

SEVENTH ANNUAL MEETING



THE ASIA PACIFIC FORUM OF NATIONAL HUMAN RIGHTS INSTITUTIONS

... a partnership for human rights in our region

SUMMARY OF THE ADVISORY COUNCIL OF JURISTS BACKGROUND PAPER ON TRAFFICKING

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1. PURPOSE

The Forum Councillors have referred the issue of ‘trafficking’ to the Forum’s Advisory Council of Jurists for consideration. The purpose of this paper is to provide participants of the Seventh Annual Meeting of the Forum with a summary of a comprehensive background paper prepared for the consideration of the Advisory Council of Jurists. A full copy of the background paper is available on the Forum’s website – www.asiapacificforum.net

2. SUMMARY OF BACKGROUND PAPER

Part One: Description of the problem

Part one of the background paper provides a description of trafficking – including its definition in international law and the links causes and consequences of trafficking.

2.1 Defining Trafficking

Until December 2000 the term “trafficking” had not been precisely defined in international law. This on-going failure to develop an agreed definition has been the result of differing opinions concerning the constitutive acts and the end results of trafficking. For example there was, and still is, wide discussion on:

- the migration aspects of trafficking,
- the need for focusing on the human rights of women, and
- a particularly prominent debate between those who wish to advance the rights of women working in prostitution and those who consider all forms of prostitution intolerable.

The UN Trafficking Protocol (also referred to as the Palermo Protocol) defines trafficking as

“...the recruitment, transportation, transfer, harboring 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 purposes of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs.”
(Article 3(c))

Of importance is the distinction of trafficking from migrant smuggling (the organized movement of persons for profit). The additional critical factor which distinguishes trafficking from smuggling is the presence of force or coercion throughout, or at some

stage, in the process – with that force being for the purpose of exploitation. The non-coerced movement of a child, however, will always be considered trafficking.

2.2 Trafficking Fact Patterns

While the existence of trafficking is beyond dispute, it is important to note the tendency of many to unquestioningly accept and promulgate unverified data. Common trends, however, have been discerned:

- Trafficking takes place for a variety of end purposes including domestic service, forced marriage and sweatshop labor. Forced prostitution and forced labor are the most visible end-results of trafficking and many would argue that they are the most common.
- While reports of trafficking in men are increasing, it appears that women and children are currently the primary trafficking targets.
- Trafficking occurs *within* as well as *between* countries.
- Traffickers use a variety of recruitment methods. Outright abduction is only very occasionally reported. Child trafficking generally involves payment to a parent or guardian in order to achieve cooperation and this is often accompanied by a measure of deception regarding the nature of the child's future employment or position.
- Most traffickers use fraud or deception, rather than outright force, to secure the initial cooperation of the trafficked person. A typical situation involves a girl or young woman being deceived about the cost (and repayment conditions) of the migration services being offered her, the kind of work she will be doing abroad and/or the conditions under which she is expected to work.
- By definition, a trafficked person ends up in a situation from which she or he cannot escape. Traffickers use a variety of methods to prevent escape including threats and use of force, intimidation, detention and withholding of personal documents.
- Most but not all trafficked persons enter and/or remain in the destination country illegally. Illegal entry increases a trafficked person's reliance on traffickers and serves as an effective deterrent to seeking outside help.
- Many trafficked persons, men as well as women, begin their journey as smuggled migrants – having contracted an individual or group to assist their illegal movement in return for financial benefit. In a classic migrant smuggling situation, the relationship between migrant and smuggler is a voluntary, short-term one – coming to an end upon the migrant's arrival in the destination country. However, some smuggled migrants are compelled to continue this relationship in order to pay off vast transport debts. It is at this late stage that the features of trafficking (debt bondage, extortion, use of force, forced labor, forced criminality, forced prostitution) will become apparent.
- Trafficking, like all forms of irregular migration, often involves movement from poorer countries to relatively wealthier ones.

Countries in the Asia Pacific region that have been identified as **source** countries or countries of origin include: Afghanistan, Bangladesh, Burma, Cambodia, China, India, Indonesia, Nepal, Pakistan, the Philippines, Thailand and Vietnam. Countries identified as a **destination** for trafficked persons include Australia, China (including Hong Kong), India, Malaysia, Pakistan, Singapore, Taiwan and Thailand. **Internal** trafficking also occurs, and has been detected particularly in China and Sri Lanka. Some countries are points of **departure, transit and destination** for trafficked persons (for example Thailand).

