.

A fourth reason why a Bill of Rights for victims of trafficking is not widely accepted is that it is not enough to recognize trafficking as a crime of a serious nature, you also have to recognize that the trafficked person is not the one who committed a crime.

The trafficked person is NOT the criminal

The trafficked person is the VICTIM of the crime of trafficking.

However, most countries of the world do not treat the trafficked person as a victim.

Take for example, the double witness rule or the corroborative evidence rule which provides that in cases of trafficking in persons, the admission of evidence of only one witness is not permissible unless the witness's testimony is corroborated by material evidence implicating the accused.

This rule means that we are not treating the victim of trafficking as a credible witness.

This rule is contradictory to the UN Protocol which mandates that "views and concerns [of the victims of trafficking] must...be presented and considered...against offenders."

Victims of trafficking are entitled to the right to be heard in court.

Victims of trafficking are entitled to the right to legal representation in court

Victims of trafficking are entitled to the right to information regarding their rights in court.

The testimony of the victim of trafficking should be regarded as credible despite her past history. This past history should not be introduced as evidence in a court of law. This is the exclusionary rule. It must be applied here to trafficking cases.

Victims of trafficking are entitled to the right to privacy.

Another example is the whole area of immigration law, residency and deportation.

How do we treat a trafficked person who is an alien?

How do we treat a trafficked person who is an illegal alien?

Most countries of the world consider illegal aliens:

- As "prohibited immigrants"
- Penalize them for the improper use of travel documents
- And subject them to deportation

To my knowledge, only in Austria, Belgium, Canada, Czech Republic, Germany, Hungary, Lithuania, the Netherlands, Spain, the United States and Italy, can victims of trafficking acquire some sort of residency status.

Only in these countries are trafficked persons considered victims and not criminals.

So the question is, is a trafficked person really a victim?

Well,

- The UN Protocol talks about trafficked persons as victims, but the Protocol does not define for us the concept of a victim of trafficking.
- However the concept of a victim of crime has been defined by the U.N. Declaration of Basic Principles of Justice for Victims of Crimes and Abuse of Power, which states:
 - Victims are "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 violation of criminal laws, operative within member states..."

Does anyone doubt that trafficked persons are victims under this definition?

Not only is a trafficked person a victim, such person is a vulnerable victim.

And that is why Judge Silverman, dissenting, United States v. Castaneda, a case decided in 2001, supported the application of the "vulnerable victim enhancement" doctrine where a co-owner of the Mood and Music Night Club recruited three young women from the Philippines for waiting tables and singing. Once hired, they were forced to provide male customers with sexual services in private rooms.

This is what we are talking about.

- Women being trafficked from one country to another
- Deception, fraud and false promises of employment
- AND vulnerable victims who, as the court pointed out, "couldn't just pack up and go home."

AND because trafficked persons are victims

AND because trafficked persons are vulnerable victims

Victims of trafficking are entitled to the right to social assistance including unemployment benefits, job training, education and other social projects

They should not be treated as criminals

What does this mean?

It means several things.

- First it means that trafficked persons, as victims, and as vulnerable victims should NOT be penalized for immigration law or labor law violations.
 - This is the principle of non-criminalization of a trafficked person as stated in the UN Regulation on the Prohibition of Trafficking in Persons in Kosovo. The Kosovo regulation states that " a persons is not criminally responsible for prostitution or illegal entry, presence or work in Kosovo, if that person provides evidence that supports a reasonable belief that he or she was the victim of trafficking."
- Second, treating trafficked persons as victims means that the fault of the victim of trafficking should not be a hindrance in a civil compensation action. A victim should not be denied civil remedy by being blamed for her own victimization. This is principle of no fault liability, a proposed amendment to the Civil Code of Russia. I hope it will pass.
- Civil compensation is not restitution and restitution should not be a substitute for civil compensation

- So when the US 2000 Act empowers a criminal court to order restitution it does not provide victims of trafficking with a private civil action for damages.
- Other legal systems allow for such possibility including, the right of trafficked person to seek punitive damages "when the degree of the exploitation or the degree of relationship or the dominating position of the offender with regard to the victim so require." And I am quoting here the 2000 Cyprus Combating of Trafficking in Persons and Sexual Exploitation of Children Law.
- So while the award of restitution depends upon a conviction of a crime, and is a part of the sentencing of such crime, civil compensation should be awarded even if the trafficker is not apprehended, prosecuted or convicted.
- I would also like to see the state itself paying for such compensation when an official of the state, whether that official is a police officer, an immigration officer, or any other public official is involved in this trafficking scheme.

Victims of trafficking are entitled to the right to compensation for damages.

- Third, treating trafficked persons as victims means that a victim of trafficking must be granted the opportunity to abandon the illegal work and allowed to apply for employment, which is valid under the law. This is the rule under the 2000 Cyprus Act.
- Fourth, treating persons as trafficked victims means that the trafficker himself and not the victim of trafficking, is the one who should be identified, apprehended, prosecuted and convicted.

I would like to see traffickers held liable even for intentionally or negligently infecting a victim of trafficking with HIV/AIDS.

Victims of trafficking are entitled to the right to medical assistance.

- This means that a trafficked person should be considered a victim regardless of whether the trafficker is identified, apprehended, prosecuted or convicted.
- Fifth treating trafficked persons as victims means that the trafficked person should acquire the status of a victim regardless of whether such person is national or foreigner and irrespective of whether such foreigner a legal or illegal alien.

Victims of trafficking are entitled to the right to seek residence.

Victims of trafficking are entitled to the right to return to their country or origin.

- In all cases they should be entitled to the same benefits.
- Not only that, but such benefits should also be extended to members of the victims' family as needed.
- This is the doctrine of derivative victim.
- It should be applied whether we are talking about the
 - Right to seek residency under immigration law [And that is why there is not only a T-1 Visa but also a T-2 (spouse), T-3 (child), and T-4 (parent)]
 - Right to civil compensation under the rules of damages
 - Or the right to safety under a witness protection program

I hope that I explained why the idea of a Bill of Rights for the Victims of Trafficking may not find universal acceptance among all legal systems. But if we keep trying and if we can find the answers to the question I have posed to you today, perhaps we will be able to succeed in establishing a Bill of Rights for the Victims of Trafficking.