

Lost in implementation? Human rights rhetoric and violations — a critical review of current European anti-trafficking policies

Bärbel Heide Uhl¹

DOI: [10.1163/187502310791305936](https://doi.org/10.1163/187502310791305936)

¹ Bärbel Heide Uhl is a Political Scientist and the Chairperson of the European Commission's Group of Experts on Trafficking in Human Beings.

Introduction

Human rights rhetoric dominates the mainstream discourses of anti-trafficking policies in Europe². Their implementation, however, has demonstrated severe shortcomings in securing this rights-based approach. During recent years NGO activists have criticized the current anti-trafficking measures for violating human rights, such as restricting the freedom of movement, criminalizing workers and failing to protect presumed victims by raiding brothels, detaining trafficked persons, and conducting compulsory medical testing.³ What are the fundamentals of this discrepancy? A predominant rationale on human rights challenges is that good ideas have become lost during the implementation process as not being fully or half-heartedly conducted. While the question of the effective implementation of programmes should be considered as valuable, I argue in this article that the substantial anti-trafficking framework rather contains inherent threats to securing human rights.

In order to substantiate this assumption, I will examine the concept of the current anti-trafficking policies by analyzing their foundations and impact. How were they developed historically? What is their underlying rationale? What impact and maybe unintended side-effects do they cause for trafficked persons and other marginalized groups?

The framework of this article does not allow for an intensive historical discourse analysis. Thus I will further elaborate these questions on two central concepts of the anti-trafficking definition that pose a challenge to the overall understanding of trafficking in human beings due to the lack of international legal definitions: the concept of 'exploitation' and the concept of 'trafficked person'.

Development of anti-trafficking policies despite lacking data

Since the adoption of the Palermo Protocol in 2000 the phenomenon of trafficking in human beings has enjoyed increasing attention in the political sphere.⁴ On a global level, the international community has dedicated numerous conferences and other procedures to discussing adequate responses to human trafficking. Regional institutions, including European ones, have adopted specialized legal instruments and created structures to address the phenomenon. Some outstanding examples of this development include the Council of Europe's Convention on Action against Trafficking in Human Beings, the OSCE Office of the Special Representative and Coordinator for Combating Trafficking in Human Beings, and the European Commission's Group of Experts on Trafficking in Human Beings, to name only a few.

Anti-trafficking policies have become an established cross-reference in international and European politics on migration, human rights, organized crime, and labour rights. Consequently, governmental, intergovernmental and non-governmental entities with distinct mandates have adopted anti-trafficking topics on their agenda and have developed numerous anti-trafficking tools, manuals, and guidelines.

2 Trafficking in human beings 'restricts the individual's full enjoyment of all human rights' (Council of the European Union), it is considered to 'constitute a violation of human rights and an offence to the dignity and the integrity of the human being' (Council of Europe Convention on Action against Trafficking in Human Beings).

3 See for instance an assessment of the human rights impact carried out by different NGO experts at http://www.bayswan.org/traffick/HOM_Summary.pdf.

4 United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organised Crime, 2000.

As of today, most European states that are members and/or participating states of the European Union, the Council of Europe and the OSCE have adopted anti-trafficking measures organized under the scheme of the often quoted 'Three Ps: Prevention, Prosecution, Protection'. In concrete terms, many states have adopted a National Plan of Action that defines anti-trafficking measures, including coordination and reporting mechanisms; prevention, including reducing demand; investigation and prosecution; victim protection and support; return and reintegration; as well as external relations.⁵

The remarkable productivity in developing specialized anti-trafficking instruments, tools, laws and declarations, however, contravenes the self-declared lack of knowledge in trafficking in human beings. The statement of the Council of the European Union can be found in a similar feature by different international and intergovernmental stakeholders:

*'(The Council of the European Union is) aware of the insufficient amount of reliable and comparable data and the fragmented character of available information to describe the phenomenon of trafficking in human beings in the EU Member States as a whole.'*⁶

Therefore, during the last few years European institutions and governments have started several initiatives aiming to improve the collection of data in the field of trafficking.

*'Concrete, reliable data on human trafficking is an essential basis for all good programs, interventions, policy and legislation. Without this data it is not possible to know the extent or the true nature of the trafficking problem, nor understand the complexity of the issues involved. As a result, practitioners and policy-makers are unable to act and react appropriately and effectively.'*⁷

The obvious discrepancy between the development of specialized anti-trafficking policies while at the same time the lack of data and information is acknowledged by the same international and European stakeholders does not seem to provoke objections or questions nor does it question the legitimacy and efficiency of existing policies.

