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INTRODUCTORY NOTE

It is with pride that the United Nations Asia and Far East Institute for the Prevention of Crime and the Treatment of Offenders (UNAFEI) offers to the international community Resource Material Series No.62

This volume contains the work produced in the 122nd International Training Course that was conducted from 2 September to 24 October 2002. The main theme of this Course was, “The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants.”

Human trafficking and smuggling of migrants is increasingly a serious world-wide concern. Many factors have led to its proliferation, including the growing disparity between the developing and developed countries; political persecution; and natural disasters. At the same time rapid globalization in transport and commerce and the involvement of organized criminal groups have added to its growth. Trafficking and smuggling in human beings has not only led to the disruption of established immigration policies of destination countries but also poses a threat to the fundamental human rights of the persons concerned. The exploitive nature of the trafficking often amounts to a modern form of slavery which victimizes the poorest and weakest, namely women and children. Moreover the increasing involvement of organized crime groups remains largely unchecked allowing them to make huge profits which have in turn been used to finance other criminal activities.

In recognition of the gravity of the current situation the international community has taken steps in recent years to control it. In 1999 the United Nations Center for International Crime Prevention and the United Nations Interregional Crime and Justice Research Institute developed the Global Programme against Trafficking in Human Beings. In 2000 the General Assembly of the United Nations adopted the Convention against Transnational Organized Crime (the TOC Convention) which was accompanied by two important protocols i.e. “Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children” and “Protocol against the Smuggling of Migrants by Land, Sea and Air”. This course sought to analyze the current situation, identify problems in detection, prosecution and punishment and explore effective ways to tackle trafficking and smuggling. This Course was part of UNAFEI's continuing commitment to the general theme of transnational organized crime.

In this issue, papers contributed by visiting experts, selected individual presentation papers from among the Course participants, and the reports of the Course are published. I regret that not all the papers submitted by the Course participants could be published. Also, I must request the understanding of the selected authors for not having sufficient time to refer the manuscripts back to them before publication.

I would like to pay tribute to the contributions of the Government of Japan, particularly the Minister of Justice and the Japan International Cooperation Agency, and the Asia Crime Prevention Foundation for providing indispensable and unwavering support to UNAFEI's international training programmes. Finally I would like to express my heartfelt gratitude to all who so unselfishly assisted in the publication of this series; in particular, the editor of Resource Material Series No.62, Mr. Simon Cornell (Linguistic Adviser) who so tirelessly dedicated himself to this series.

February 2004

A handwritten signature in black ink, appearing to read 'Kunihiko Sakai', with a stylized, flowing script.

Kunihiko Sakai
Director of UNAFEI

RESOURCE MATERIAL SERIES
No. 62

Work Product of the 122nd International Training Course
“THE EFFECTIVE ADMINISTRATION OF CRIMINAL
JUSTICE TO TACKLE TRAFFICKING IN HUMAN
BEINGS AND SMUGGLING OF MIGRANTS”

UNAFEI

VISITING EXPERTS' PAPERS

THE GLOBAL CHALLENGE OF HUMAN TRAFFICKING & SMUGGLING

*Farooq Azam**



I. BACKGROUND

Cross-border migration of people has been continuously on the rise, and its proper management is one of the greatest challenges of this century. Conservative estimates suggest that about 160 million people were living outside their country of birth in year 2000, compared to 120 million in 1990. However, cross-border migrants (people living outside their country of origin) as a proportion of world population have not changed much, increasing from 2.2% in 1965 to 2.8% in 2000.

Although this shows that more than 97% of the people prefer to stay in their home country, the increasingly large number of international migrants itself is becoming a management challenge for most governments. While more than half of the international migrants (55%) remain within the same geographical region as their country of origin, about 45% are absorbed by a small number of developed countries. The trends also show that migrants mainly remain in neighboring countries, or in the same region. For instance, labor migration from Asian countries, with the exception of China, from 1975 to 1994 reveals that less than 10% of the migrants actually went outside the Asian continent (IOM, 2000, p.6).

Asia has the largest number of international migrants, followed by European and North American regions. The countries in Africa, Latin America and Oceania have relatively lesser numbers of migrants. Five major developed countries actually give permanent residence status to about 1.2 million immigrants annually. The United States officially admits about 800,000 immigrants a year, Canada 200,000, Australia 75,000, Israel 65,000 and New Zealand 35,000 (Martin and Widgren, 20002, p.4). The East and South East Asia region plays host to some of the largest cross-border people movements in the world, much of which is irregular in nature.

Normally, the decision to leave one's country to settle or work in another country is a difficult one. People generally move for either economic or non-economic reasons. In the economic reasons are included the demand-pull and supply-push factors, the former relating to the destination country and the latter to the country of origin. In addition, the economic migration is facilitated by community networks that exist both in the destination country and the country of origin. Non-economic factors include family unification and conditions threatening the safety and lives of people in the origin countries.

A. Demographic Change and Migration

Profound demographic changes are taking place all over the world that stimulate international migration. Fertility rates are declining, but many developing countries continue to experience high population growth. In developed countries, on the other hand, fertility rates have declined so much that trends for decline in total population are becoming obvious. This evidently has implications for labour shortages in developed countries. The United Nations has pointed towards the trend of aging, where especially countries experiencing significant decline in population growth rate would move towards having an increasing share of population aged 60 years and above. Worldwide, the population in this age group is projected to increase from 600 million in late 1990s to around 2 billion in 2050 (United Nations, 2001). This would mean that for the first time in history there would be more old people in the world population compared to children. In general, countries in the west are more likely to have older populations while countries in the east would still have younger populations. In all likelihood,

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therefore, such drastic demographic developments would lead to migration between countries on an increased scale.

The current demographic trends in both Europe and Asia suggest that in all likelihood, Africa will be a major source of migrants during the current century. In fact, there are already a significant number of African migrants present in Europe mainly due to the historic links and geographical proximity, which explain the predominant presence of Algerians in France and of Moroccans in Mediterranean Europe. The historic ties and community networks would be mainly instrumental in channeling further immigrants from Africa to Europe in the next few decades, particularly during 2020-2050 when the demand for migrant workers in Europe is likely to rise sharply (Feld, 2000). According to the Council of Europe, at the beginning of 2000, there were about 21 million “foreigners” (people living outside their country of origin holding a foreign passport) living in Europe including 12.9 million from European countries, 3.4 million from African countries and 1.5 million from Asian countries. The biggest non-European communities were Moroccan (1.2 million), Algerian (670,000) and American (360,000) (Council of Europe, 2000). This number would increase significantly with the inclusion of immigrants who have acquired the nationality of their country of residence.

B. Feminization of International Migration

According to recent estimates, men constitute 52.5% of the international migrants, women being 47.5%. The proportion of women migrants is 50% in developed countries and 46% in developing countries. The lowest proportion of female migrants is found in the Middle East. There has, however, been increasing feminization of migration in recent times with more female migrants working as principle wage earners. According to an estimate, about 1.5 million Asian women were employed overseas in the mid 1990's. As women gain greater access to education in developing countries and their share of the labour market increases, there will be a decline in fertility. But this would also mean more women becoming part of the migration flows, not as dependents of male bread-earners-that traditionally has been the dominant trend, but as migrant workers. For example, the proportion of female migrant workers in the total number of migrant workers from Sri Lanka abroad rose from 33% in 1986 to 65% in 1999. In 2000, the proportion of women among migrant workers from Philippines was 70% (Omelaniuk, 2002).

C. Voluntary and Forced Migration

International migration could be classified in to two categories: voluntary migration and forced migration. The voluntary migration consists of people crossing their national borders in search of employment or for studies, and family reunification or other personal reasons. The forced migration is characterized by people escaping persecution, conflict, natural or created disasters, ecological or environmental degradation and other situations endangering their lives, security, freedom or livelihood. Also included in the forced migration are the trafficking of persons and human smuggling. Although in some cases it is difficult to distinguish between the two types of migration, the categorization is important as international instruments and national laws have different provisions to deal with each of these types of migration.

The voluntary migration consists of both regular and irregular migrants. In the case of labour migration, for instance, many labour receiving and labour sending countries have established systems and procedures to guide and manage the migration process. Other countries experiencing migration lack such systems. But even in cases where such systems are enforced the regular migration is often accompanied by irregular or unauthorized migration. Until recently, for instance, Malaysia housed an estimated 800,000 to one million irregular migrants, mainly from Indonesia and the Philippines. There are between 1-1.5 million irregular migrants in Thailand, mainly from Myanmar (80%), Lao PDR (10%) and Cambodia (10%).

II. IRREGULAR MIGRATION : TRAFFICKING AND SMUGGLING OF HUMANS

Two particularly repugnant forms of irregular migration are human smuggling and trafficking in persons. It is important to distinguish between the two forms, as they have different consequences from the point of view of the laws of destination as well as transition and source countries and, therefore, for the migrants involved themselves. In simple terms, smuggling involves taking migrants to the

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promised destination for earning profits, and trafficking includes the same operation as smuggling but is accompanied by subjecting the victims to slavery-like conditions and/or forced prostitution.

Irregular migration, particularly of labour, creates and reinforces the conditions conducive especially to human smuggling¹. The presence of demand factors and the absence or inadequacy of the systems for regular/legal migration in destination countries lead to the adoption of irregular channels. As migrants themselves are generally not in a position to thwart the border control arrangements, a role for third parties having this capacity is thus created. As smuggling operations generally involve crossing more than one border, the groups that undertake such operations tend to be highly organized. The migrants are charged sizeable sums depending on the destination country and the route involved. The instances of human smuggling have been growing recently, directed mainly towards Europe, Australia, the Middle East and the United States. Migrants are smuggled across borders in sealed containers and fragile boats, and in many instances lose their life due to the excessive risks involved.

III. THE MAGNITUDE OF THE TRAFFICKING PROBLEM

The trafficking in persons² mainly involves young women, girls and children who are smuggled across borders and made to work under extremely exploitative conditions. Due to the secretive nature of the trafficking phenomenon, it is extremely difficult to provide accurate estimates of the stock and flows anywhere in the world. The Trafficking in Persons Report (TIP Report) released by the United States government in June 2002 estimates the number of persons trafficked in 2001 as between 700,000 to 4 million. This of course is a very broad range, and underlines the extreme difficulties in estimating the number of victims with any accuracy, given the hidden nature of the criminal operations involved. Other global estimates of the number of victims trafficked annually range from approximately one to four million. According to the International Organization for Migration, the number of victims trafficked both internally and across national borders in 1997 was four million. The United States government also estimates that about 50,000 women and children are trafficked annually for sexual exploitation into the United States, which is also used as a transit country by the traffickers.

It is estimated that around 300,000 trafficked women, mostly from East European and African countries, are currently working as prostitutes in Western Europe alone. These women are promised jobs as waitresses etc. but are forced into prostitution once they arrive in Western Europe. They are also deprived of their passports and other documents and are continuously harassed by the traffickers (Boudreaux, 2001, quoted in Martin and Widgren, 2002).

Estimates suggest that nearly one-third of the global trafficking trade, or about 200,000-225,000 women and children, are trafficked annually from South-East Asia. However, most of this trafficking occurs within the region itself, about 60%, to major regional cities while 40% takes place to the rest of the world. Of the 50,000 women and children estimated to be trafficked annually to the United States, approximately 60 per cent originate from South-East Asia, making this region the most important source region in the world for victims of trafficking to the United States.

IV. MAIN CAUSES OF TRAFFICKING

Countries having economically and socially vulnerable communities are greatly susceptible to traffickers. High incidence of poverty and unemployment and an absence of economic opportunities provide traffickers ideal opportunity to lure the people with promises of employment and higher wages

¹ The United Nations Convention Against Transnational Organized Crime defines human smuggling as: "the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident".

² The United Nations Convention Against Transnational Organized Crime defines human trafficking as: "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or the use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power of position 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 purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

in more prosperous countries. In addition, people running away from civil unrest, internal armed conflict, and natural disasters fall prey to these organized criminal groups. Some social or cultural practices that assign a low social status of women and girls also contribute to their vulnerability and make them susceptible to trafficking.

Besides these push factors, strong pull factors including demands for commercial sex and cheap labour operate in destination countries. These factors are exploited by traffickers for large profits. It is estimated that the trafficking and smuggling operations generate profits of about US\$ 7 billion annually for these organized groups. Unlike the trafficking of drugs, this business in humans is less risky as in many countries penalties for this crime are rather mild. In addition, corruption among law enforcement officials in many countries helps the traffickers to operate without much difficulty.

V. DIMENSIONS OF TRAFFICKING

Trafficking in persons is a multi-dimensional issue. Significantly, it is a migration, labour, criminal, health and human rights issue and, therefore, needs to be addressed at all these fronts. The transnational character of trafficking also means that origin, transit and destination countries must work together to effectively deal with this issue.