2.3 Links, Causes and Consequences

2.3.1 The Emigration Push

Migration can be broken down into *survival migration* (escape from economic, political or social distress) and *opportunity-seeking migration* (the search for better opportunities). The majority of survival migrants are women, and the gender dimension of the trafficking cycle should not be underestimated. ‘Push’ factors for women include the general feminization of poverty as well as the issue of human rights violations of women in source countries. Another factor contributing to the large proportion of women being trafficked could be the relative inability of women to pay up-front for their transportation, thereby increasing their vulnerability to exploitative relationships and conditions.

2.3.2 The Immigration Pull

The demand side of trafficking – the ‘pull’ of unmet labor demands, particularly in the informal, unregulated sector has not been extensively considered, but is a significant factor. Trafficked persons fill a market requirement for cheap labor. The profit potential of using foreign, illegal workers is substantial. The general gender division of labor often means that women have less opportunity than men to engage in skilled labor. In the case of trafficking into the sex industry, the profitability of foreign workers is reinforced by the demand for the ‘exotic’.

The ‘pull’ power of information should not be underestimated: many trafficked persons make the decision to emigrate on the basis of false or misleading information, and the suggestion of obtaining a job – any job – is a powerful incentive.

2.3.3 The Impact of Emigration and Immigration Restrictions

Some commentators believe that a severely restrictive emigration policy is more likely to fuel irregular migration than stop it. When discriminatory restrictions on movement (such as on some groups of women in Nepal and Thailand) are enacted without any corresponding effort to alleviate the compulsion to migrate, they serve only to encourage potential migrants to seek out the services of smugglers and traffickers. Similarly, the restriction by developed (often destination) countries on legal immigration opportunities usually leaves survival migrants with little choice but to seek out and accept the services of smugglers and traffickers.

2.3.4 The Organized Crime and Globalization Connections

Restrictions on legal migration in countries of origin and destination have served to ensure a regular and increasing demand for the services of organized criminal groups. Aided by the increased mobility and declining international restrictions on the movement of goods, money and services, migrant smuggling and trafficking now constitute a major source of revenue for organized crime.

Part Two: International Law and Trafficking

Part two of the background paper examines how international law applies to trafficking – including state responsibility, human rights law, international refugee law, international humanitarian law and international criminal law.

2.4 State Responsibility

It is widely accepted that human rights violations are an important root cause of trafficking and that the trafficking process itself constitutes a serious violation of human rights. States remain the primary actor in international law, and they are obliged to respect, protect and fulfill rights accordingly. Although much trafficking is undertaken by non-State actors, states may be directly or indirectly responsible for the subsequent human rights violations.

States are *directly* involved when violations occur with official support or acquiescence, for example when law enforcement officials are directly involved or complicit in trafficking practices. Discriminatory property or emigration laws which drive women and girls to use the services of traffickers or smugglers also activate state responsibility.

States may be *indirectly* responsible for human rights violations where the government has allowed the violative act to take place without taking effective measures to prevent it or to punish those responsible, that is if the state has not exercised *due diligence*.

2.5 Human Rights Law

2.5.1 The Rights of Non-Nationals

The development of international human rights law has resulted in greater protection of persons as rights are vested in the individual as opposed to the State. However despite universalist claims, a number of the major human rights treaties either specifically exclude non-nationals or are inapplicable to them (for example ICESCR and CERD). Core rights such as the prohibition on slavery, forced labor and debt bondage appear to be protected.

2.5.2 The International Prohibition on Slavery and Servitude

“Classical” slavery is prohibited in a number of international instruments including the 1926 Convention on Slavery, its 1956 Supplementary Convention, the Universal Declaration of Human Rights (UDHR) and the ICCPR. The prohibition on slavery is now recognized as *jus cogens* – a fundamental norm of international law. While it is not clear whether the legal prohibition on an apparently exhaustive list of practices “similar” or “analogous” to slavery can be extended to cover trafficking, there are a number of developments pointing to an argument that trafficking could be legally equivalent to slavery. Such developments include a recent decision of the ICTY relating to a charge of enslavement as a crime against humanity and the ICC Statute which includes “enslavement” and “sexual slavery” as crimes.

2.5.3 The Prohibition on Trafficking, Forced Prostitution and Forced Marriage

The 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others currently has 73 State Parties. The Convention still attracts a measure of political support (it was referred to at the 1995 Beijing Platform of Action), but has come under considerable attack, most notably for its abolitionist stance on prostitution. The 2000 Palermo Protocol does not mention its predecessor, and assuming that the Protocol enters into force within a reasonable period, it will render the 1949 Convention irrelevant.

Prohibitions on forced prostitution and exploitation of prostitution of others have been incorporated into CEDAW (Article 8).

2.5.4 The Prohibition on Forced and Compulsory Labor

The prohibition on forced and compulsory labor is contained in the 1930 ILO forced Labor Convention (the definition of forced labor contained therein is still widely accepted) and the ILO Abolition of Forced Labor Convention of 1957. Forced labor is indirectly addressed in the UDHR, ICCPR and ICESCR.