Anti-trafficking policies and their human rights impact

An underlying consensus among European institutions and governments repeatedly stresses that governmental response to trafficking should be based on a human rights approach. Even though one could argue that states parties are obliged to ratify international human rights law — once signed — into national law and therefore are bound to protect the rights of all human beings in the respective territory, including trafficked persons. The common narrative of a human rights approach in anti-trafficking policies, however, refers to a foreseen improvement in investigations and prosecutions if a human rights approach has been chosen:

'(..) Figures show that in countries where there are a significant number of assisted victims, statistics on criminal

5 This structure was developed in the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings, OJ C 311, 9.12.2005.

6 Council conclusions on establishing an informal EU Network of National Rapporteurs or Equivalent Mechanisms on Trafficking in Human Beings. 2946th Justice and Home Affairs Council meeting, Luxembourg, 4 June 2009.

7 ICMPD Handbook on Anti-trafficking data collection in South-Eastern Europe: Developing Regional Criteria, 2008.

*proceedings are higher. This implies that a human rights-centered approach is needed not only to protect victims' rights but also in the interest of justice.*⁸

Scholars and practitioners discuss in major publications how the anti-trafficking system can be reformed in order to ensure a proper implementation of the human rights approach. These analyses are based on the assumption that the basic architecture of anti-trafficking policies is efficient and leaves sufficient room to implement procedures to protect the human rights of trafficked persons. According to those discussions, an improvement is of the utmost necessity and has to be attained by implementing these measures and by reallocating more resources and prioritizing political will.⁹

A different angle in the human rights discussion was chosen in an anthology by the NGO network Global Alliance against Trafficking in Women (GAATW). Current anti-trafficking measures were labelled as 'collateral damage' that have the potential and power to pose a violation of human rights. 'Governments and others routinely refer to their anti-trafficking work as 'rights based' or based on a "human rights approach" when, even allowing for the fact that these concepts are not defined in international law, it is clear that their policies and approaches do not place respect for the human rights of trafficked persons at the centre'.¹⁰ In concrete terms, the authors highlighted immigration, gender and sex work as areas where human rights are systematically violated by implementing anti-trafficking measures.¹¹

According to the authors, the predominant focus of anti-trafficking policies in these areas provides legitimacy for governmental action like the deportation of migrants, stereotyping gender roles and excluding women from labour and migration opportunities, while stigmatizing them as passive, incapable of decision-making and in need of protection.¹² In addition, sex work is regarded as the demarcation for trafficking, restrictive policies are being implemented such as raids, and sex workers have been excluded from decision-making procedures.

An illustrative example of translating these underlying principles into a concrete anti-trafficking action can be found in the 'Action Oriented Paper (AOP) on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings' that was adopted by the Council of the European Union in 2009. The establishment of Swift Action Teams enlarges the idea of rescuing passive migrants even before they enter the territory of the country of destination:

'A Swift Action Team (SAT) should be deployed to support a specific third country, region or international organization in the area of migration management, for example by assisting third countries in identifying victims of THB at airports before they board and providing training on the identification of victims and forged identity papers. Before a SAT starts

8 Commission of the European Communities: Commission Working Document. Evaluation and monitoring of the implementation of the EU Plan on best practices, standards and procedures for combating and preventing trafficking in human beings. Brussels 17.10.2008 COM(2008) 657 final.

9 See for instance Conny Rijken: A human rights based approach to trafficking in human beings. Security and Human Rights 2009 no. 3, and Barbara Limanowska/Helga Konrad: Problems of Anti-trafficking Cooperation. In. Friesendorf: Strategies against Human Trafficking: The Role of the Security Sector. Geneva 2009, p. 452-458.

10 Global Alliance Against Traffic in Women (GAATW): Collateral Damage. The impact of anti-trafficking measures on human rights around the world 2007, p. 16.

11 Collateral Damages, p.17.

12 Collateral Damages, p.17.

*work, care should be taken to ensure that shelter and assistance are available for any victims identified in that third country.*¹³

This policy measure is remarkable for different sets of reasons. It suggests that persons who board an aircraft can be traced as a victim of a crime even though the crime might not even have been committed. According to this logic the politics of migration management can contribute to the efforts of the authorities to filter out risk elements for regular migration procedures during the process of travel. The fluent delineation of repressive measures and rescue metaphors represented in this approach suggests that trafficked persons and forged documents legitimately belong to one risk group that needs to be identified and detected.