A. Trafficking as a Migration Issue

The destination countries usually view the issue of trafficking as the one associated with irregular/illegal migration. The trafficked victims are treated as illegal migrants that should be quickly deported. Measures adopted by states include visa restrictions and stricter border controls, and even increased restrictions on foreigners within the country. Victims of trafficking are thus criminalized and the state is viewed as the victim, in need to protect itself against such national security threats as illegal migration.

The origin countries pay little attention to the fate of their citizens working in other countries, and to make the vulnerable communities aware of possible exploitation by organized criminal groups.

B. Trafficking as a Labour Issue

It is seen that lack of employment opportunities and hard working conditions in origin countries can drive people, especially women, to seek work in foreign countries, thereby becoming vulnerable to traffickers. In destination countries, trafficked victims, including children, are made to work under hard and exploitative conditions and subjected to forced sex work, domestic work and organized begging. Issues relating to child and forced labour are relevant here.

C. Trafficking as a Criminal Issue

Trafficking as a criminal problem has especially been emphasized due to the involvement of transnational organized crime that not only abuses and exploits persons, but also undermines national and international laws and structures. The role of criminal justice system and criminal law, in the fight against trafficking, is central here. This entails legislative reforms involving higher penalties and more stringent laws, training of law enforcement officials, and establishing and strengthening interagency, regional and international cooperation for the fight against international organized crime.

The effectiveness of a criminal system, however, critically depends on the extent of law enforcement. Due to corruption the enforcement remains weak and the criminal system becomes ineffective at combating trafficking. Besides, where women are themselves criminalized as illegal migrants or as workers in, for example, prostitution, they have no incentive to report abuse to the police as they then may face arrest and expulsion. This problem though has been partly addressed by introducing clauses in the criminal law relating to victim assistance and witness protection.

D. Trafficking as a Human Rights Issue

Women and children, who are the main victims of trafficking, are amongst those who most need their human rights protected and promoted. By defining trafficking as a violation of human rights, states, as the protectors of human rights in their territory and of their citizens, are held responsible for

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the fight against trafficking. This entails a legal obligation of governments to work towards eliminating trafficking.

VI. INTERNATIONAL EFFORTS

The enormous scale of trafficking around the globe requires cooperative efforts to solve this problem and bring relief to its many victims. These efforts need cooperation at bilateral and multilateral levels among various governments, and also between governments and civil society, including NGOs. It requires coordination between the relevant government agencies, as well as coordination at a local level. Destination countries must work with transit and source countries not only to prevent trafficking but also to help with the reintegration of trafficking victims back into their home societies.

Many international instruments are now available to deal with numerous issues relating to trafficking through international cooperation. These include the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, which supplements the UN Convention against Transnational Organized Crime and was adopted by the UN General Assembly in November 2000. Governments that sign and ratify this Protocol make a commitment to criminalize trafficking, protect its many victims, and prevent future trafficking. To date, 105 countries have signed the Protocol.

Two other international instruments including International Labor Organization (ILO) Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, and the Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography, address the sale of and trafficking in children. The ILO Convention 182 requires that countries take steps to protect children from the worst forms of child labor, such as prostitution and pornography, and facilitate their access to free basic education.

Some countries have also introduced minimum standards for cooperation with other countries to combat trafficking in persons. The United States promulgated such an Act in 2000, which is also linked to the bilateral cooperation and assistance. The minimum standards and associated regulations under the Act are given in Appendix A.

A. Regional Cooperation

A number of initiatives exist at the regional level that support efforts at forging regional cooperation in dealing with various migration issues, including irregular migration of which human smuggling and trafficking in persons are sub-sets. The main course adopted is to facilitate regional dialogue processes that have the potential to lead to bilateral or multilateral agreements on migration management. These regional consultative processes thus complement the deliberations of more formal and institutionalized bodies including the United Nations and European Union, and regional bodies such as the ASEAN and SAARC.

Some of the main regional dialogue processes include the following:

1. **Bangkok Declaration on Irregular Migration:** This declaration was adopted by a ministerial conference of 18 countries, held in Bangkok in April 1999, entitled "International Symposium on Migration: Towards Regional Cooperation on Irregular/Undocumented Migration". The participants called for multilateral efforts to combat irregular migration including trafficking in persons, and to strengthen the national capacities and systems for regular migration. The IOM Regional Mission in Bangkok is entrusted with the follow-up of the Declaration.
2. **Dakar Declaration:** The Declaration was adopted by the West African Ministerial Meeting on the Participation of Migrants in Development, held in October 2000. Twenty-three countries participated in the meeting. A follow-up process has since been put in place. The Declaration mainly spells out measures for the protection of migrants and improving benefits of migration for the origin countries, through the use of remittances and insertion of highly skilled migrants into the economies of their home countries.

3. **North-South Cooperation on Migration and Development (5+5 Dialogue):** A dialogue was started in 1990, involving 5 countries each of the Arab region and Western Europe, for identifying and implementing measures to maximize development benefits to the origin countries.
4. **Puebla Process:** The Regional Conference on Migration was held in 1996 in Mexico, involving 11 countries of the Latin American region. The conference agreed on measures to deal with migration issues in the region including irregular migration, human rights of migrants, trafficking in persons, and migration and development, and technical cooperation between states to improve management of these issues. The states agreed on a Plan of Action in 1997, which was reviewed and revised in 2000. The Process has been working well with most of the goals included in the Plan of Action being achieved.
5. **Lima Declaration:** A meeting of 11 South American states on Migration, Integration and Development was held in July 1999, leading to the Lima Declaration. The delegates agreed to undertake systematic efforts towards monitoring and analyzing migration issues in the region, in order to find solutions and implement measures that are consistent with the interests of the countries concerned.
6. **Inter-governmental Consultations on Asylum, Refugees and Migration Policies in Europe, North America and Australia (IGC):** This is an informal consultative process involving 16 countries and 3 concerned bodies including IOM, UNHCR and the European Union. Created in 1985, the main issues discussed under this process are policy responses to the growing number of asylum seekers and to improve asylum application procedures including minimizing its abuse, and addressing the problem of population displacement. IGC has a permanent Secretariat that was established in 1990.
7. **Inter-governmental Asia-Pacific Consultations on Refugees, Displaced Persons and Migrants (APC):** This is another informal consultation process involving 31 countries of the Asia-Pacific region, as well as IOM and UNHCR. Established in 1996, the main purpose of the consultations is to highlight and develop understanding of issues relating to migrants, refugees and displaced persons.
8. **Bali Process:** A Ministerial conference on People Smuggling, Trafficking in Persons and Related Transnational Crime held in Bali in February 2002, brought together some 53 countries (38 participant countries and 15 observers) and 14 International Agencies to discuss the need for a multi-lateral approach to address transnational crime. The meeting was jointly sponsored by Indonesia and Australia. The Conference identified specific areas for intervention and established two ad-hoc Working Groups to follow-up its recommendations. These Working Groups are led by Thailand and New Zealand, focusing on policy, legislation and law enforcement issues, and on information sharing, secondary movements and regional processes, respectively. The overall goal of these Working Groups is to yield concrete results in the respective areas, involving the introduction of specific measures nationally and regionally to effectively address the issues of people smuggling and trafficking in persons. One of the Working Groups has been instrumental in developing minimum standards for legislative reforms to combat trafficking and smuggling, as given in Appendix B, against which the state of current national legislation will be assessed by various governments involved in the process.

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APPENDIX A

**MINIMUM STANDARDS UNDER THE UNITED STATES GOVERNMENT
TRAFFICKING VICTIMS PROTECTION ACT
(DIVISION A OF PUBLIC LAW 106-386)**

The Act defines “minimum standards for the elimination of trafficking”, which are summarized as follows:

- 1) The government should prohibit trafficking and punish acts of trafficking.
- 2) The government should prescribe punishment commensurate with that for grave crimes, such as forcible sexual assault, for the knowing commission of trafficking in some of its most reprehensible forms (trafficking for sexual purposes, trafficking involving rape or kidnapping, or trafficking that causes a death).
- 3) For knowing commission of any act of trafficking, the government should prescribe punishment that is sufficiently stringent to deter, and that adequately reflects the offense’s heinous nature.
- 4) The government should make serious and sustained efforts to eliminate trafficking.

The Act also sets out seven criteria that “should be considered” as indicia of the fourth point above, “serious and sustained efforts to eliminate trafficking.” Summarized, they are:

- 1) Whether the government vigorously investigates and prosecutes acts of trafficking within its territory.
- 2) Whether the government protects victims of trafficking, encourages victims’ assistance in investigation and prosecution, provides victims with legal alternatives to their removal to countries where they would face retribution or hardship, and ensures that victims are not inappropriately penalized solely for unlawful acts as a direct result of being trafficked.
- 3) Whether the government has adopted measures, such as public education, to prevent trafficking.
- 4) Whether the government cooperates with other governments in investigating and prosecuting trafficking.
- 5) Whether the government extradites persons charged with trafficking as it does with other serious crimes.
- 6) Whether the government monitors immigration and emigration patterns for evidence of trafficking, and whether law enforcement agencies respond appropriately to such evidence.
- 7) Whether the government vigorously investigates and prosecutes public officials who participate in or facilitate trafficking, and takes all appropriate measures against officials who condone trafficking.

The Act also states three factors that the Department is to consider in determining whether a country is making significant efforts to bring itself into compliance with these minimum standards. Summarized, these considerations are: 1) the extent of trafficking in the country; 2) the extent of governmental noncompliance with the minimum standards, particularly the extent to which government officials have participated in, facilitated, condoned, or are otherwise complicit in trafficking; and 3) what measures are reasonable to bring the government into compliance with the minimum standards in light of the government’s resources and capabilities.

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The Tiers

Tier 1

The governments of countries in Tier 1 fully comply with the Act's minimum standards. Such governments criminalize and have successfully prosecuted trafficking, and have provided a wide range of protective services to victims. Victims are not jailed or otherwise punished solely as a result of being trafficked, and they are not summarily returned to a country where they may face hardship as a result of being trafficked. In addition, these governments sponsor or coordinate prevention campaigns aimed at stemming the flow of trafficking.

Tier 2

The governments of countries in Tier 2 do not yet fully comply with the Act's minimum standards but are making significant efforts to bring themselves into compliance with those standards. Some are strong in the prosecution of traffickers, but provide little or no assistance to victims. Others work to assist victims and punish traffickers, but have not yet taken any significant steps to prevent trafficking. Some governments are only beginning to address trafficking, but nonetheless have already taken significant steps towards the eradication of trafficking.

Tier 3

The governments of countries in Tier 3 do not fully comply with the minimum standards and are not making significant efforts to bring themselves into compliance. Some of these governments refuse to acknowledge the trafficking problem within their territory. On a more positive note, several other governments in this category are beginning to take concrete steps to combat trafficking. While these steps do not yet reach the appropriate level of significance, many of these governments are on the path to placement on Tier 2.

Penalties

According to the Act, beginning with the 2003 report, countries in Tier 3 will be subject to certain sanctions, principally termination of non-humanitarian, non-trade-related assistance. Consistent with the Act, such countries would also face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions, specifically the International Monetary Fund and multilateral development banks such as the World Bank. All or part of the bilateral and multilateral assistance sanctions may be waived upon a determination by the President that the provision of such assistance to the country would promote the purposes of the Act or is otherwise in the national interest of the United States. The Act provides that the President shall waive those sanctions when necessary to avoid significant adverse effects on vulnerable populations, including women and children.

APPENDIX B

**PROPOSED ISSUES FOR CONSIDERATION BY THE LEGISLATION DEVELOPMENT
WORKSHOP**

Expert Group II - Planning Meeting, Bangkok, 13-14 June 2002

TRAFFICKING

1. Legislation

Is there specific legislation dealing with trafficking in persons?

2. Definition

What is the legal definition of trafficking in persons in any of your country's legislation?

Does the definition cover trafficking in all persons, or only trafficking in certain categories of persons (for example women or children)?

3. Criminalization

Is trafficking in persons criminalised in your country?

What types of trafficking-related acts are criminalised in your country's legislation i.e. including conspiracy, attempt, aiding, abetting, being involved in the business of, harbouring, corruption of public officials etc.?

Is trafficking a crime if the acts take place outside your country (does the legislation have extraterritorial application)?

Does your legislation address the procurement, production or use of fraudulent documents in relation to trafficking in persons?

Is the trafficking in persons considered "organised crime" under your legislation?

What is the penalty applicable to the crime of trafficking in persons and how does this compare with penalties applicable to other crimes?

Does the legislation define the responsibility of commercial carriers of trafficked persons?

SMUGGLING OF MIGRANTS

4. Legislation

Is there specific legislation dealing with smuggling of migrants?

5. Definition

What is the legal definition of smuggling of migrants?

6. Criminalization

Is smuggling of migrants into your country a crime in your country?

Is smuggling of migrants into a third country a crime in your country?

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What types of smuggling of migrants related acts are criminalized in your country's legislation i.e. including conspiracy, attempt, aiding, abetting, being involved in the business of, harbouring, corruption of public officials etc.?

