

Focusing on Prevention: The Social and Economic Rights of Children Vulnerable to Sex Trafficking

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Abstract

The commercial sexual exploitation of children (“CSEC”) is an egregious human rights and public health violation that occurs every day across the US. Although there has been positive change in the US to bring attention to CSEC and to reform laws and policies to assist CSEC victims, scant attention and resources have been dedicated to prevention efforts. This paper critiques current US strategies to address CSEC and highlights the limitations of an interventionist framework that narrows its focus to anti-trafficking efforts. As an alternative, the paper proposes a human rights-based approach focusing on the fulfillment of economic and social rights of children as a prevention strategy in the US.

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Introduction

THE COMMERCIAL SEXUAL exploitation of children (“CSEC”) is an egregious human rights and public health violation that occurs every day across the US. Violence against an individual is widely recognized as a public health issue.¹ Reliable estimates of the prevalence of CSEC in the US are scarce, although the most cited study, dating from 2002, estimates that between 244,000 and 325,000 children annually are at risk of sexual exploitation.² As CSEC victims are a marginalized and largely hidden population, accurate data are not available. There are official records of CSEC victims that arise from law enforcement and prosecution data, but these represent only a minority of total CSEC victims.

Through public awareness campaigns and increased media attention, the general public is becoming more aware of the existence of CSEC and its effect upon foreign-born and domestic populations.³ As such, trafficking has become a social issue topic in recent years in the US. CSEC is a form of child sex trafficking, but depending on the jurisdiction, there can be other forms of child sex trafficking; under US federal law, CSEC is the only form of child sex trafficking. There has been a recent proliferation of anti-trafficking initiatives and programs, including an increasing number of legislative and policy reform efforts to address CSEC.⁴ Considerable efforts have been devoted to increasing the conviction rates of exploiters and clients, and to reducing the impunity of child traffickers.

While increased attention to CSEC has brought about positive change, there have been some drawbacks as well. Greater awareness, more funding support to prevent CSEC, and critical legal reform have positively changed the CSEC landscape in the past decade. However, the multitude of programs and frameworks now being employed to combat CSEC appear to be addressing the symptoms of CSEC rather than the underlying causes.

This paper critiques current US strategies to address CSEC by highlighting the limitations

of frameworks that narrow the focus to anti-trafficking rather than taking a more holistic prevention approach. Adopting a human rights-based approach, the paper focuses on the economic and social rights of at-risk children as an alternative framework to understand prevention and identify prevention strategies. In part one, I identify three main problems with the current approach to CSEC in the US. In part two, I outline the current prevention approaches to CSEC in international law, human rights law, and in the US, exploring their limitations with respect to prevention. In part three, I examine the role of economic and social rights as a human rights-based approach to analyzing at-risk children and refocusing the prevention discussion. I also explore the underlying determinants of CSEC as a method of identifying relevant economic and social rights. This section includes specifics on the right to health as an example of a rights-based analysis. Finally, I examine the challenges and benefits of a social and economic rights-based approach to CSEC prevention.

Although the terms “sex trafficking of children” and “CSEC” are used interchangeably in the literature, I use only the latter term in this paper. Further, although labor trafficking and adult sex trafficking have some crossover with CSEC, these topics are outside the scope of this paper.

Critique of the current approach to CSEC in the US

Under the Victims of Trafficking and Violence Protection Act (TVPA), sex trafficking of a minor is defined as inducing a person under 18 years of age to perform a commercial sex act.⁵ This definition is consistent with international child trafficking definitions. The Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol) defines child trafficking as “the recruitment, transportation, transfer, harbouring, or receipt of persons ... for the

purpose of exploitation.”⁶ Notably, the TVPA—a federal law that establishes immigration measures to protect foreign-born victims—created new crimes under which traffickers can be prosecuted, and provides assistance for state and local law enforcement as well as service provisions for trafficking victims. The TVPA also has foreign policy implications, which are addressed below.