2.5.5 Debt Bondage

Debt bondage is defined in the 1957 Slavery Convention. The Convention identifies debt bondage as a practice similar to slavery. Debt bondage is included in the prohibition on servitude in the ICCPR, and has arguably been assimilated into the broader notion of forced labor.

2.5.6 Violence Against Women

Violence against women has not been directly addressed in international law. However two UN instruments are significant: a General Recommendation adopted by the CEDAW committee (in 1992) and a Declaration on Violence Against Women adopted by the General Assembly in 1993. The Recommendation makes specific reference to

trafficking, thereby identifying trafficking as a form of violence against women which is incompatible with the equal enjoyment of rights by women.

2.5.7 Trafficking in and Related Exploitation of Children

The Convention on the Rights of the Child (CROC) requires States Parties to “take all appropriate national, bilateral and multilateral measures to prevent the abduction of, the sale of or traffic in children for any purpose or in any form” (Article 35). It has been noted that CROC does not, however, require States Parties to criminalize particular forms of crime such as trafficking or to assume extraterritorial criminal jurisdiction in respect of such conduct. An Optional Protocol to the CROC – purporting to extend the reach of the Convention’s provisions in relation to the sale of children, child prostitution and child pornography – has recently been finalized.

The 1999 ILO Convention on the worst forms of Child Labour (No 182) reiterates the prohibition of the trafficking and related exploitation of children.

2.5.8 The Rights of Trafficked Persons as Migrants and Migrant Workers

The position of migrants under international law is linked to and determined by their status as aliens and non-nationals or non-citizens. Two ILO Conventions, of 1949 and 1975, deal with the work conditions of migrants. The International Convention on the Protection of the Rights of All Migrant Workers and members of their Families was adopted by the General Assembly in 1990 and is expected to come into force shortly. It stipulates that migrant workers must not be held in slavery or servitude and that forced labor must not be demanded of them. The drafting history of the Convention reveals little political support from the major western destination countries.

2.5.9 Other Relevant Rights including Economic, Social and Cultural Rights

Violations of these rights occur at various stages of the trafficking cycle. For example, violation of the right to education, to inherit and own property and the right of opportunity to gain a living through work freely chosen or accepted all contribute to individual vulnerability to trafficking and related exploitation. Violation of civil and political rights may occur during the transportation process, for example the right to liberty and security of the person as well as to freedom of movement.

2.6 International Refugee Law

Two important questions arise for this branch of law:

- (i) Is a trafficked person, as a matter of principle, entitled to seek and receive asylum?
- (ii) Under what circumstances, if any, could the act of trafficking itself consist of persecution under the refugee convention and therefore be considered as a ground for the granting of refugee status?

The answer to the first question is that it is not (legally) possible to deny a person refugee status solely because they were trafficked into the country. As to the second question, further study is required to determine the link between the persecution requirement and current trafficking practices.

2.7 Developments in International Humanitarian Law and Criminal Law

International humanitarian law does not specifically address the issue of trafficking, however, it does identify and prohibit certain acts which will inevitably be connected to trafficking in times of conflict, for example enforced prostitution and slavery. The ICC Statute identifies trafficking and associated offences. The constituent acts of “crimes against humanity” include “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other forms of sexual violence of comparable gravity” (Article 7(1)(g)).

Part Three: Recent Legislative and Policy Initiatives

Part three of the background paper examines recent legislative and policy initiatives – including the Palermo Trafficking Protocol, the SAARC Convention and the Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the UN High Commissioner for Human Rights.

3.1 The Palermo Trafficking Protocol

In November 2000 the UN General Assembly adopted three instruments designed to form the basis of a new international legal regime to fight transnational organized crime: The *Convention Against Transnational Organized Crime* is the ‘parent’ instrument and is supplemented by two additional treaties (protocols), dealing respectively with *Smuggling of Migrants* and *Trafficking in Persons – Especially Women and Children*.

The stated purpose of the Trafficking Protocol is two-fold: first, to prevent and combat trafficking in persons, paying particular attention to the protection of women and children; and second, to promote and facilitate cooperation to this end among States Parties (Article 1). Application of the Protocol is limited to situations of international trafficking involving an organized criminal group (Article 4). States Parties are obliged to criminalize trafficking and related conduct as well as to impose appropriate penalties (Article 3). As with the Convention, the obligation to criminalize defined conduct will have the additional effect of promoting uniformity in national anti-trafficking legislation amongst States Parties.