Does your legislation address the procurement, production or use of fraudulent documents in relation to migrant smuggling?

Is the smuggling of migrants a crime if the acts take place outside your country (does the legislation have extraterritorial application)?

Is the smuggling of migrants considered "organised crime" under your legislation?

What is the penalty applicable to the crime of smuggling of migrants and how does this compare with penalties applicable to other crimes?

Does the legislation define the responsibility of commercial carriers of smuggled migrants?

Does your country's legislation make a distinction between smuggling of migrants for profit and not for profit?

INVESTIGATION AND COOPERATION

7. Confiscation

Does your legislation provide for the confiscation of the proceeds of trafficking and smuggling?

Does your legislation provide for the confiscation of vessels and other tools used in trafficking and smuggling, including vessels used to transport trafficked or smuggled persons once they are within your country?

Does your country have money-laundering legislation that applies to proceeds of trafficking and smuggling?

8. Extradition

Does your country have a specific extradition act?

Does your country extradite offenders of trafficking related offences?

Does your country extradite offenders of smuggling related offences?

Does your country need a treaty as a basis for extradition?

Does your law prohibit extraditing your own nationals?

Are there any barriers to extradition for trafficking or smuggling in your country?

9. Mutual Legal Assistance (MLA)

Does your country have a specific act for mutual legal assistance?

Does your country need a treaty-level agreement as the basis for MLA?

Does your country require dual-criminality for providing MLA?

Does your country provide MLA in trafficking cases?

Does your country provide MLA in smuggling cases?

Are there any barriers to your country providing MLA in trafficking or smuggling cases?

10. Cooperation

What types of law enforcement cooperation can be provided to or requested from other countries?

Does your country's legislation provide for sharing of information on traffickers and smugglers and/or the methods and routes used by traffickers and smugglers, and with which countries does your country have information sharing arrangements?

11. Special Investigation

Does your country's legislation allow wiretapping, electronic surveillance or other special investigative techniques for trafficking and smuggling related offences and for its use in legal proceedings?

DEALING WITH TRAFFICKED AND SMUGGLED PERSONS

12. Assistance to Trafficked and Smuggled Persons

Does your legislation provide protection for trafficked or smuggled persons?

Does your legislation provide for assistance to be given to the trafficked or smuggled persons?

Does your legislation provide for special assistance to women or children who have been trafficked?

Does your country's legislation allow trafficked or smuggled persons to remain in your country temporarily during criminal investigations and proceedings?

Are trafficked or smuggled persons prosecuted on charges of prostitution, other criminal activities or illegal entry?

13. Repatriation

Does your country's legislation provide for the safe repatriation of trafficked or smuggled persons?

Does your country's legislation provide for the acceptance without undue delay and with due regard to the safety of trafficked or smuggled persons?

14. Prevention

Does your legislation prescribe activities for the prevention of trafficking and smuggling?

Does your country have a national plan of action to prevent trafficking of persons (including women and children) or smuggling of migrants?

FOLLOW-UP SCHEDULE

Noting that this process is voluntary, and in preparation for the proposed workshop in September:

- Countries that wish to may comment on the above material and questions, preferably by the end of June
- Countries that wish to may circulate responses to the questions, preferably by the end of July

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- Countries may suggest elements that need to be considered in relation to a definition of migrant smuggling and people trafficking. Countries that wish to may circulate these proposals, preferably by the end of July.

THE UNITED NATIONS PROTOCOL TO PREVENT, SUPPRESS AND PUNISH TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN: A TOOL FOR CRIMINAL JUSTICE PERSONNEL

*Natalia Ollus**



I. INTRODUCTION

This paper will present the main characteristics of the United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children. I will focus briefly on the background to the Protocol and the phenomenon of trafficking in persons, before going into detail with the Protocol. I will also present some comments to the articles of the Protocol. Finally I will look at some examples of combating trafficking in persons and the implementation of the Protocol mainly from the European region.

I will in this paper talk broadly about trafficking in persons. However, I will give special attention to trafficking in women and children for the purpose of sexual exploitation.

II. TRAFFICKING IN PERSONS - CHARACTERISTICS AND BACKGROUND TO THE UN PROTOCOL

A. Characteristics of Trafficking in Persons

Trafficking in human beings includes illegal transport of people for the purposes of labour exploitation and sexual exploitation. Trafficking in persons is not limited to the sex industry and prostitution, but includes also different forms of bonded labour.

Trafficking in persons is a global phenomenon. Although it seems to have increased in intensity during the last 10-15 years, it is not a new phenomenon. Slavery and trafficking in persons, either for sexual exploitation or for labour, has taken place in different forms throughout history. The recent growth seems to be facilitated by increased globalisation and modern communication techniques. There are, however, also those that argue that the recent focus on trafficking in women and children for sexual exploitation is partly a result of an increased focus on the phenomenon, rather than a result of an increasing problem. It is difficult to obtain figures on trafficking in persons. The United Nations Centre for International Crime Prevention has set up a database on global trends, cross national routes and the volume of trafficking in persons and smuggling of migrants, as well as data on victims and offenders of trafficking and responses of criminal justice systems to this criminal activity. The database is not yet publicly available. This type of database is the first of its kind and will be used to facilitate development of strategies to combat trafficking both nationally and globally.

Increasing global economic disparity, poverty, lack of education prospects, lack of adequate employment opportunities and the disruption of traditional livelihoods contribute to the existence of trafficking in persons. Trafficking in persons for the purpose of sexual exploitation is also directly linked to the increasing proportion of women among the world's poor and to women's disadvantaged social, economic and legal situation in many countries.

Trafficking does not only exist due to an increase in supply of potential persons to be trafficked. The global demand for cheap and undeclared labour as well as the demand for women and children in the globalised sex market together with large numbers of potential immigrants form a lucrative ground for traffickers to engage in this crime.

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Trafficking in persons has become a very profitable business for different organised crime groups. Trafficking in persons is practised alongside the more traditional forms of crime such as drug trafficking and the illegal arms trade. In many instances trafficking in persons has overtaken the more traditional forms of crime since profits tend to be bigger and risks lower. So far, penalties have also been relatively lenient.

B. Approaches to Trafficking

Trafficking in persons, especially trafficking in women for sexual exploitation, can be approached from a variety of perspectives. Many actors, including authorities and non-governmental organisations around the world, are currently paying immense attention to the problem of trafficking in persons. This means that there are many simultaneous and sometimes opposed views on the same phenomenon. The following approaches and the analysis of them outline some of the complexities of dealing with trafficking in persons, especially trafficking in women¹.

1. Migration Problem

In this approach, the focus is on trafficking in persons as a problem of migration. Preventive measures in this approach include monitoring the movement of persons e.g. through increased border control, through increased control of travel documentation or through preventing migration in the first place.

Trafficking in persons is indeed linked to migration. Many persons who are trafficked are persons who themselves wish to migrate, e.g. for better work opportunities. Trafficking can thus be a form of irregular migration. However, trafficking in persons differs from illegal migration in that persons who are trafficked are by definition exploited in the country of destination. They are not only taken over the border but also exploited. Illegal or smuggled migrants, on the other hand, are usually only assisted over the border. The transporters might expose the smuggled migrants to inhumane treatment during the trip, but their contact is usually cut when the migrants reach their destination. While smuggling of migrants can be seen as a crime against state sovereignty, trafficking is foremost a crime against the individual and only secondarily a crime against state sovereignty. In seeing trafficking only as a form of migration, there is a risk of insensitivity towards individual victims at the expense of protecting the state from undesired aliens.

2. Criminal Problem

This approach sees trafficking in persons from a penal viewpoint, treating trafficking as a crime. The aim in the criminalistic approach is to introduce more effective ways of investigation, prosecution and punishment of trafficking in persons. This approach also aims at intensifying police and judicial co-operation in order to facilitate prosecution of international criminal groups that organise trafficking in persons. The criticism against the criminal approach focuses on the insensitivity towards the victims of trafficking. In some instances the victims' security and protection is placed in a subordinate position to the interests of prosecution and trial. This means that victims of trafficking are seen foremost as witnesses or informants, rather than as victims of a serious crime. On the other hand, victims of trafficking might themselves be proven guilty of offences, e.g. migration offences, drug crimes, or as recruiters for trafficking². A trafficked person might therefore simultaneously be an offender, an illegal migrant, a victim, and a witness. This complexity poses a challenge for the criminal justice authorities dealing with trafficking in persons.

3. Human Rights Problem

In this approach, trafficking in persons is seen as a violation of human rights. In this approach, all measures to prevent and combat the phenomenon, as well as measures to support and assist victims, are guided by basic human rights principles, guaranteeing the rights of the victims of trafficking. There are many different advocates for the human rights approach. These diverging viewpoints bring up some quite controversial issues for public policy. Some advocates, for example, see trafficking for sexual exploitation as closely linked to prostitution. They see both prostitution and trafficking as forms of sexual exploitation. Other advocates focus solely on the coercive aspects of trafficking and forced

¹ See Askola, H. (2001) and Strandberg, N. (1999).

² See Cordero, T. and Facio, A. (2001).

prostitution. Some advocates, however, do not take a stance for or against prostitution, but only look at the violating aspects of trafficking. All human rights approaches, however, share the notion that trafficking is a serious human rights violation, and that all measures to combat trafficking should guarantee the rights of the victim. The human rights perspective regards trafficking as exploited migration, simultaneously stating that trafficked persons should not be seen as migration criminals.

4. Labour Issue Problem

This approach sees trafficking in persons as a result of foreign migrants' poor status. In this view, trafficking in persons should be prevented through guaranteeing workers' rights for migrants also in the countries of destination. If the working conditions were secured, these persons need not be trafficked in the first place but could instead travel as migrant workers. This approach can be criticised for not focusing on the wishes of the individual persons being trafficked. All trafficked persons do not want to work in the field they end up in. Although it is important to improve working conditions, this might merely function as a treatment of the symptoms, not a remedy to the problem itself. And, it does not necessarily solve the problem of smuggling of migrants.

5. Health Problem

This approach focuses on the side-effects of trafficking in persons. Trafficking especially for the purpose of sexual exploitation is seen as a contributor to the spreading of diseases, especially sexually transmitted ones. In this perspective the focus is on the trafficked persons as transmitters of disease and as a threat to the health of the rest of the population. Preventive measures include awareness raising about sexually transmitted diseases. In some instances, it also includes health control of women in prostitution. This approach can be criticised for only seeing the consequences of trafficking and not the fate of the victims. Additionally, women who are trafficked and held in control by the traffickers do not necessarily benefit from the health measures introduced. This approach also mainly sees trafficking mainly from the perspective of the receiving countries.

The approaches above can roughly be categorised into strategies that repress trafficking in persons, and strategies that focus on victim support. Both strategies can be beneficial and sometimes they can be combined. States and non-governmental organisations that fight trafficking in persons use different approaches depending on their ideologies and goals. In some instances, their interests are opposed. Non-governmental organisations tend to highlight victims' rights, while States are more interested in combating organised crime and protecting State sovereignty, be it sometimes at the expense of individual victims. We as representatives of the criminal justice system are mainly interested in the criminal justice and perhaps also the migration approach to trafficking in persons. However, trafficking is a complex problem, and it seems that it is best combated through combining forces between different organisations and advocates.

United Nations Member States also have diverging interests when it comes to combating trafficking in persons. While some countries mainly function as countries of origin, others are countries of transit and others countries of destination. In some instances, a country can be all three at once. This poses different problems as well as interests for a State in dealing with the problem of trafficking in persons.

III. PREVIOUS MEASURES TO TACKLE TRAFFICKING IN PERSONS, ESPECIALLY WOMEN AND CHILDREN

Trafficking in women has been targeted by the international community for many decades. The United Nations has in many of its sub-bodies developed Declarations, Protocols, and Resolutions to target trafficking in persons. Some of these documents do not explicitly talk about trafficking, but focus instead, for example, slavery or women's rights.

A. Human Rights Instruments

The following is a list of some international, mainly human rights focused instruments directly or indirectly related to trafficking in persons, especially trafficking in women and children³.

³ See Askola, H. (2001).

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The 1948 Universal Declaration of Human Rights

- Acknowledges the equality, liberty, security, freedom, also from slavery or servitude, of all human beings

The United Nations International Covenant on Civil and Political Rights (1966)

- Forbids slavery and slave-like practices

The United Nations Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others (1949)

- Combined earlier UN Conventions from the three first decades of the 20th Century on the suppression of slave trade, “white slave traffic” and traffic in women and children
- Provides an obligation to punish traffickers, even if the person being exploited has consented to the trafficking

1926 Slavery Convention and the 1956 Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery

- Criminalises the act of “enslaving another person” and requires states to co-operate in combating slavery

The Convention on the Elimination of All Forms of Discrimination against Women

- Mentions trafficking in women and encourages States to take legislative and other measures “to suppress all forms of traffic in women and exploitation of prostitution of women”

B. Resolutions of the United Nations Commission on Crime Prevention and Criminal Justice

The United Nations Commission on Crime Prevention and Criminal Justice has especially recently adopted several resolutions related to trafficking in persons. The list below gives an overview of some of the resolutions.