State or municipal law enforcement and child welfare responses to CSEC are governed by state laws that differ from state to state. In fact, most states use different definitions of CSEC and even establish different ages for the definition of a child. Until the past decade, most states criminalized CSEC, declaring it juvenile prostitution. Under these laws, children who were identified as exchanging sex for financial gain, were labeled as juvenile offenders and were processed through the juvenile justice system. A set of legal reforms known as safe harbor laws have in some states defined CSEC as child trafficking; these laws treat children as victims, which in some states triggers a child protective response.⁷ Simply put, there are two types of protections provided under the safe harbor laws, and states that adopt safe harbor laws adopt protections along this spectrum. The first category ensures that children are granted immunity from prosecution for prostitution, either through defining commercially sexually exploited children as victims or by processing them through the juvenile justice system in a way that does not leave them with a criminal record.⁸ The second category protects and supports CSEC victims through the provision of specialized services, either through child welfare or other state or private sources.⁹ The result of reforms is that state responses vary, favoring either immunity, diversion, or victim-centered approaches.

As a result of the disparate state and federal laws applicable to domestic-born victims of CSEC, there is no singular or national approach. There are, however, many commonalities in the strategies employed from state to state to address CSEC. Below, I outline the three main criticisms of the current approach to CSEC in the US.

The first critique is of the emphasis placed on evidence-based responses. This has led to a

proliferation of funding to identify and quantify the number of CSEC victims in the US, which is problematic for several reasons. It diverts funds away from first responders and service providers who offer essential services to victims and at-risk children. There are many factors that contribute to the lack of data, including, but not limited to, the fact that victims are “overlooked and underreported” because exploitation “occur[s] at the margins of society and behind closed doors.”¹⁰ Scholarly research has thus far failed to capture adequate data that accounts for the marginalization of victims; this has led to biased, non-representative, and unreliable data. Furthermore, the emphasis on gathering data means that there is more attention given to identifying and responding to victims than to preventing harm in the first place.

A second critique of the current approach to CSEC in the US is that it focuses heavily on legal responses to CSEC, which, as previously discussed, are divergent from state to state. Some states have passed legislation recognizing that children who have been commercially sexually exploited are victims and should be treated as such under the law. These jurisdictions focus on legal strategies that identify victims and prosecute exploiters. But the majority of states in the US still consider CSEC victims to be juvenile offenders who can be prosecuted for prostitution. While some of these states do pursue strategies to prosecute exploiters and have programs to expunge the criminal records of children prosecuted for prostitution, the approach is still archaic and not aligned with the current victim-focused approach to CSEC. Although legal strategies are essential, they do not, by themselves, remedy underlying structural problems or prevent the potential exploitation of at-risk children.

A third critique is that private, not-for-profit organizations provide many of the responses to CSEC, including, most frequently, service provision. Although these organizations provide essential and critical services to child victims, their central role is problematic for several reasons. Many organizations cannot adequately address the significant needs of this population due to lack of capacity and funding. They are responsive to

victims, rather than supporters of at-risk children, often knowingly choosing to do so because of resource constraints. This approach bypasses essential government involvement and undermines government accountability mechanisms. As such, it is not sustainable and does not remedy the underlying structural problems.

These three problems arise from one underlying issue: that the current responses merely address the symptoms of CSEC and not its underlying structural and systemic causes. In the main, CSEC programs in the US focus on interventionist and response-based approaches. By contrast, preventive approaches, when present, focus on making vulnerable and at-risk children more resilient to becoming victims.

The current prevention framework in the US

International and national level instruments have been created to address CSEC. Many of these legal instruments recognize the need not only to identify and assist victims of trafficking, but also to create mechanisms ensuring the protection of at-risk individuals. Of course, defining “at risk” is a difficult task.

The US is a party to the Palermo Protocol, which was created to “prevent and combat trafficking in persons, paying particular attention to women and children.”¹¹ This international instrument is a Protocol to the United Nations Convention against Transnational Organized Crime, and is the first “global legally binding instrument with an agreed definition on trafficking in persons.”¹² The third section of the Protocol, Articles 9 to 13, contains the provisions on prevention; Article 9 requires States to “establish comprehensive policies, programmes and other measures” to prevent trafficking.¹³ Anne Gallagher, a leading expert on international law and human trafficking, critiques the provisions on prevention as being “phrased in the UN’s best, programmatic, nonobligatory style,” stating further that “[t]here is no reference to the acknowledged root causes of trafficking.”¹⁴ Prevention is included as an essential, but secondary, focus of the instrument.

