

## Human Trafficking and the Fallacy of Human Rights Violations

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The views expressed here are those of the author, and do not necessarily reflect the views of GRETA or any other organisation with which the author is associated.

[1] It is incorrect to say that trafficking in human beings is a breach of human rights for the same reason that it is incorrect to say that  $2+2=5$ : because it is wrong, and there is an inherent good in getting things right. It also has significant practical ramifications for the welfare of trafficked people.

[2] In 2018-19, the Committee on the Elimination of Discrimination against Women, as part of its preparation of a *General Recommendation on Trafficking in Women and Girls in the Context of Global Migration*, published a Concept Note.<sup>1</sup>

[3] The Concept Note in my view contains a conceptual error that has practical ramifications. At paragraph 8, it is stated that “...under international law, the act of trafficking is defined as both a criminal offence and as a human rights violation”. It is subsequently asserted that a number of rights are violated when a person is trafficked, although it is not really stated how precisely these rights are violated.

[4] One can find plentiful support for this notion, in primary sources and the literature. For example, in the Council of Europe Convention on Action against Trafficking in Human Beings,<sup>2</sup> it is repeated in the Preamble, which provides that THB “constitutes a violation of human rights”. This preambular text is really little more than a rhetorical claim; it establishes no duty upon States. There are important conceptual and practical reasons why trafficking in human beings should be seen, not as a human rights violation, but as a criminal act with a human rights *dimension*.

### Conceptual reasons

[5] The protection of human rights is a duty undertaken, an obligation owed, by the State towards all those within its jurisdiction. It means that the State must not itself violate human rights, and it must take certain steps to ensure the protection of these rights.<sup>3</sup> In the absence of State complicity (such

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<sup>1</sup> Concept Note prepared for the Committee on the Elimination of Discrimination against Women on its elaboration of a General Recommendation on Trafficking in Women and Girls in the Context of Global Migration, <https://www.ohchr.org/EN/HRBodies/CEDAW/Pages/GRTrafficking.aspx>

2. CETS No.197

<sup>3</sup> In the context of THB, see R Piotrowicz, “States’ Obligations under Human Rights Law towards Victims of Trafficking in Human Beings: Positive Developments in Positive Obligations”, (2012) 24 *International Journal of Refugee Law* 181-201

as a corrupt border official) or failure to act (such as not having appropriate laws in place or failing to give effect to the law), there is no immediate State involvement in THB, which is a private criminal act just like murder, rape or theft.

[6] When someone is murdered it is not, in the absence of State involvement, normally described as a violation of human rights; it is a serious crime perpetrated by one or more persons against another. The same applies to THB. The description of THB as a human rights violation is a catchy rhetorical device but it is legally incorrect.

[7] This analysis is supported by a relatively recent decision of the Court of Appeal of England and Wales, which addressed the nature and scope of States' obligations under the European Convention on Human Rights.<sup>4</sup> Giving the only judgment, with which his two co-judges concurred, Lord Justice Laws stated (with regard to Article 3 ECHR):

"The rights which the Convention guarantees are enjoyed against the State, and only the State. It is important to recognise that ill-treatment by a non-State agent, however grave, does not of itself constitute a breach of Article 3. This is sometimes glossed over in the language of the cases ... Likewise a killing does not of itself violate Article 2, nor an act of enslavement Article 4, if it is not perpetrated by an agent of the State. But it is surely inherent in the Convention's purpose that the State is to protect persons within its jurisdiction against such brutalities, whoever inflicts them..."<sup>5</sup>

[8] It is not, in principle, the fault of the State if I traffic someone; nor is it the fault of the State if I murder someone. However, it is the fault of the State:

- if it does not have in place laws that effectively criminalise THB;
- if its police force is not capable of mounting effective investigations to apprehend traffickers;
- if it has no prosecution service with the capacity to mount an effective prosecution;
- and there is no justice system capable of staging a fair trial.

There can be no absolute guarantee that people will never be trafficked, just as there can be no absolute guarantee to prevent murder; but the State has a duty to have in place laws, procedures and measures that will enable it to obtain convictions for THB, and to help and support those who have been trafficked.

### **Practical reasons**

[9] The prohibition of slavery, forced labour and servitude (and hence THB according to the ECtHR in *Rantsev*),<sup>6</sup> does indeed create human rights obligations for States. In particular, it creates obligations (broadly termed) of protection and assistance to trafficked persons and potential victims of THB. It may also give rise to international protection obligations (refugee status or subsidiary/complementary protection).

[10] Where the State fails in these duties, it may indeed commit a human rights violation **because of its failure to protect the individual**. In other words, the human rights violation is not the act of trafficking, but the State's actions or failure to act: the State's (non-)response, as it were. The THB is not committed by the State and hence cannot be a human rights violation. This is precisely the

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<sup>4</sup> *The Commissioner of Police of the Metropolis v DSD and NBV; Alio Koraou v The Chief Constable of Greater Manchester Police*, [2015] EWCA Civ 646. Case No: B2/2014/1643, A2/2014/2662 & A2/2014/2731

<sup>5</sup> Para 43 (emphasis added)

<sup>6</sup> *Rantsev v Cyprus and Russia*, ECtHR, Application No 25965//04, 7 January 2010, para 282

foundation for the ECtHR's reasoning in *Rantsev*.<sup>7</sup> The human rights dimension exists because of the State's failures:

- Failure to have adequate anti-trafficking laws;
- Failure to enforce relevant laws effectively;
- Failure to mount effective prosecutions;
- Failure to provide adequate support and assistance for victims of trafficking;
- Failure to protect those at risk of being trafficked nor re-trafficked;
- Failure to grant international protection to persons at risk of being trafficked if compelled to return to their home country.

**[11]** This has potentially immense practical significance. Those advocating the human rights of trafficked persons need to know where the State's obligations actually lie. They should be scrutinising the behaviour and failures of the State, not the trafficker, where the human rights of the victims are concerned. The act of THB is a crime perpetrated by one or more private individuals and the State is not, in the absence of complicity or failure, responsible for that, just as it is not responsible for murder.

**[12]** The recognition of, and respect for, the human rights of trafficked persons is best achieved by focussing on the acts and failures of the State – failures to protect and assist, as recognised in *Rantsev*, if positive results in helping trafficked people are to be achieved.<sup>8</sup> Describing THB as a human rights violation is not only inaccurate but detracts attention from these fundamental human rights obligations, and failures, of States.

**[13]** We do not lessen, or deny, the enormity of human trafficking by denying that it violates human rights. Rather, we draw attention to where the real human rights violations lie: in the failure by States to protect and support the victims of trafficking.

**[14]** Some argue that human rights can, or should, be owed horizontally, by one human being to another. One can do this; then every nasty thing done to us becomes capable of being called a human rights violation: when you steal my bar of chocolate, you violate my human right to enjoyment of my property; when you traffic me, you violate my right not to be exploited. This approach dilutes the high value we attach to human rights and their protection.

**[15]** Human rights protect the individual from the power of the State. They require the State to protect us from certain threats, including by other private citizens. And, when the State fails to do so, it may well violate our human rights.

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<sup>7</sup> *Rantsev v Cyprus and Russia*, Application No. 25965/04, 7 January 2010. See, for instance, paras 284 and 286. See also *Hadijatou Mani Koraou v The Republic of Niger*, ECW/CCJ/JUD/06/08, Economic Community of West African States (ECOWAS), 28 October 2008, para 85

<sup>8</sup> The position was expressed very clearly by the OHCHR in its *Recommended Principles and Guidelines on Human Rights and Human Trafficking*. Principle 2 provides: "States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons.", E/2002/68/Add.1