1994	Organised Smuggling of Migrants International Trafficking in Minors
1995	Combating the Organised Smuggling of Illegal Migrants
1996	Violence Against Women International Trafficking in Children
1997	Violence Against Women
1998	Draft Resolution on Illegal Migrants and Trafficking in Persons
1999	Resolutions concerning the Palermo convention

These resolutions formed some of the background to the elaboration of the new instruments for combating different forms of organised crime.

C. Background to the UN Protocol - Increase in Organised Crime and the Need for Increased International Co-operation

1. Organised Crime and Trafficking in Persons

Although trafficking in persons, especially in women for the purpose of prostitution, has been on the international agenda for many decades, many national laws have been poorly equipped to combat the

new forms of trafficking in persons. During the last decade of the 20th Century it seemed that the extent of trafficking in persons was increasing and that it took new forms. This change was linked to the increase in transnational organised criminal activities.

The technological developments during the late 20th Century opened up internationalisation and interdependence among businesses. In the same manner as legal businesses expanded internationally, so did criminal enterprises⁴. Trafficking in persons has become a profitable business for different organised crime groups. Trafficking in persons is practised alongside the more traditional forms of crime such as drug trafficking and the illegal arms trade. In many instances trafficking in persons has overtaken the more traditional forms of crime since profits tend to be bigger and risks lower. So far, penalties have also been relatively lenient.

As an example of the profits involved, according to some estimates in Thailand, women who wish to migrate end up paying up to 40 000 US\$ to traffickers. These women find themselves in indentured service, most often in prostitution. Although they may earn up to 7 000 US\$ per month, they often receive very little of that money themselves⁵.

Governments realised the threats posed by the increase in transnational crime during the late 1990's and started to develop a new international instrument for combating transnational organised crime.

2. The Elaboration of the Convention and the Protocols

The Declaration adopted at the meeting of the Ministers of Interior and Justice in Naples in 1996 called for actions to combat organised crime. As a result, Poland drafted a first outline for a convention against organised crime. The General Assembly founded an Ad-hoc Committee in 1998 with the aim to draft the Convention against Transnational Organised Crime. The first meeting for the development of the convention took place in Warsaw, Poland in February 1998. During the Seventh Session of the Commission on Crime Prevention and Criminal Justice in 1998, Argentina suggested drafting a new convention against trafficking in minors. On the suggestion by Greece, Member States decided to expand the scope of the instrument and included all forms of trafficking in persons. Women and children were given special attention, as they tend to be especially vulnerable to this form of crime. It was agreed that the instrument would be elaborated as a Protocol to the UN Convention against Transnational Organised Crime. The Convention includes three optional Protocols:

- Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime⁶
- Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime
- Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

The Committee convened at the United Nations in Vienna eleven times. Some 120 countries participated in the negotiations together with a large group of non-governmental organisations. The negotiations for the Trafficking Protocol were finalised in October 2000. The General Assembly of the United Nations adopted the Convention together with two Protocols⁷ on 15 November 2000. The Trafficking Protocol was opened up for signatories at the Signing Conference in Palermo, Italy in December 2000. Almost eighty states signed it at that occasion. Currently (as of 15 August 2002) there are 106 signatories to the Protocol and 14 ratifications. The Protocol enters into force when forty Member States have ratified it.

⁴ Adamoli, S. et al (1998).

⁵ Conference Report of the two Transatlantic Workshops on Human Smuggling

⁶ Henceforth referred to as the (Trafficking) Protocol.

⁷ I.e. the Trafficking Protocol and the Illegal Migrants Protocol. The Firearms Protocol was adopted in May 2001.

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The Trafficking Protocol is primarily a law enforcement instrument but it also encompasses the protection of victims. The concept adopted during the negotiations for the Protocol aims at keeping a balance between the penal and the human rights perspective to trafficking. It combines traditional law enforcement measures with measures for victim protection. While criminalising the traffickers, the Protocol highlights that prosecution and punishment should not endanger the safety of the victim.

IV. OUTLINE OF THE TRAFFICKING PROTOCOL

The Protocol is divided into three main parts:

Part I - General Provisions (articles 1-5)

- purpose (art. 2)
- definition (art. 3)
- scope of application (art. 4)
- criminalisation (art. 5)

Part II - Protection of Victims of Trafficking in Persons (articles 6-8)

- assistance and protection of victims (art. 6)
- status of victim in receiving state (art. 7)
- repatriation of victims (art. 8)

Part III - Prevention, Co-operation and Other Measures

- prevention of trafficking in persons (art. 9)
- information exchange and training (art. 10)
- border measures (art. 11)
- security and control of documents (art. 12)
- legitimacy and validity of documents (art. 13)

The final part (art. 14-20) of the Protocol deals with the technicalities of the document.

V. PRESENTATION OF THE PROTOCOL⁸

A. General Provisions (articles 1-5)

The first article of the Protocol outlines the relationship between the Convention on Organized Crime and the Protocol. The relationship is built on three principles.

- 1)The Protocol supplements the Convention and shall be interpreted together with the Convention
- 2)The provisions of the Convention shall apply, mutatis mutandis, to this Protocol unless otherwise provided herein
- 3)The offences established in article 5 of the Protocol shall be regarded as offences as established in accordance with the Convention

The relationship between the Protocol and the Convention was rather difficult to establish during the negotiations. The Protocol was negotiated in parallel with the Convention. The negotiations proceeded at a different pace causing difficulties in determining the scope of the application of the Protocol. Some Member States e.g. were of the opinion that the Protocol should not only cover criminal acts falling under the definition of organised crime, but should also include acts committed by one or two persons.

In order to become a Party to the Protocol, States must first be a Party to the Convention. The Protocol contains several additional provisions to the Convention. The principle of mutatis mutandis

⁸ For the full document as well as for the interpretative notes and reports of the ad-hoc group, please visit the website of the United Nations Office of Drug Control and Crime Prevention at: www.odccp.org

means that the criminalisations that are covered by the Protocol should be applied as such. In implementing the Protocol, the Convention is thus subordinate to the Protocol if the Protocol states something additional to the Convention.

The Trafficking Protocol has three main purposes as outlined in article 2, namely to:

- **prevent and combat trafficking** in persons paying particular attention to women and children
- **protect and assist the victims** of such trafficking, with full respect for their human rights; and
- **promote co-operation** among States in order to meet those objectives

Besides combating organised crime and promoting international co-operation, victim protection is a crucial element of the Protocol. The definition of trafficking as outlined in article 3 defines a variety of practices and actors that can be involved in trafficking. Trafficking in persons means:

- the recruitment, transportation, transfer, harbouring 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 giving or receiving payments or benefits to a person in control of the victim,
- for the purpose of exploitation.

The definition of exploitation includes the:

- exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

This is the first time the international community agreed on a common definition of trafficking in persons. The crime of trafficking in persons consists of three parts. The crime involves a measure which is carried out through one or some of the means listed above, for the purpose of exploitation of a person. The definition furthermore outlines the minimum meaning of exploitation.

The definition was perhaps the most difficult aspect of the Protocol during negotiations. On one hand the definition is regarded to include many elements that are difficult for prosecutors to prove. On the other hand, the Protocol is seen to provide a good ground for prosecuting all forms of trafficking since it outlines also the more subtle forms of threat and coercion that leads a person to become a victim of trafficking. The reference to “abuse of power or of a position of vulnerability” is in the interpretative notes of the Protocol defined as referring to a situation where the person has no real and acceptable alternative but to submit to the abuse. This definition recognises that trafficking can also occur without any actual threat or use of force - simply that a person who might not have had any means to refuse being trafficked should still be regarded as a victim of trafficking.

The definition of exploitation is one of the more controversial aspects of the Protocol. Countries have different laws and views on prostitution. During the negotiations, some participants, including non-governmental organisations and States, wanted to classify all prostitution as trafficking in persons (referring to the definition above - abuse of power or position of vulnerability) while others wanted to include only forced labour, slavery or servitude in the definition. Consensus was reached with defining trafficking as involving slavery, forced labour and servitude, and leaving exploitation of the prostitution of others and sexual exploitation undefined. The Protocol addresses the exploitation of the prostitution of others and other forms of sexual exploitation only in the context of trafficking in persons. The interpretative notes highlight that States may interpret the article according to their domestic legislation.

Exploitation also includes, in the Protocol, servitude and the removal of organs. The removal of organs was included on the request by some states. The interpretative notes further clarify that the removal of organs should not include the removal of organs from a child with the consent of a parent or guardian for legitimate medical reasons. Furthermore, illegal adoption also falls under the scope of the Protocol.

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Article 3 (b) deals with the consent of the victim.

3 (b) The consent of a victim of trafficking in persons to the intended exploitation set forth in subparagraph (a) of this article shall be irrelevant where any of the means set forth in subparagraph (a) have been used.

This definition states that the consent of the victim of trafficking is irrelevant to the prosecution of the traffickers. The article recognises that although some of the persons who are trafficked are aware that they may be used for labour or prostituted in the country of destination, their initial “consent” is a result of their vulnerable or difficult situation and should not dispense the traffickers from legal responsibility. Even though a person would initially agree to travel abroad, to work in bad conditions for little salary and with little freedom, the person would still be a victim of trafficking if the trafficker uses force, deception, abduction or the victim’s position of vulnerability. During negotiations, some participants called for limiting the definition to only those persons who could prove that they had been forced into trafficking without their own consent. If this definition had been adopted, the focus would have been more on the victim of trafficking than on the actions of the traffickers. The current definition leaves instead the burden of proof on the State or the public prosecutor in accordance with domestic law. In order to reach convictions, prosecutors must therefore show that the trafficker used coercion and fraud as outlined in article 3 to exploit the victim. The interpretative notes add that there should be no restrictions on the right of the accused persons to a full defence and to the presumption of innocence.

Subparagraphs (c) and (d) of article 3 deal with children as victims of trafficking in persons. Any recruiting, transportation, transferral, harbouring or receipt of a person under 18 for the purpose of exploitation is considered as trafficking. The Protocol thus criminalises all forms of exploitation of children. Although the Protocol puts special emphasis on children, some non-governmental organisations have criticised the Protocol for not addressing adequately the special needs of children. They call State parties to also incorporate additional relevant provisions from other UN conventions dealing specifically with the rights of children⁹.

Article 4 deals with the scope of application and article 5 with the criminalisation.

4. The Protocol shall apply, except as otherwise stated herein, to the prevention, investigation, and prosecution of the offences as established in accordance with article 5 of this Protocol, where those offences are transnational in nature and involve an organised criminal group, as well as to the protection of victims of such offences.

The application of article 4 establishes who can be prosecuted and what is the scope of the crime. The crime should be transnational and should involve an organised criminal group¹⁰.

However, article 4 should be read together with article 5, defining the scope of criminalisation.

5.1 Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally.

Although article 4 covers only offences that are transnational in nature and involve an organised criminal group, article 5 does not include these two links. Thus national law can criminalise trafficking regardless of whether the conditions of transnationality and involvement of criminal organisations are

⁹ See e.g. the International Human Rights Network’s joint NGO submission to the eighth-session of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.

¹⁰ The definition of transnational in nature, and organised criminal group is outlined in articles 2 and 3 of the Convention on Organised Crime. An organised criminal group is a structured group of three or more persons with the aim of committing one or more serious offences in order to gain financial or other material benefit. A transnational offence should be committed in more than one State, or planned in more than one State, or involving an organised criminal group, or has effects in another State.

met. In interpreting the Protocol States can ask for international assistance and co-operation from other State Parties with reference to the Protocol only in cases that involve transnational elements and organised crime groups. However, States may commit themselves to a broader scope of criminalisation and also include crimes committed by a single perpetrator within the borders of that nation.

Additionally, article 5 requires State Parties to criminalise also:

- attempting to commit a trafficking offence
- the participation as an accomplice in such an offence, and
- the organisation or directing of other persons to commit such an offence

The legal provisions of article 5 are mandatory. The subparagraph defining attempt caused some discussion during negotiations. Different penal systems have diverging views on attempt. The interpretative notes thus highlight that “attempting to commit an offence” can in some countries be understood as acts perpetrated in preparation for an offence, and also those acts carried out in an unsuccessful attempt to commit the offence, when those acts are punishable under domestic law. It is also important to recognise that “participating as an accomplice” ideally should not cover the victims of trafficking.

The first part of the Protocol clearly outlines that trafficking can and should be considered as a separate offence in criminal provisions.

B. Part II - Protection of Victims of Trafficking in Persons (articles 6-8)¹¹

The second part of the Protocol deals extensively with measures to protect victims. During the negotiations for the Protocol this section received intense attention especially from human rights organisations and non-government organisations working with victims of crime.