Similarly, the TVPA provides for some funding for international prevention initiatives.¹⁵ Among its approaches for raising awareness and providing

technical support for law enforcement, the TVPA does provide funding for “economic alternatives to prevent and deter trafficking.”¹⁶ These initiatives may include programs to ensure girls’ enrollment in education, women’s participation in economic decision-making, job skills training, and programs to advance the role of women in the public sphere.¹⁷

Similar to the obligations under the Palermo Protocol, the Convention on the Rights of the Child (CRC) establishes in Article 19 that States must take “all appropriate legislative, administrative, social and educational measures to protect the child from all forms of . . . exploitation . . .”¹⁸ Under Article 34 of the CRC, States are obligated to protect a child from CSEC.¹⁹ Prevention is defined as 1) reducing the vulnerability of children by eliminating the risks to which children are exposed, and 2) increasing the resilience of children to resist those risks.²⁰

The problem with this approach to prevention is that it frames children at risk of trafficking as soon-to-be-victims. In this context, law enforcement initiatives and awareness-raising campaigns are reasonable prevention strategies. However, the literature on the ‘risk factors’ or underlying determinants of CSEC have identified a much broader set of conditions that leave children vulnerable to CSEC. Improving access to health and education, as well as a broad range of other rights, are issues that need to be realized in a comprehensive and rights-based approach.

Underlying determinants of CSEC

The literature in the US points to several leading risk factors for CSEC: poverty, childhood abuse, family disruption, school related problems, runaways and homelessness, child welfare involvement, low self-esteem, and community factors.²¹ The most commonly cited risk factor is childhood sexual and emotional abuse. Runaway and homeless children, as well as children with weak family support—including divorced parents, parents with substance abuse, single parents, and marital fighting—are generally listed as the next two groups most at risk.

A risk factor is simply a prediction that when one event occurs, there is an increased risk that a second event will occur. Risk factors are

correlations with an event and are not determined to be causally related. So while perhaps helpful for identification of at-risk children, risk factors do not provide an accurate picture of the underlying determinants of CSEC. While this argument has been made more frequently with regard to trafficking abroad, few scholars or activists in the US discuss discrimination, inequality, poverty, or other socio-economic status as determinants to CSEC.²² Scholars and activists outside the US have begun to identify the determinants of CSEC and study the effects on a child's risk to CSEC. The UN Special Rapporteur on the sale of children explicitly makes the connection between CSEC, vulnerability, and fundamental deprivations:

Trafficking and sexual exploitation are symptoms of a social problem, namely the vulnerability in which too many people are trapped, lacking the material and educational tools to live in dignity. Children are the ones who suffer the most and have less means of protecting themselves. Vulnerability is a silent social disease. Many societies live with it and do not take firm and sustainable actions to face it until the consequences erupt in violent and dramatic forms. Prevention means acting before this happens. It means preventing the social fabric from tearing apart.²³

A small number of prominent CSEC advocates in the US have identified the structural and systemic causes of CSEC and recognize that these are issues of inequality and poverty. Rachel Lloyd, a prominent CSEC advocate and service provider, writes:

Commercially sexually exploited young women in the US, like their foreign counterparts, often come from low socio-economic backgrounds, making them at higher risk for recruitment than more affluent youth. When we think about children who are sexually exploited in other countries, we acknowledge the socioeconomic dynamics that contribute to their exploitation – the impact of poverty, of war, of a sex industry. Yet in our own country, the focus on individual pathologies fails to frame the issue appropriately.

We ask questions such as, “Why doesn't she just leave?” and “Why would someone want to turn all their money over to a pimp?” instead of asking, “What is the impact of poverty on these children?” “How do race and class factor into the equation?” “Beyond their family backgrounds, what is the story of their neighborhoods, their communities, their cities?”²⁴

Lloyd articulates the current dilemma in the US. One of the largest impediments to addressing CSEC is the difficulty in changing perceptions of victims and the social determinants that made them vulnerable in the first place. She further explains that these determinants and perceptions are not solely issues of “who has what,” but can be attributed to government laws and policies.

While the crack epidemic has economically damaged many communities, the larger social and governmental policy decisions have been far more destructive. Of course many children who grow up in challenging economic situations thrive, but the reality is that far too many don't, and too many children's futures can be determined by zip code. Children in poor neighborhoods frequently receive a substandard education, are often exposed to lead paint in poorly constructed buildings, have higher rates of asthma, and live in communities where there are little to no recreational or green spaces and where entire neighborhoods have been abandoned and forgotten by those in power. Children born into poverty are at risk for many things, including being recruited into the commercial sex industry.²⁵

By recognizing that the determinants of CSEC arise from a chronic range of interrelated deprivations including low socio-economic status, Lloyd says it is necessary to understand the social relations that determine socio-economic distribution. In the next section a rights-based approach is employed to analyze these determinants of CSEC and to formulate a holistic prevention strategy.