The politics of identification

One of the most discussed topics in the anti-trafficking discourse is the question of the identification of trafficked persons. Practical manuals for law enforcement agencies provide indicators specifying, besides objective evidence that can be found on the spot (locked doors, no distinction between working and living space etc.), also the appearance and behaviour of the presumed victim as evidence that the crime of trafficking has been committed. International and regional data collection efforts are aimed at storing the personal data of officially identified trafficked persons that is being used as a data pool for establishing victims' profiles.¹⁴

The common assumption that forms the basis of all these endeavours is the existence of a joint characteristic and entity that forms the identity of a 'trafficked person'. The more is known about the 'profile' of a victim — so the assumption goes — the more prevention activities can be designed and targeted in a more effective way. Moreover, it would assist authorities and other relevant stakeholders in identifying trafficked persons once they have been exploited. Rather than assuming that every person could be, in a certain situation during his/her life, a victim of the complex crime of trafficking, this approach suggests that victims fall into certain categories of characteristics, demography, and behaviour that can be collected and evaluated. Governmental and other actors create identification measures to enable authorities and other relevant stakeholders to reach out and to find victims of a crime rather than preparing a low threshold and a safe environment that would encourage victims to seek help and assistance. Once victims are officially identified, they have to go through interviews and other screening measures to be able to qualify for the benefits designed to support trafficked persons. These qualification procedures differ in each European state as is also noted by the OSCE/ODIHR:

*'The determining factor in the use of the word trafficked or exploited person (...) is whether their experience might fall within the international definition of trafficking under Art 3 of the UNTOC Trafficking Protocol. A trafficked person may have to meet certain criteria in order to qualify for a 'victim' status in a criminal trafficking case in a given country.'*¹⁵

As European governments do not share joint identification and qualification procedures for presumed

13 Council of the European Union, Action Oriented Paper on strengthening the EU external dimension on action against trafficking in human beings; Towards Global EU Action against Trafficking in Human Beings. Brussels 19 November 2009, 11450/5/09, REV 5.

14 See ICMPD: Handbook on Anti-trafficking data collection in South-Eastern Europe, 2008; IOM: Counter-Trafficking Module Database at <http://www.iom.int/jahia/Jahia/pid/748> IOM.

15 OSCE/ODIHR Compensation for trafficked persons. P.17.

trafficked persons to enter support and assistance structures, the definition of what is officially regarded as a trafficked person also differs from country to country. Consequently, the creation of European-wide comparable and transparent data is not likely to be a successful effort. From a human rights perspective activists have started to question the procedural exceptionalism that is practised in the anti-trafficking framework, in which a victim of a crime first has to qualify for support and screened before he or she can access support and protection structures. Consequently, identification and qualification mechanisms in many European countries do not treat trafficked persons as bearers of rights but rather as contenders who need to qualify for participation in certain programmes.

The production of knowledge on trafficking

The vague and unclear status definition of trafficked persons incorporates an additional obstacle for trafficked persons to access support and protection services. The legal knowledge on trafficking and its victims consists of a combination of different international conventions and national criminal codes. As for Europe, the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Approved by General Assembly Resolution 317 (IV) of 2 December 1949 (the so-called '49 Convention') is still an influential international legal framework in the field of trafficking as it has been ratified by numerous countries, including some EU Member States. Therefore, I will focus my considerations on the authorities' understanding of the status of trafficked persons in the 49 Convention and the Palermo Protocol. From the point of view of the sociology of knowledge, a criminological phenomenon and the governmental and social response to it is based on manifold genealogical layers of knowledge. Thus, the knowledge on trafficking is produced by multiple layers of historical, cultural and moral sets of understandings that feed not only into the creation of legal and political anti-trafficking instruments but also play a crucial role in implementing these policies.¹⁶

As already mentioned above, the Palermo definition of trafficking lacks terminological clarity, namely the term 'exploitation' that is not identified in international law, as well as the non-existent status definition of a 'trafficked person'. The term 'exploitation' was first introduced in the international anti-trafficking legal context in the so-called 49 Convention¹⁷:

'The Parties to the present Convention agree to punish any person who, to gratify the passions of another: (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; (2) Exploits the prostitution of another person, even with the consent of that person.'