Article 24 of the Convention covers the protection of witnesses who give testimony, and in appropriate cases, also provide protection for the relatives of the witnesses. Article 25 additionally provides for the assistance and protection of victims. The Protocol contains some more specific measures for protection. The Protocol recognises that victims of trafficking are specially vulnerable and need specific protection. According to article 6 of the Protocol States shall protect the privacy and identity of victims of trafficking in persons, including by making legal proceedings relating to such trafficking confidential. The Protocol thus recognises the importance of protecting the identity of trafficking victims facing retaliation from traffickers. However, the provision does not contain any legal obligations. If possible, States should therefore not reveal the identity of trafficked persons e.g. in connection to trials. The implementation of this provision may call for legislative changes in the State Parties. Currently, for example in Finland the trial documents contain very detailed information on the persons involved in the trial, including addresses and contacts. The accused, the plaintiff and the witness alike have the right to this information. In order to accommodate the safety of victims of trafficking, this practice needs to be reconsidered e.g. so that only authorities can get access to this type of sensitive information.

Additionally, the Protocol highlights the need of trafficked persons to receive information on relevant court and administrative proceedings. Victims should also receive assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings.

Although this subparagraph is also conditional, it can be understood to require States to provide information to victims in their own language through a translator. It also entails that victims should have the right to legal assistance in order to ensure that their views are presented at trial. This is especially the case if investigation, prosecution, and sentencing require the presence of the victim. However, the paragraph should preferably be interpreted to cover any victims, not just those that take part in criminal proceedings as witnesses.

¹¹ For further discussion on this section, please see Van Dijk, J. (2002).

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Furthermore, States in co-operation with civil society shall consider to provide for the physical, psychological and social recovery of victims or trafficking in persons. This shall include:

- Appropriate housing;
- Counselling and information, especially concerning legal rights, in a language that the victim can understand;
- Medical, psychological and material assistance; and
- Employment, education and training opportunities.

This subparagraph recognises that victims of trafficking in persons have some basic needs. The paragraph also outlines multi-agency co-operation as a model for providing victim assistance. In many instances non-governmental organizations are better equipped to deal with victims in a sensitive way than authorities, be it in sheltering them, giving legal and psychological counselling and training. It is necessary for States to co-operate with civil society in providing victim assistance.

This paragraph does not give any legal obligations to State Parties although the Convention itself does contain a provision on mandatory, general assistance to victims. During the negotiations for the Protocol participants could not agree on mandatory assistance. It was mainly some of the countries of destination that opposed this obligation referring to its financial implications. As a consequence, the types of assistance as set forth in this subparagraph shall be applicable only to persons who are in a State Party's territory. Thus the measures of assistance are applicable to the receiving state only until the victim has returned to his or her state of origin. Ideally, in implementing the Protocol, all involved States should have an obligation to take care of the victims, also those that have been repatriated. Wealthier countries should preferably provide assistance for poorer countries in fulfilling the demand of providing services for victims.

States shall especially take into account the age, gender and special needs of victims of trafficking in persons, notably the needs of children. The measures taken should be both gender and child sensitive in terms of housing, education and care. This provision shows that States recognise that trafficking in persons has specially harmful effects on women and children.

Furthermore article 6 calls States to provide for the physical safety of victims of trafficking in persons while they are within its territory. This paragraph demands States ensure the safety of all victims of trafficking, not just those who are witnesses at trials. Contrary to the Convention (referring to witnesses), the Protocol does not mention protection of the relatives or other persons close to the victim. Neither does the Protocol create obligations for countries of destination to cater for the protection of victims, or their relatives, once they have been repatriated from the receiving country¹². In theory, States should co-operate in order to share the responsibility of keeping the victims safe and also provide for security measures after repatriation. Furthermore, it is known that both victims and their relatives or friends can risk retaliation both before and after repatriation.

Additionally, article 6 also outlines compensation measures for victims. States shall ensure that there are measures within the legal system that offer compensation for damages the victim has suffered. While States may provide compensation, the Protocol does not guarantee the right for victims to compensation. The Protocol does not either address who should provide this compensation - the State or the offender. Depending on domestic legislation, this can be solved in different ways. Some countries have, for example established funds for victims of trafficking, financed partly by confiscated assets¹³.

In addition to victim assistance, the Protocol defines the status of victim in receiving States in article 7. Each State shall consider adopting measures that permit victims of trafficking in persons to remain in its territory, temporarily or permanently, in appropriate cases. In many countries, victims of

¹² For a critique of this paragraph and for other comments to the Protocol, see The Annotated Guide to the Complete UN Trafficking Protocol by the International Human Rights Law Group. See also Raymond, J. (2001) for comments to the Protocol.

¹³ See Van Dijk, J. (2002), p. 22.

trafficking are deported when detected or after trial. This paragraph highlights the need to provide some residence rights for victims. During negotiations there were extensive discussions on how long a victim has the right to stay in a country of destination. There was general consensus on permitting the victim to stay at least during the court process. Subparagraph 7.2 adds that States shall give appropriate consideration to humanitarian and compassionate factors. Since the Protocol does not oblige states to provide for the safety of victims after repatriation, the “humanitarian and compassionate factors” should preferably receive thorough consideration and should be used for providing victims in jeopardy with a permit to stay.

In addition to protection of victims, and the right to stay in the country of destination, the Protocol deals with repatriation of victims of trafficking. The Protocol facilitates the repatriation of victims through article 8. The State Party of which a victim of trafficking in persons is a national or in which the person had the right of permanent residence at the time of entry shall facilitate and accept, with due regard for the safety of that person, the return of that person without undue or unreasonable delay.

The definition of permanent residence caused some debate during negotiations. Some legislation does not recognise the concept of permanent residence. However, permanent residence was agreed to be better than mere residence. Many victims who have been away for long periods of time might not anymore have a residence in their country of origin while they usually do have the right to permanent residence.

States should take into consideration the safety of the person when repatriating a victim of trafficking. States should also consider the other provisions of the Protocol, such as victims’ rights to justice before repatriating a victim of trafficking. When a State returns a victim, the return shall, besides being safe, also consider the status of possible legal proceedings, and shall preferably be voluntary (art. 8.2). However, the interpretative notes from the negotiations outline that the return can also be involuntary. In repatriating victims States should preferably return only those that want to return, and those whose safety can be guaranteed and whose legal proceedings in the receiving country have been finalised. It is thus necessary to consider the risk of retaliation to the victim and his or her relatives before repatriating him or her. The article shall furthermore be without prejudice to victims’ rights in existing domestic law and to any bilateral or multilateral agreements that govern the return of victims of trafficking.

The rights of the receiving countries are quite strongly outlined in the next paragraphs. In order to facilitate repatriation the Protocol requires countries of origin to co-operate with receiving States in providing information on the nationality of victims (article 8.3) and in issuing travel documents to enable the person to travel and re-enter (article 8.4).

C. Part III - Prevention, Co-operation and Other Measures

Article 9 of the Protocol requires States to implement comprehensive policies and measures to prevent and combat trafficking in persons and to protect victims, especially women and children from revictimisation (subparagraph 9.1). It is known that in some cases persons who have been trafficked and then deported to their country of origin may face being trafficked again. Hence the implementation of the Protocol, including the implementation of the provisions dealing with repatriation, should aim at minimising the risk of revictimisation.

Furthermore, states shall engage in research, information and mass media campaigns and social and economic initiatives in co-operation with non-governmental organisations and other relevant organisations. Mass-media campaigns have successfully been organised in several countries. E.g. the International Organization for Migration is currently carrying out a large campaign in central and Eastern Europe for raising the awareness about trafficking in women.

Countries shall also strengthen measures to ease the factors that make especially women and children vulnerable to trafficking. States shall thus fight poverty, unemployment and lack of equal opportunity (paragraph 9.4). The Protocol also calls States to discourage the demand that fosters all forms of exploitation of persons, especially women and children, that leads to trafficking (para 9.5). The two last paragraphs of article 9 complement each other in preventing trafficking. It is crucial to both

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address the root-causes of trafficking as well as the demand that maintains trafficking. The demand-side can be approached in different ways. One interpretation of this paragraph is that the demand for trafficking for the purpose of sexual exploitation could be reduced through addressing the clientele of prostitution. Additionally, trafficking for the purpose of labour could be reduced through discouraging the demand for migrant workers.

Article 10 deals with information exchange between authorities and training of authorities. Law enforcement, immigration and other relevant authorities shall, as appropriate, co-operate with one another by exchanging information, in order to be able to determine:

- whether individuals crossing borders with travel documents belonging to another person or without travel documents are perpetrators or victims of trafficking (para 10a)
- the types of documents that are used in crossing an international border for the purpose of trafficking (para 10b)
- the means and methods used by organized criminal groups, such as recruitment, transportation, routes and links, and possible measures to detect them (para 10c)

As regards training of authorities, States should provide training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on measures of prevention, prosecution of offenders and protection of victims. The training should also encourage co-operation with civil society and non-governmental organisations. It is important to note that the training shall take into account human rights aspects and be child- and gender sensitive.

Article 11 deals with border measures:

- Without prejudice to international commitments in relation to the free movement of people, State Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking in persons.

This paragraph calls for a careful balance between freedom of movement and border controls. While States strengthen border control measures to get at traffickers and illegal migrants, it should not happen at the expense of victims' human rights. Training of officials will be crucial in reaching this balance.

Article 11 furthermore requires States to adopt measures to prevent transport operated by commercial carriers. States shall also oblige such commercial carriers or companies to ascertain that all passengers have necessary travel documents and provide for sanctions in case of violations of this obligation. These sanctions could include, for example that the commercial carrier is obliged to return any persons who are found to possess inadequate travel documents.

States can also permit the denial of entry or revocation of visas of persons who are known to engage or suspected of engaging in trafficking crimes. Finally, States shall consider strengthening co-operation among border control agencies by establishing and maintaining direct channels of communication.

Article 12 deals with the security and control of documents, obliging States to:

- ensure that their travel or identity documents cannot easily be misused, falsified or unlawfully altered, replicated or issued
- ensure the integrity and security of these documents and to prevent their unlawful creation, issuance and use

The final article (article 13) of the Protocol deals with the legitimacy and validity of documents. At the request of another State, a State Party shall verify within a reasonable time the legitimacy and validity of travel documents that are suspected of being used for trafficking in persons.

The final part of the Protocol includes the savings clause. The savings clause is similar to the clause in the Migrants Protocol. The Protocol shall not affect any other rights, obligations or responsibilities of

States and individuals under international law, including humanitarian, human rights and refugee laws. Also the notion of non-refoulement is included in the Protocol. Victims of trafficking shall thus have the right to seek asylum in a State regardless of whether they entered the country illegally or not. Furthermore, the Protocol shall not be interpreted in a way that is discriminatory to victims of trafficking.

The final articles cover the normal provisions, including settlement of disputes, ratification measures, entry into force, amendment, and denunciation.

VI. REQUIREMENTS AND SUMMARY

A. Summary of the Aims of the Trafficking Protocol

In preventing trafficking in persons, the Protocol obliges states to:

- criminalise trafficking
- investigate, prosecute and convict traffickers
- undertake border control measures

States shall also, within their means:

- provide measures to protect and assist victims
- train law enforcement and border control officials
- inform and educate victims and potential victims, as well as the general public
- co-operate with each other and civil society to reach these aims

Although the international community has attempted to combat trafficking in persons already earlier, it has failed to do so effectively. The strength of the Trafficking Protocol lies in that it provides requirements for legal measures, through combining the human rights and law enforcement approaches to trafficking in persons. The successful implementation of the Protocol, however, requires a careful balance between these two approaches.

B. Main Ratification Requirements

The main requirement for ratification of the Trafficking Protocol involve the following:

State parties shall:

- Criminalise all forms of trafficking in persons as outlined in article 3
- Undertake legislative or other measures to prevent the misuse of commercial carriers for the smuggling of migrants (article 11)
- Make it a legal obligation for commercial carriers to check passenger travel documents (article 11)
- Prepare travel documents that are difficult to misuse, falsify, alter or replicate (articles 12-13)

It is mainly the criminalisation of all forms of trafficking in persons which will require some legislative changes or additions in many Member States. Additionally, States need to include the victim-centred approach in the ratification of the Protocol.

VII. SOME EXAMPLES FROM THE EUROPEAN REGION

In the European region, trafficking in persons is currently receiving increasing political priority. The activities include both the prevention of trafficking in women and children for the purpose of sexual exploitation, and trafficking in human beings for the purpose of labour exploitation.

The European Union's actions to combat trafficking in human beings are, since 1999, explicitly mentioned under Title VI in the Amsterdam Treaty covering police and judicial co-operation. As a measure to criminalise trafficking, the Council of the European Union adopted a framework decision on combating trafficking in human beings in June this year¹⁴. The aim of the decision is to set up

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commonly adopted definitions and penalties in the Member States' legislation. These definitions are largely based on the definitions of the UN Protocol.