Exploring the right to health as a determinant of CSEC

For example, violations of the right to health are rights violations that precipitate vulnerability to CSEC. Under ICESCR and the CRC, children have the right to the enjoyment of the highest attainable standard of physical and mental health.²⁶ The right to health has been interpreted by the UN Committee on Economic, Social and Cultural Rights to also include a “wide range of socio-economic factors that promote conditions in which people can lead a healthy life,” extending to the underlying determinants of health including “food and nutrition, housing, access to safe and potable water and adequate sanitation, safe and healthy working conditions, and a healthy environment.”²⁷ The rights to health and freedom from exploitation are interrelated and interdependent rights, meaning that they are dependent upon each other and connected to each other. CSEC, as a form of violence and exploitation, is a determinant of health and health is a determinant of CSEC.²⁸

When the right to health, including its underlying determinants, is violated, a child may become more vulnerable to CSEC. For example, in the US, childhood abuse is the highest risk factor to becoming a victim of CSEC. The “psychological trauma resulting from abuse, neglect, violence or exploitation” is great and assists in paving a pathway into CSEC victimization. The UN Committee on the Rights of the Child argues that, in light of this, there is a need “for increased attention [to the] behavioural and social issues that undermine children’s mental health, psychosocial wellbeing and emotional development.”²⁹ However, we must also make the link between realization of the right to health and prevention to CSEC. Framing violations of health rights as a determinant of vulnerability to CSEC aligns with the research conducted in the US on risk factors to CSEC.

Therefore, realization of the right to health is a critical form of ‘prevention’ to CSEC, as well as other forms of violence. The UN Committee on the Rights of the Child views health as a primary prevention for violence, writing that “[p]rimary prevention, through public health, education, social services

and other approaches, of all forms of violence is of paramount importance.”³⁰

Realizing economic and social rights to address CSEC

What is a human rights-based approach?

A human rights-based approach uses international human rights instruments as a framework for understanding and addressing issues. While international human rights law creates positive legal obligations for States, a rights-based approach can be used to critique current norms and reshape our understanding of a problem and approaches to redressing it. Therefore, the fact that the US is not a party to the Convention on the Rights of the Child (CRC) or the International Covenant on Economic and Social Rights (ICESCR) is not dispositive. This paper uses the economic and social provisions in the CRC and ICESCR not as a method for defining State obligations and holding State actors accountable for lack of progress, but to conceptualize prevention to CSEC.

Health and human rights scholar Alicia Ely Yamin, writing on the right to health, explains that “[u]sing rights to advance the health of impoverished and marginalized peoples around the world requires more than reference to positive norms; it also demands critiquing and expanding limited understandings of rights in theory and practice. Implicitly, doing so also requires challenging underlying premises about justice and power.”³¹

In addition to altering conceptualization of rights, a rights-based approach also influences how rights violations should be addressed, and urges reconsideration of both processes and outcomes. Yamin notes:

A rights-based approach to health implies a distinct change in the missions and operational approaches of most service delivery organizations ... Because a rights framework focuses centrally on the conditions under which people are able to exercise meaningful agency ... it challenges

[responses] to take account of inequality, exclusion, and oppression in both the processes and the outcomes of their work.³²

By addressing inequality, discrimination, and unjust power relations, a rights-based approach ensures sustainable, systemic outcomes, while also ensuring that individuals are empowered through change and its resulting outcomes.

Applying a human rights-based approach to children at risk of CSEC

A rights-based approach to the prevention of CSEC examines a child's well-being in the context of the child's social relations and power structures. A child's well-being is "produced, experienced and understood in the social, political, historical, and economic contexts in which we live."³³ Consequently, the approach to CSEC violations cannot be divorced from the considerations of underlying determinants that make a child vulnerable to CSEC. A rights-based approach to CSEC considers underlying structural and systemic issues of discrimination, inequality, exclusion, poverty, and socio-cultural determinants.