From an etymological point of view 'exploitation' stands in the tradition of the socio-critical theories of Karl Marx and Friedrich Engels, who adverted to the socialist movement in France of the 19th Century. According to Marx, 'exploitation' was defined as the 'annexation of unpaid labour of workers by the owners of the means of production'.¹⁸ Hence, the term 'exploitation' refers to an economic and work-related dimension.

The term 'exploits the prostitution of another' in the 49 Convention replaced the term 'immoral purposes' that

16 Mariana Valverde: Law's dream of a common knowledge. Princeton Press 2003.

17 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, Approved by General Assembly Resolution 317 (IV) of 2 December 1949.

18 Wolfgang Pfeifer: Etymologisches Wörterbuch der Deutschen. 1998. (Etymological Dictionary).

constituted the first international legal document on a historical predecessor to the term ‘trafficking’, namely the ‘International Convention for the Suppression of the White Slave Trade’ adopted in Paris in 1910.

The 49 Convention introduced an economic and labour-related meaning into the international anti-trafficking framework, while the understanding of the crime of trafficking in the first half of the 20th Century was solely meant for ‘immoral purposes’ in the absence of any economic dimensions. The predominant approach towards the victims in sister Conventions remained the same, however, as their decision, action and intention were regarded as irrelevant in defining the crime.

In 2000, the Palermo Protocol introduced the current definition of the crime of trafficking by disclaiming any kind of moral attribution. During the negotiations, the international community decided upon the general term ‘for the purpose of exploitation’. Consequently, the definition of trafficking moved away from the moral and sexualized connotation as described in the Paris and the 49 Convention and towards labour and economic dimensions.

Interestingly enough, the moral and sexual appreciation of the phenomenon of trafficking still prevails in the public discourse that produces, in numerous media articles, the manifestations of identities such as ‘sex slave’ and ‘forced prostitute’.

The historical legal knowledge on trafficking in human beings is based on the irrelevance of the consent and agency of possible and actual trafficked persons. The 49 Convention refers to the consent of the person being enticed into prostitution as being insignificant. Even though the Palermo Protocol declares that the consent of a person who is recruited by certain acts and means for the purpose of exploitation is irrelevant, anti-trafficking policies still present a picture of possible and actual trafficked persons as passive, incapable of decision making and too traumatized to claim their rights.

Conclusions

Human rights activists criticise anti-trafficking policies as being inherently harmful in fully guaranteeing migrants’, women’s and sex workers’ rights. The collateral damage of anti-trafficking policies — so the argument goes — contravenes their claims to protect trafficked persons and to ensure a human rights approach. While the anti-trafficking framework lacks legal clarity concerning the status of a trafficked person and the definition of exploitation, the multitude of specialized policy tools and measures designed during the last decade in Europe to tackle prevention, protection and prosecution strongly build on knowledge taken from historical and cultural layers of knowledge.

Ten years after the Palermo Protocol could be a good time to set new paradigms of anti-trafficking policies by translating political and legal measures into the reality of the 21st Century.


A human rights approach should be redefined from a ‘victim-centred approach’ to securing the agency of (migrant) workers in every respective economic sector. Agency refers to a sociological concept to ensure the capacity of individuals to act independently and to make free choices.

Thus, anti-trafficking policies should aim to create context-related space for individual decision-making procedures, negotiations, judgments, actions, definitions and organizations of all (migrant) workers, including trafficked persons. It would include the transformation of a culture and politics of spectatorship, external

identification and attributions of behaviour and appearances into the democratic culture of participation by and the representation of trafficked persons in decision- making processes that have strong impacts on their lives.

As for repressive actions, I argue for an open transnational dialogue to establish common standards for exploitative economic activities, within and beyond national borders. Such standards should be based on commonly agreed criteria for minimum wages and decent working conditions.





This article was first published with Brill | Nijhoff publishers, and was featured on the Security and Human Rights Monitor (SHRM) website.

Security and Human Rights (formerly Helsinki Monitor) is a journal devoted to issues inspired by the work and principles of the Organization for Security and Cooperation in Europe (OSCE). It looks at the challenge of building security through cooperation across the northern hemisphere, from Vancouver to Vladivostok, as well as how this experience can be applied to other parts of the world. It aims to stimulate thinking on the question of protecting and promoting human rights in a world faced with serious threats to security.

Netherlands Helsinki Committee
Het Nutshuis
Riviermarkt 4
2513 AM The Hague
The Netherlands

© Netherlands Helsinki Committee. All rights reserved.

www.nhc.nl