Sweden is one of the EU member states that has most recently ratified the UN Protocol. From 1 July 2002, the Swedish legislation criminalises trafficking for the purpose of sexual exploitation where the crime of trafficking involves the crossing of borders. The penalties range from between 2 and 10 years of imprisonment. Attempted trafficking, preparations for trafficking or the endorsement of trafficking is also criminalised in the Swedish legislation.

The newly established unit of EUROJUST, composed of national prosecutors, magistrates and police officers from the EU aims at facilitating co-operation in order to support criminal investigations in organised crime cases. Combatting trafficking in persons through co-operation in investigation and prosecution is also one of its tasks.

There are also several programmes at EU level that contribute to actions aimed at supporting, assisting and protecting victims of trafficking. Many of these programmes focus on providing financial assistance for non-governmental organisations that support victims. With such EU funding non-governmental organisations have e.g. built networks for assisting victims who are repatriated and created means of support for victims both in countries of origin and destination.

Furthermore, there are also some measures to prevent trafficking through information campaigns. The Nordic and Baltic countries of Europe are currently engaged in a campaign to prevent trafficking in women. In the Nordic countries, mainly acting as receiving countries, the campaign addresses the general awareness of the population so that they recognise the existence of the problem. It also addresses clients and potential clients of prostitution, thus aiming at reducing the demand for trafficking in women. In the Baltic countries, which mainly act as countries of origin, the campaign focuses on preventing women from becoming victims of trafficking through media and school campaigns. The campaign also aims at providing recommendations for the ratification of the Protocol in the region.

The Trafficking Protocol provides some excellent guidelines for good practice. Once the Protocol enters into force we will see what effect it has on combating the organised crime groups who engage in the horrendous crime of trafficking in persons - I hope that it will have vast global effects on increasing human safety.

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PROTOCOL AGAINST THE SMUGGLING OF MIGRANTS BY LAND, AIR AND SEA, SUPPLEMENTING THE UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME: A TOOL FOR CRIMINAL JUSTICE PERSONNEL

*Natalia Ollus**

I. INTRODUCTION

This paper will present the main characteristics of the United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime. I will focus briefly on the phenomenon of smuggling of migrants and the background to the Protocol. I will then go into detail with the Protocol and its articles and comment on the main provisions. Finally, I will briefly discuss some implications for implementation.

II. SMUGGLING OF MIGRANTS

A. Reasons for Smuggling of Migrants

The smuggling of persons involves the illegal movement of migrants across international borders. The smuggling of migrants is a form of illegal migration.

The smuggling of migrants take place when three basic conditions are met:

- there are persons interested in (or lured into) international migration, be it for economic or other reasons
- who have no legal ways of migrating, hence they contact or are contacted by
- one or more persons who organise the movement of these migrants for profit

The reasons for migration include both push and pull factors. These factors are to a large extent related to the different socio-economic situations as compared between the country of origin of the migrant and the country of destination. The push factors include e.g. lack of education or job opportunities, poverty, and the disappearance of traditional livelihoods. The pull factors include e.g. higher salaries and better job opportunities in the country of destination or existing organised means of migration. The pull factors also include the possible existence of ethnic groups and communities in the country of destination into which it is easy for a migrant to integrate.

When the push and pull factors are attractive enough, a person may decide to migrate. In many instances, however, migration is difficult to undertake. Nation States cautiously regulate and control the entry and exit of people into or from their territory. This has been the case since nations started to pose duties and privileges on their nationals or residents. Although migration can be both positive and negative it nevertheless disrupts the traditional composition of the nation state. In cases where no legal means of migration are available, a person interested in migrating will have to take to illegal means.

It seems that there is a trend that illegal migrants increasingly use professional smugglers in order to migrate. It has been estimated that today more than half of all illegal migrants in the world are assisted by smugglers¹.

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¹ See Report of the Regional Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime.

B. Involvement of Organised Criminal Groups and the Development of the Protocol

It seems that illegal migration is increasing in the world today. In the European Union the estimated number of persons smuggled into the territory has increased from about 50 000 entries in 1993 to more than 400 000 entries in 1999. These figures are only estimates, based on doubling the number of persons caught at border control².

In the United States, annually more than 500 000 migrants enter the country legally. Additionally, a large number of people enter illegally. For example, the U.S. Coast Guard made over 4000 migrant interdictions at sea in 2001. This figure only includes undocumented migrants travelling by sea and does not include illegal entry across the land border or at airports. Most of the migrants entering illegally come from the south of the U.S., including from Caribbean countries. There also seems to be an increase in the number of migrants to the U.S. from Asia, especially from China³.

When control of illegal migration becomes harsher, it opens up the way for organised smuggling of migrants. When border controls are tightened, the previously simple illegal practice of crossing a border becomes a complex criminal activity, involving professional smugglers. This is the case, for example, across the U.S.-Mexican border where the migrant smuggling business is thriving.

The paradox related to the smuggling of migrants is that the more measures there are to prevent illegal entry, the more the arrangement of illegal entry becomes organised. Under current circumstances with tightened border control measures and tightened sanctions on illegal residence, there does not necessarily exist many ways for migrants interested in residence or labour to enter without the involvement of smuggling organisations.

Some researchers argue that the smuggling of migrants, especially in Europe, does not necessarily involve highly organised, large criminal groupings. Instead, it seems that the smugglers can consist only of highly professionalised, loosely grouped individuals⁴. However, there exists a clear link to organised criminal activities in human smuggling although not all smuggling organisations are highly organised or involved in transnational activities. Many known organised criminal groups, such as the Chinese, Albanian, North African and Russian organised crime groups, are involved in arranging the illegal smuggling of migrants⁵.

Migration in search of better prospects is an accepted custom. As long as there is supply in the form of groups of people who wish to migrate and demand fostering migration, people will migrate. Migration as such is thus not a problem of organised crime or a negative phenomenon as such. But, since the ways of legal migration are so few, transnational criminal groups are continuing to develop means to smuggle migrants. These organisations smuggle migrants for large profits, and do not refrain from exploiting the misery or desperation of the migrants.

Recently there has been increasing focus on the prevention of the illegal practices related to migration. The new UN Protocol to Prevent the Smuggling of Migrants⁶ stemmed from the need to develop measures to combat the organised crime that orchestrate the smuggling of migrants. The Protocol is criminal justice centred although it recognises that migration itself is not a crime and the human rights of the migrants should be protected.

The Declaration adopted at the meeting of the Ministers of Interior and Justice in Naples in 1996 called for actions to combat organised crime. As a result, Poland drafted a first outline for a convention against organised crime. The first meeting for the development of the convention took place in Warsaw, Poland in February 1998. Later that year, the General Assembly of the UN founded an Ad-hoc

² Conference Report of the two Transatlantic Workshops on Human Smuggling.

³ <http://www.uscg.mil/hq/g-o/g-opl/mle/amiostats1.htm#2000>

<http://usinfo.state.gov/regional/ea/chinaaliens/puleostory.htm>

⁴ Conference Report of the two Transatlantic Workshops on Human Smuggling.

⁵ Bruggeman, W. (2002).

⁶ Henceforth the United Nations Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime is referred to as "the Protocol".

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Committee with the aim to elaborate the international convention against transnational organised crime and three additional international legal Protocols. Austria and Italy presented a joint draft of the Migrants Protocol at the first session of the Ad Hoc Committee in Vienna in January 1999. The instrument was elaborated as one of the three optional Protocols to the UN Convention against Transnational Organised Crime⁷.

The Committee convened at the United Nations in Vienna eleven times. Some 120 countries participated in the negotiations together with representatives of civil society. The negotiations for the Migrants Protocol were finalised in October 2000. The General Assembly of the United Nations adopted the Convention together with the Migrants Protocol and the Trafficking Protocol on 15 November 2000⁸. The Migrants Protocol was opened up for signatories at the Signing Conference in Palermo, Italy in December 2000. Some eighty states signed the Protocol at that occasion. Currently (as of 15 August 2002) there are 102 signatories to the Protocol and 13 ratifications. The Protocol enters into force when forty Member States have ratified it.

C. Difference Between the Smuggling of Migrants and Trafficking in Persons

Smuggling of migrants and trafficking in persons are both forms of illegal migration. There are thus both some basic similarities and differences between the two concepts.

The similarities between trafficking and smuggling are that both involve recruiting and transportation arranged by criminal networks⁹. Both phenomena include e.g. recruiters who promise better lives in countries of destination, ways of transport that utilise weak links in border control measures, corruption, and links between local and international organisers. The same organisations can be involved in both smuggling and trafficking and they often co-operate both nationally and internationally in order to facilitate their activities.

The main difference between smuggling of migrants and trafficking in persons is that trafficking is by definition for exploitative purposes. Trafficking is thus a more long-lived criminal activity than is the smuggling of migrants. The profit of smuggling in migrants comes mainly from the organisation of entry into another country while the profit of trafficking comes from both the transportation of the person being trafficked, and from the exploitation the person is subjected to. It is this long-term exploitation that yields the largest profit. Persons being smuggled often share a mutual interest with their smugglers, i.e. they wish to enter another country. This is, however, sometimes also the case in trafficking. Although the victim of trafficking might originally have consented to the trafficking, it is the exploitative characteristics that differentiates trafficking from smuggling. Trafficking in persons is thus a crime against a person, while smuggling can be regarded as a crime against state sovereignty.

III. OUTLINE OF THE PROTOCOL ON SMUGGLING OF MIGRANTS¹⁰

The Protocol covers the illegal migration taking place through sea, land or air. The aim of the Protocol is to prevent illegal migration and to punish the procurers. The Protocol, however, does not aim at limiting the free movement of people, nor does it regulate the legal entry of people. The Protocol does not either aim at criminalising the illegal migrants for being the object of smuggling.

The Protocol is divided into three main parts besides the preamble:

⁷ The three Protocols are: the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime; the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; and, the Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention against Transnational Organized Crime

⁸ The Firearms Protocol was adopted in May 2001.

⁹ For further comparison, see e.g. the International Human Rights Network's joint NGO submission to the eight session of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.

¹⁰ For the full document as well as for the interpretative notes and reports of the ad-hoc group, please visit the website of the United Nations Office of Drug Control and Crime Prevention at: www.odccp.org

Part I - General provisions (articles 1-6)

- relation with the Convention on organised Crime (art. 1)
- purpose (art. 2)
- terminology and definition (art. 3)
- scope of application (art. 4)
- criminal liability of migrants (art. 5)
- criminalisation (art. 6)

Part II - Smuggling of migrants by sea (articles 7-9)

- co-operation (art. 7)
- measures against the smuggling of migrants by sea (art. 8)
- safeguard clauses (art. 9)

Part III - Prevention, co-operation and other measures (articles 10-18)

- information (art. 10)
- border measures (art. 11)
- security and control of documents (art. 12)
- legitimacy and validity of documents (art. 13)
- training and technical co-operation (art. 14)
- other prevention measures (art. 15)
- protection and assistance measures (art. 16)
- agreements and arrangements (art. 17)
- return of smuggled migrants (art. 18)

The final part (art. 19-25) of the Protocol deals with the technicalities of the document.

IV. PRESENTATION OF THE PROTOCOL¹¹

A. General Provisions (articles 1-6)

The first article of the Protocol deals with the relation between the Convention on organised Crime and the Protocol. This relation is the same for all three optional Protocols to the Convention¹².

- 1)The Protocol supplements the Convention and shall be interpreted together with the Convention
- 2)The provisions of the Convention shall apply, *mutatis mutandis*, to this Protocol unless otherwise provided herein
- 3)The offences established in article 6 of the Protocol shall be regarded as offences as established in accordance with the Convention

The Protocol is implemented together with the Convention. The principle of *mutatis mutandis* means that the criminalisations that are covered by the Protocol shall be applied as such, e.g. regardless of whether they fulfil the definitions of organised crime as stated in the Convention. In implementing the Protocol, the Convention is thus subordinate to the Protocol if the Protocol states something additional to the Convention.

The purpose of the Protocol as stated in article 2 is to prevent and combat the smuggling of migrants, promote co-operation among States Parties to that end, while protecting the rights of smuggled migrants. Similarly to the Trafficking Protocol, the Protocol on Illegal Migrants contains a special reference to the protection of the human rights of illegal migrants.

¹¹ For the full document as well as for the interpretative notes and reports of the ad-hoc group, please visit the website of the United Nations Office of Drug Control and Crime Prevention at: www.odccp.org

¹² In order to become a party to the Protocol, a State must first be a party to the Convention (Convention article 37).

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During negotiations of the Protocol, State Parties underwent discussions on the aim of the Protocol. Some States were of the opinion that the main aim of the Protocol should be to prevent crime and not to promote human rights. However, other participants stated that some reference to the protection of migrants should be included. Especially human rights advocates were worried about the human rights violations that may face migrants in vulnerable positions. As a consequence, the Protocol includes the need to protect the rights of the migrants. However, a major difference between trafficking in persons and smuggling of migrants can be spotted in the second article. The Trafficking Protocol puts equal weight on the need to prevent the crime of trafficking and the need to protect the victims. The Migrants Protocol, on the other hand, mainly aims at preventing crime. Additionally, it does not refer to “victims” but to “smuggled migrants”.