Points of significance to note:

- The Protocol contains a number of important protection, repatriation and prevention provisions, however most of these are not binding on States Parties.
- Another weakness of the Trafficking Protocol is the absence of any guidance on the process by which trafficked persons are to be identified.
- The protocol contains extensive provisions relating to law enforcement and border patrol.
- Implementation of the new legal distinction between trafficked persons and smuggled migrants is likely to be difficult and controversial. Potential problems include the greater administrative burden for states dealing with trafficked persons rather than smuggled migrants (the Smuggling Protocol makes no provision for smuggled migrants to remain in the country of destination) and that the definition of migrant smuggling is sufficiently broad to apply to all irregular immigrants whose transport has been facilitated.

3.2 The SAARC Convention

The SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution was adopted in January 2002. The stated purpose of the Convention is to promote cooperation amongst SAARC countries to effectively deal with the prevention, interdiction and suppression of trafficking and the repatriation and rehabilitation of victims. State Parties are to make trafficking a criminal offence, and one which is extraditable if possible, and if not possible, State parties are to ensure that offending nationals are prosecuted and punished by their own courts. The Convention contains detailed provisions on mutual legal assistance designed to improve cooperation in relation to investigations, inquiries, trials and other proceedings. Protection and assistance to victims are framed within the context of repatriation.

A number of Human Rights NGOs and women's groups throughout South Asia have expressed concern over a number of provisions of the Convention including:

- The definition, which appears to conflate trafficking and prostitution, and also limits trafficking to women and children and to prostitution;
- The Convention generally treats women and children equally, making no allowance for the relative greater agency of women and the particular circumstance of children; and
- The Convention provides for the automatic repatriation of trafficked persons to countries of origin – with no consideration of their safety and the added human rights violations it may expose such persons to.

3.3 The Recommended Principles and Guidelines on Human Rights and Human Trafficking issued by the UN High Commissioner for Human Rights

The Recommended Principles and Guidelines were released in July 2002 and were designed to promote and facilitate the integration of a human rights perspective into

national, regional and international anti-trafficking laws, policies and interventions. While the Recommended Principles and Guidelines are not legal texts, this does not discount the possibility that certain aspects of them (i) are based upon established customary rules of public international law; and/or (ii) reiterate norms contained in existing international agreements.

Part Four: National Situations and Responses to Trafficking in Regional countries with National Human Rights Institutions

Part four of the background paper (pp 69 – 92) outlines relevant legislation, government initiatives, NGO activities and the work of National Human Rights Institutions in the relevant countries with regard to the issue of trafficking.

Part Five: Conclusions and Possible Recommendations

Part five of the background paper discusses a range of possible conclusions and recommendations that the Advisory Council of Jurists may wish to consider.

5.1 Conclusions on the International Legal Issues

The international legal position on trafficking is far from settled and developments in this area have been uneven and inconsistent. The connection of trafficking with controversial issues such as migration and prostitution has contributed to the complex situation. Instruments which are invoked in support of the prohibition of slavery reflect, arguably, protective and paternalistic views of social relations which are difficult to align with securing the human rights of women. Another difficulty is applying international legal norms to non-State actors. Despite these difficulties, existing human rights law does provide a base from which to secure dignity and justice for trafficked persons.

5.2 Possible Recommendations for Further Action

5.2.1 Educating about human rights and human trafficking

Key target groups for sensitization and training in the human rights aspects of trafficking include public officials such as police, prosecutors, the judiciary, immigration officials and consulate staff as well as civil society groups including the media, educators, NGOs and community leaders.

5.2.2 Monitoring and Advising Governments

National Institutions (NHRIs) could undertake a review of relevant domestic laws, possibly using the UN High Commissioner's Recommended Principles and Guidelines. In addition to anti-trafficking legislation, attention should be paid to laws relating to immigration, emigration and prostitution; as well as extraterritorial legislation and laws

relating to birth registration and citizenship (to ensure that trafficked persons may exercise their right to return home).

NHRIs could also provide policy advice to governments on trafficking and on issues related to it, for example the education of girls and the development of codes of conduct in relevant industries such as tourism, media and communications.

5.2.3 Investigating Human Rights issues connected to Trafficking

NHRIs should ensure that the public is aware that they may lodge a complaint in relation to trafficking and related abuses. NHRIs should also be aware that trafficked persons are illegal immigrants, and target appropriate communication channels accordingly. An inquiry into trafficking in the member country may provide useful information in this regard.

5.2.4 Working Together

The critical link between trafficking and human rights makes NHRIs especially relevant players in relation to this issue. In some instances, NHRIs cooperating together may well be able to provide important leadership to other key players such as police, judicial and immigration authorities. The follow-up to any recommendations will be critical to their success. The APF and its member institutions could decide to contribute, substantively, to the development of international law as it relates to trafficking, as well as endorsing the Recommended Principles and Guidelines.