The Committee on the Rights of the Child—the treaty body charged with offering general recommendations and comments as authoritative interpretations of the treaty's meaning—explains in General Comment 13 that "[a] child rights-based approach to child caregiving and protection requires a paradigm shift towards respecting and promoting the human dignity and the physical and psychological integrity of children as rights-bearing individuals rather than perceiving them primarily as "victims."³⁴ The Committee further explains that a child-rights approach to freedom from exploitation includes "[r]espect for the dignity, life, survival, well-being, health, development, participation and non-discrimination of the child as a rights bearing person ..."³⁵

A child-rights approach focuses on the child as a rights-bearing individual rather than a potential victim. The focus is on realizing the child's economic and social rights, a distinct shift from focusing on preventing commercial sexual exploitation.

A rights-based approach to CSEC prevention in the US

Such an approach in the US would need to embrace the difficult task of addressing structural inequality and gender discrimination; "[w]ell-intentioned efforts to transform deeply embedded structural inequalities and gender-linked exploitation are difficult to initiate and sustain politically, economically, and culturally."³⁶ Scholars have reflected on the scale required within this approach:

Governments have been deeply reluctant...to view trafficking in this broader frame—that is, as a problem of migration, poverty, discrimination, and gender-based violence. They have tended to view trafficking as a 'law and order' problem requiring an aggressive criminal justice response.³⁷

Others consider it possible to apply an approach to CSEC that recognizes the determinants as structural, systemic inequality and poverty:

I do... strongly believe that we can significantly decrease the commercial sexual exploitation and trafficking of girls and young women, but it will not come through salacious news coverage, huge stings, or rescue-focused work, but through the infinitely less sensational work of building resilience in the lives of vulnerable children, creating resources and support for under-served communities and ultimately addressing the inequities that girls and young women face.³⁸

A rights-based approach has the critical role of refocusing attention on the "less sensational" issues of addressing inequity and discrimination, and on the violation of economic and social rights. Current knowledge and approaches to CSEC demonstrate that victims are overlooked and that exploitation occurs "at the margins of society and behind closed doors."³⁹ But to really address CSEC and protect children from becoming victims, it is imperative that the conditions which create CSEC victims—and then leave them marginalized and overlooked—are overcome.

Developing a rights-based strategy to address CSEC is necessary. The rights-based approach highlights the reality that a child experiences multiple rights violations before they become at risk of CSEC and later a victim. Drawing upon guidance from the UN Committee on the Rights of the Child, the following are some possible rights-based legislative and administrative strategies that could be applied in the US.⁴⁰

Legislative measures: Continued advocacy to reform legislation is in line with a rights-based approach, ensuring that the approach is comprehensive and inclusive of prevention measures. Prevention measures should specifically outline concrete obligations for all involved agencies and dedicate specific budget allocations for implementation of those obligations. Advocacy should also target the TVPA, which could provide more concrete obligations with respect to the foreign policy prevention measures so that they are no longer merely aspirational provisions.

Administrative measures: Although many advocates and funding sources have recognized that collaborative approaches are critical, there is still a lot of progress to be made. Involved actors will either need to develop new and creative approaches to collaborating, or possibly seek legislative or administrative reform to authorize collaboration in their mandates or permit information sharing. Previously excluded partners, including community-based groups, schools, and health care centers, should be included in prevention strategies. Training on CSEC prevention can be included in professional training curricula, including for medical personnel, teachers, and social workers who are often on the front lines of service provision to children.

Conclusion

A human rights-based approach to preventing CSEC in the US would provide a host of benefits to the CSEC movement. It would require a critical analysis of how CSEC is conceptualized and addressed, and what interventions will result in the optimum outcomes. The underlying determinants

that leave a child vulnerable to commercial sexual exploitation would be addressed. An analysis of structural and systemic issues of discrimination, inequality, exclusion, poverty, and socio-cultural determinants is needed. Once identified, a rights-based response must follow, where the focus is realizing the rights of equality, including gender, health, education, and housing. This holistic response considers these children as rights-holders who are equally entitled to the same rights as all other children in the US. The rights-based approach requires the development of tools to empower and provide a voice for this invisible and marginalized population. It is this last point that fundamentally alters the current framework for discussion of prevention of CSEC. In her article on social and economic rights approach to trafficking, A. Yasmine Rassman writes, “An economic and social rights framework entails the empowerment of the most disenfranchised to ‘transform the oppressive social relations that limit their choices about life and their capabilities to live lives of dignity.’”⁴¹

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