Article 3 outlines the use of terms of the Protocol.

3 a) “Smuggling in Migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident;

b) “Illegal entry” shall mean crossing borders without complying with the necessary requirements for legal entry into the receiving State.

The Protocol thus defines illegal migration as gaining benefit through the procuring from the illegal entry of a person into a State of which the person is not a national or a permanent resident. The definition only includes “illegal entry” as a ground for defining the smuggling of migrants. Originally some States wanted to include also “illegal residence” in the definition. The definition of smuggling of migrants was therefore thoroughly discussed during negotiations for the Protocol. It can be difficult to prove illegal entry of a person afterward, especially if the documents of entry have been destroyed after entry. In such cases illegal residence would be easier to prove. However, it was agreed that it is the illegal entry into, not the stay in, another State that forms the basis for the understanding of smuggling of migrants.

The criminalisation only covers those who gain profit from organising smuggling. The interpretative notes for the official records of the negotiations highlight that the criminalisation of gaining financial or other material benefit referred to in article 3 should not cover family-members or non-governmental or religious groups who support migrants for humanitarian reasons.

Article 3 also defines “fraudulent travel or identity documents”. The fraudulent travel or identity document includes documents that have been falsely made or altered, documents that have been improperly issued, or used by someone else than the rightful holder. During negotiations there was also a discussion on the need to include only documents meant for international travel. However, the current definition includes all types of documents that are required for entering or leaving a State, or documents used for identifying a person in a State. According to the interpretative notes the fraudulent documents shall also include the filling in of stolen blank documents, forged documents and documents that were validly issued but are used by someone else than the lawful holder.

Article 4 deals with the scope of application of the Protocol and is similar to article 4 of the Trafficking Protocol.

4. The Protocol shall apply, except as otherwise stated herein, to the prevention, investigation, and prosecution of the offences as established in accordance with article 6 of this Protocol, where those offences are transnational in nature and involve an organised criminal group, as well as to the protection of the rights of persons who have been the object of such offences.

The Protocol shall be used for preventing illegal migration and for punishing those who procure it. Similarly to the Trafficking Protocol, the Protocol on Illegal Migrants highlights the need to simultaneously protect the rights of the persons who are the object of these offences. However, contrary to the Trafficking Protocol, the persons who are smuggled are not defined as victims, but as “objects of offences”. During negotiations it was agreed that it is not necessary to define the persons as victims,

although it was agreed to be necessary to include specific reference to the safeguarding of their human rights.

Furthermore, according to article 4 the Protocol is applied in a manner similar to the Trafficking Protocol. That is, the Protocol is applied to cases that involve transnational crimes and organised criminal groups according to the definition of the Convention on Organized Crime¹³. However, article 1 of the Protocol defines that the Protocol is applied *mutatis mutandis* to the Convention. Thus the criminalisations in the Protocol are applicable in their own right. When it comes to the criminalisation of the smuggling of migrants, State Parties can in their domestic legislation implement a broader scope of criminalisation and also criminalise acts that are committed by single persons within the boundaries of one State, without the involvement of any organised criminal group or transnational nature of the crime. However, when it comes to the application of the Protocol in international co-operation, State Parties can ask for assistance and co-operation from other State Parties only if the conditions of transnationality and involvement of an organised criminal group are met.

Article 5 clearly states that the illegal migrants themselves must not be held responsible for the crime of smuggling that they are object to:

Migrants shall not become liable to criminal prosecution under this Protocol for the fact of having been the object of conduct set forth in article 6 of this Protocol.

This article was included to make it explicit that no-one who has been illegally smuggled should be penalised with reference to this Protocol for the fact that they are objects of smuggling. However, the Protocol leaves it open for States in their domestic legislation to cover the possibility of criminalising smuggled migrants. The smuggled migrants themselves should not be accused of the specific crime of smuggling as defined in this Protocol. Instead, it is the smugglers who should be faced with that charge. However, most domestic legislation criminalize, for example illegal entry, use of falsified documents, possession of falsified documents, or illegal residence. A smuggled migrant can, and in most cases will, be charged domestically based on these domestic criminalisations¹⁴. However, the main problem of interpretation will arrive if a smuggled migrant is charged, for example, for aiding in the offence of smuggling or for inciting to commit the offence of smuggling. In these situations the active role of the migrant in the smuggling has to be assessed - as the safeguarding of the migrant in article 5 only defines the smuggled migrant as an object of smuggling. Once the Protocol is ratified we will have more information on how this article is implemented in practice.

Article 6 defines the scope of criminalisation, including:

- The smuggling of migrants;
- Producing, procuring, providing or possessing a fraudulent travel or identity document for the purpose of smuggling of migrants;
- Enabling a person to remain illegally

Although smuggling of migrants is defined only as the illegal entry into, not the stay in, another State, article 6 also criminalises the enabling of a person to remain illegally. Hence, the organisation or procuring of the offence of smuggling covers not only entry but also illegal stay. The interpretative notes highlight that the offences set forth in article 6 should be seen as being part of the activities of organised criminal groups. In this respect, the Protocol follows the precedent of subparagraph 34.2 of the Convention which outlines that offences “shall be established independently of the transnational nature or the involvement of an organized criminal group”. Furthermore the Protocol does not

¹³ The definition of transnational in nature, and organised criminal group can be found in articles 2 and 3 of the Convention on Organized Crime. An organised criminal group is a structured group of three or more persons (also 2 is enough) with the aim of committing one or more serious offences in order to gain financial or other material benefit. A transnational offence should be committed in more than one State, or planned in more than one State, or involving an organised criminal group, or has effects in another State.

¹⁴ It is important to note here that the reference to the criminalisation of possession of falsified documents in the Protocol only covers the act of smuggling of migrants, not illegal entry as such.

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criminalise any humanitarian support groups or family members, only organised criminal groups acting for profit.

The criminalisation of possession of fraudulent documents shall apply only to the organisers of smuggling, not to smuggled migrants who might hold fraudulent documents in order to enable his or her own smuggling.

Subparagraph 6.2 includes additional acts that shall be established as criminal offences attempting, participating as an accomplice, organising or directing others to commit an offence established in accordance with paragraph 1 of this article.

In some countries attempt can be understood as acts perpetrated in preparation for an offence, and also those acts carried out in an unsuccessful attempt to commit the offence, when those acts are punishable under domestic law. The implementation of article 6 should simultaneously consider the rights of the migrants as outlined in article 5. With reference to the earlier discussion on the possible criminalisation of the smuggled migrant, it is necessary to note that “participating as an accomplice” should not, ideally, criminalise the participation of the smuggled person as merely an object in the smuggling operation.

Subparagraph 6.3 deals with aggravating circumstances to the smuggling offences. These include circumstances that:

- endanger or are likely to endanger the lives or safety of the migrants concerned
- entail inhumane or degrading treatment, including for exploitation

The aggravating factors refer to not only the principal offence of smuggling of migrants but also to the producing of fraudulent travel documents, and to enabling a person to remain illegally in a State. During negotiations for the Protocol, a number of State Parties wished to include exploitation of the migrants as an aggravating factor. This was thoroughly discussed, as exploitation is so closely linked to the definition of trafficking in persons and the scope of the Trafficking Protocol. As a compromise, exploitation was included through referring to inhuman or degrading treatment, including certain forms of exploitation. This exploitation can be interpreted to include e.g. sexual violence targeted at female migrants which takes the form of exploitation. The exploitation is supposedly short-term and is perhaps not as systematic as the exploitation taking place in trafficking crimes. It was agreed that the inclusion of exploitation should be without prejudice to the exploitation outlined in the Trafficking Protocol. In some situations it might be difficult to establish the difference between exploitation of smuggled migrants and trafficking. However, States combating the smuggling of migrants will most likely also work towards the prevention of trafficking in persons. Hence both Protocols can and will be implemented in parallel.

The final paragraph of article 6 states that State Parties shall have the right to take measures against persons who commit acts that are offences in domestic law. Hence also smuggled migrants can, and will, be charged for crimes that are defined as a crime in the domestic legislation. This provision thus recognises that States have the right to act on their own territory according to domestic legislation. The interpretative notes furthermore highlight that the measures should be interpreted to include both criminal and administrative sanctions.

B. Part II - Smuggling of Migrants by Sea (articles 7-9)

Part II of the Protocol deals extensively with measures related to the smuggling of migrants by sea. The smuggling of migrants by sea is often more unsafe and risky for migrants than other forms of transportation. On sea, hygiene can be poor and the vessels may lack sufficient reservoirs of drinking water and food. Additionally, the treatment of the migrants by the smugglers or operators can be very violent. The smuggling by sea also places States in difficult situations when they try to take measures towards cases of smuggling. Border control for migrants arriving via land is easier as there are control points at both sides of the border. When migrants arrive by sea, the control is only in the hands of the receiving state. Furthermore, migrants may land anywhere, not just at formal points of border crossings. Additionally, in dealing with migration by sea, states must consider and respect several

international laws and regulations. The second part of the Protocol hence obliges States to adopt new provisions dealing particularly with smuggling of migrants by sea.

Articles 7, 8 and 9 in the second part of the Protocol are largely based on the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the interim measures for combating unsafe practices associated with the trafficking or transport of migrants by sea of the International Maritime Organization (IMO). The negotiations for this section of the Protocol focused largely on maritime law and the articles were scrutinised by experts in maritime law¹⁵.

One of the main aims of the Protocol is to facilitate and encourage international co-operation so that the smuggling of migrants can be prevented and combated. This co-operation is especially necessary when dealing with smuggling by sea. According to article 7 States shall co-operate to the fullest extent possible to prevent and suppress the smuggling of migrants by sea in accordance with international maritime legislation.

Article 8 deals with direct measures against the smuggling of migrants by sea. This provision covers both indirect and direct smuggling. Thus also larger ships that transport migrants on the open sea and later transfer them to smaller vessels that take them to the shore shall be included within this paragraph. This is often the case, for example, in the U.S. where there are several instances of smuggling where the migrants are transferred from larger ships to smaller pick up vessels offshore for the final ride to the U.S.

States can ask for assistance from other states in stopping a vessel which is under its flag, being used or suspected of being used for the smuggling of migrants. Furthermore, if a State suspects that a vessel under some other State's flag is engaged in the smuggling of migrants it can notify the flag State and if authorised, it can board and search the vessel and take measures with respect to the vessel and persons and cargo on board. Similarly, if a vessel is without nationality, State Parties may board and search the vessel.

The meaning of the word "board a vessel" was discussed at the negotiations for the Protocol as some delegates wondered whether it authorises the boarding of a vessel against the will of the person in charge of it. The Protocol does allow the boarding of a vessel against the will of the person in charge if the flag state authorises the measure. However, in implementing article 8 it is crucial to observe article 9 dealing with safeguard clauses.

The rest of article 8 deals with different duties, such as the duty to inform about any measures taken, the duty to respond immediately to requests concerning the registry of vessels, and the duty not to take any unauthorised measures. However, states may take measures to relieve imminent danger to the migrants themselves, or the crew members on board and the boarding parties. The use of force is excluded from this paragraph as delegations could not reach consensus. It was also feared that the reference to use of force would encourage rather than limit the use of force.

Article 9 deals with the safeguard clauses related to the measures taken in accordance with article 8 of the Protocol. Article 9 is important for ensuring that the measures are humane and legal.

The actions shall:

- ensure the safety and humane treatment of the persons on board
- take due account of the need not to endanger the security of the vessel or its cargo
- take due account of the need not to prejudice any commercial or legal interests
- ensure that any measure taken with regard to the vessel is environmentally sound.

Thus when boarding and searching a vessel in accordance with the Protocol, the persons on board shall be guaranteed their human rights. This should apply to all persons on board, regardless of

¹⁵ The interpretative notes outline that these provisions of the Protocol should not prejudice the principles, rights, obligations or responsibilities under international instruments of maritime law.

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whether they are organisers of smuggling or smuggled migrants. The environmentally sound measures that should be taken can be interpreted to refer, for example to situations where the vessel is worn-out and there is risk that it may sink, thus causing not only environmental hazards (e.g. oil leakage) but also a risk to sea traffic.

The further safeguard clauses outline the right to compensation for vessels that are damaged when no justification for the measures taken can be found (para 9.2). The responsibility of compensation should be understood to lie on the State that took the measure that damaged the vessel.

Furthermore, the measures taken in accordance with article 9 shall not interfere or affect:

- the rights and obligations of coastal States in accordance with the international law of the sea
- the authority of the flag State to exercise jurisdiction and control in administrative, technical and social matters involving the vessel

Hence, although another State can take penal action against the illegal smuggling of migrants, the flag State keeps any other authority and obligations over the vessel, its passengers and crew.

Finally, subparagraph 9.4 determines that any measures taken at sea in accordance to the smuggling of migrants by sea shall be carried out only by warships or military aircraft, or by other ships or aircraft clearly marked and identifiable as being on government service.

C. Part III - Prevention, Co-operation and Other Measures (articles 10-18)

The third part of the Protocol deals mainly with measures directed towards immigration and border control. This focus is due to the fact that the smuggling of migrants is most efficiently exposed and stopped at immigration.

Article 10 deals extensively with the information duties of State Parties in order to facilitate the prevention of smuggling of migrants. Those States with common borders or located on routes along which migrants are smuggled, shall exchange relevant information on:

- Embarkation and destination points and routes, carriers and means of transportation
- Identity and methods of organisations engaged or suspected of being engaged in smuggling
- Authenticity and proper form of travel documents
- Means and methods of concealment and transportation of persons, including unlawful alteration of travel documents
- Legislative experiences and practices
- Scientific and technological information useful to law enforcement

Additionally, States shall comply with any restrictions placed on information they receive from other States (para 10.2).

Article 11 of the Illegal Migrants Protocol deals with border measures. The wording is almost exactly the same as in the Trafficking Protocol.

Without prejudice to international commitments in relation to the free movement of people, State Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect the smuggling of persons.

The implementation of this paragraph calls for a careful balance between freedom of movement and border controls. While States strengthen border control measures to detect the smuggling of migrants, it should not happen at the expense of people's rights of freedom of movement. Nor should it compromise the human rights of migrants or other people moving across borders. At the same time, however, border control is the spot where States have the greatest chance of revealing cases of migrants smuggling. Thus States need to improve measures to detect the smuggling of migrants and to hinder the crime while simultaneously avoiding any unnecessary inconveniences to people moving across

borders, or any human rights infringements. One key to improved practice in this regard is increased and continuous training of officials.

Article 11 furthermore requires States to adopt measures to prevent transport operated by commercial carriers. States shall also oblige such commercial carriers or companies to ascertain that all passengers have necessary travel documents and provide for sanctions in case of violations of this obligation. States can also permit the denial of entry or revocation of visas of persons involved in organising smuggling. Finally, States shall consider strengthening co-operation among border control agencies by establishing and maintaining direct channels of communication.

The interpretative notes to the Protocol highlight that commercial carriers only have an obligation to determine whether the passengers have valid travel documents, not to judge the validity or authenticity of the documents. Additionally, in implementing these regulations, carriers shall not overly hinder the free movement of legitimate passengers.

Article 12 deals with the security and control of documents, and similarly to the Trafficking Protocol, it obliges States to ensure that their travel or identity documents cannot easily be misused, falsified or unlawfully altered, replicated or issued and to ensure the integrity and security of these documents and to prevent their unlawful creation, issuance and use.

Article 13 of the Protocol deals with the legitimacy and validity of documents. At the request of another State, a State Party shall verify within a reasonable time the legitimacy and validity of travel or identity documents issued or purported to have been issued in its name and suspected of being used for smuggling of migrants.

Article 14 covers training of authorities and technical co-operation between States. First of all, specialised training shall be directed to immigration and other officials. The aim of the training is both to prevent smuggling and to make sure that the officials respect the rights of the migrants and treat them in a humane way (para 14.1). As already noted, this is important in the implementation of the border measures. Additionally, States shall co-operate with each other and with other organisations and civil society to ensure that the training is adequate. The training itself is quite technical and shall include:

- Improving the security and quality of travel documents
- Recognising and detecting fraudulent travel or identity documents
- Gathering criminal intelligence - on identifying criminal groups, methods of transportation used, misuse of travel documents and means of concealment used
- Improving procedures for detecting smuggled persons
- The humane treatment of migrants and the protection of their rights as set forth in this Protocol

The training for preventing and combating the smuggling of migrants largely focuses on immigration related measures and on measures of the criminal justice system. The humane treatment of migrants is included at the very end. Contrary to the Trafficking Protocol, the Migrants Protocol does not in this article highlight the need for gender- or child-sensitive training and treatment. This reflects the understanding that the smuggling of migrants is not, contrary to trafficking, a problem that specifically affects women and children. However, it is important to note that women migrants might have special needs, e.g. medical needs, that should be covered in both the training and treatment of the migrants.

The final provision of article 14 declares that those States that have relevant expertise in the field of combating the smuggling of migrants shall consider providing technical assistance to countries of origin or transit. This provision reflects the idea that the fight against human smuggling is a shared global problem which requires international co-operation and sharing of expertise.

In article 15 the Protocol deals with other preventive measures besides those focusing on border and immigration control. Similarly to the Trafficking Protocol, the Migrants Protocol calls for awareness-raising among the public. The awareness-raising shall focus on informing the public about the criminal

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character of smuggling of migrants and about the impacts of organised criminal groups who smuggle for profit. The awareness-raising should also outline the risks such smuggling poses to the migrants themselves. The main aim with the awareness-raising is to prevent potential migrants from falling victim to organised criminal groups. It should not aim at preventing migration as such.

Article 15 also reflects some views presented during the negotiations that the problem of illegal migration should be combated at its origin. Hence countries are asked to strengthen co-operation and programmes, especially in deprived areas, to combat the socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment.

The provisions on the protection of and assistance to migrants are perhaps the most interesting paragraphs of the Protocol. Article 16.1 declares that all State Parties shall take all appropriate measures to preserve and protect the rights of persons who have been the object of smuggling. More specifically, migrants shall have the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. The right for protection only refers to those migrants that have been the object of smuggling as outlined in the Protocol. It excludes any other migrants. However, the Protocol should not be interpreted to exclude any existing obligations or rights that are not explicitly listed in the Protocol. Hence the Protocol does not limit any other obligations that States have towards the protection of migrants as outlined in other international agreements.

Additionally, States shall protect migrants from violence that may be inflicted upon them. After all, there is the danger that the organisers of the smuggling might inflict violence on migrants who, for example, reveal who was responsible for the smuggling. This provision should also include the protection from violence by state officials.

Similarly to the Trafficking Protocol, States shall give appropriate assistance to migrants whose lives or safety are endangered. This protection clause is thus not as broad as the protection clause in the Trafficking Protocol according to which protection should be offered to any victims of trafficking. Additionally, States shall take into account the special needs of women and children in implementing these measures of protection and assistance. During negotiations, some non-governmental organisations called for the need to recognise the specific protection needs of smuggled women and children. Although the Protocol does include women and children in this subparagraph, the focus is quite weak. In implementing all provisions of the Protocol it would thus be important to cover the special needs of children and women as smuggled migrants.

The final provision of article 16 refers to the Vienna Convention on Consular Relations as a guideline for dealing with smuggled persons who have been detained. According to this Convention, States must always inform the consular authority of the State of the detained person about the measures taken.

Additionally, States shall also utilise bilateral and regional agreements to prevent and combat the smuggling of migrants and enhance the Protocol (article 17).

In addition to protection of smuggled persons and assistance, the Protocol deals with repatriation of smuggled migrants. The Protocol facilitates the repatriation of migrants through article 18. Each State Party agrees to facilitate and accept, without undue or unreasonable delay, the return of a smuggled person who is a national or has the right of permanent residence in its territory at the time of return (para 18.1). Contrary to the Trafficking Protocol, the Migrants Protocol does not cater for smuggled persons to stay in the country of destination or transit. According to general understanding, established during negotiations of the Protocol, migrants are not regarded as victims in the same manner as trafficked persons are.

Furthermore, States shall, when possible, facilitate and accept the return of smuggled migrants who had the right of permanent residence in the country of origin at the time of entry in the receiving State (para 18.2). The difference between paragraphs 1 and 2 is that the former deals with persons who still have the nationality or permanent residence of a State upon return. The latter deals with the case of a person who had the right upon entry to the receiving State but no longer has it.

Additionally, States shall verify the nationality or residenceship upon request (para 18.3), issue travel documents for persons without proper travel documents who are being returned (para 18.4), and carry out the return of a person in an orderly, safe and decent manner (para 18.5). Additionally, States may co-operate with relevant international organisations in implementing article 18.

Finally, the savings clause (article 19) states that the Protocol shall not affect any other rights, obligations or responsibilities of States and individuals under international law, including humanitarian, human rights and refugee laws. Many asylum seekers, also those with genuine claims for asylum, are being transported by means that are covered by this Protocol. Hence they enter the State illegally, and are thus covered by, for example, the measures of repatriation as outlined in the Protocol. At the request of mainly human rights organisations the notion of non-refoulement was included in the Protocol¹⁶. That is, illegal entrance to a State shall not negatively affect a person's claim for asylum in that State. Furthermore, the Protocol shall not be interpreted in a way that is discriminatory to smuggled migrants. During negotiations it was also agreed that the Protocol shall not cover the status of refugees.

The final articles cover the usual provisions, including settlement of disputes, ratification measures, entry into force, amendment, and denunciation.

V. REQUIREMENTS AND SUMMARY

A. Main Ratification Requirements

The four main requirements for ratification of the Migrants Protocol involve the following:

State parties shall:

- Criminalise the smuggling of migrants and the other acts outlined in article 6
- Undertake legislative or other measures to prevent the misuse of commercial carriers for the smuggling of migrants (article 11)
- Give legal obligation for commercial carriers to check passenger travel documents (article 11)
- Prepare travel documents that are difficult to misuse, falsify, alter or replicate (articles 12-13)

B. Summary of the Aims

The main aims of the Protocol are to:

- While not compromising the human rights of the smuggled migrants, to
 - prevent and combat the smuggling of migrants through:
 - hindering the smuggling of migrants through commercial carriers
 - guaranteeing the quality and security of travel and identity documents
 - providing information to the public to prevent potential migrants of falling victim to organised criminal groups, and
- increase co-operation among States in:
 - preventing smuggling by sea
 - improving exchange of information
 - verifying travel documents
 - training officials
 - providing technical assistance, and
 - enhancing the underlying socio-economic causes of migration.

¹⁶ See the International Human Rights Network's joint NGO submission to the eight session of the Ad-Hoc Committee on the Elaboration of a Convention against Transnational Organised Crime.

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In order to prevent and combat the smuggling of migrants it is thus necessary to reveal more cases of smuggling and to sanction the smugglers. Although there are many good examples of sharing of information there is need for intensified co-operation among law enforcement agencies to combat the use and producing of falsified documents. There is also the need for prosecution guidelines and multiagency working groups, both nationally and internationally.

As to the preventive measures, economic incentives and information campaigns can have an effect in preventing the smuggling of migrants in the first place. Some argue that legal immigration programmes could be one solution for curbing smuggling. There are different experiences of this approach. In Germany, there exists very little smuggling of persons from Poland as compared to other countries in the vicinity of Germany. Polish citizens can obtain legal entry quite easily in German. However, counter arguments from the U.S. and Canada claim that despite means of legal migration, these two countries continue to attract large numbers of illegal migrants¹⁷.

In implementing the Protocol it is crucial to focus both on the organisations procuring the smuggling, and the people being smuggled. We can all agree that organised crime must be combated since it poses a national security problem to all states. However, the smuggling of migrants is not just a problem of transnational organised crime, but also a problem of human security, that is, of the security of the persons being smuggled¹⁸. Hence any criminal justice measures need to, ideally, also recognise the point of view of the persons being smuggled. The major global threat is not the high number of potential migrants being smuggled. The major threat is instead the organised criminal networks that operate around the globe. With delicate implementation of the Protocol to Prevent the Smuggling of Migrants the international community can both ward off some of the threats of transnational organised crime, and protect the security of those who are less fortunate.

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¹⁸ See Goodey, J. (2000).

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS

*Hamish McCulloch**



I hope to be able to stimulate a number of thoughts in your mind and assist you in understanding the intricate problems faced by law enforcement when having to deal with the crime areas involving the smuggling and trafficking of people. I will start by providing you with a very brief overview of the history of Interpol and then look at the history of law enforcement's involvement in both the smuggling and trafficking of people. I will touch upon the amounts of money that can be earned by the criminal gangs, the human suffering endured by the victims and the role of Interpol in combating these crime areas.

Interpol has existed for almost 80 years, its roots go back to 1914 when the concept of an international criminal police organisation originated and police officers from 14 countries met at the first International Criminal Congress, to discuss the possibility of establishing an international criminal records office and harmonising extradition proceedings. It was, however, a further 9 years before the second International Police Congress met and an agreement was reached to set up the International Criminal Police Commission with its own statutes and official headquarters in Vienna, Austria. Hence, 1923 is recognised as the year that the Organization was conceived.

In 1946 new statutes were adopted, the commission's headquarters moved to Paris and 'Interpol' was chosen as the telegraphic address. In 1956 the International Criminal Police Commission became the International Criminal Police Organization, which currently has 179 member states co-ordinated through the General Secretariat, situated in Lyon, France.

In recent months both civil society and law enforcement have been repeatedly exposed to shocking reports about the ruthless methods used by criminals involved in the smuggling and trafficking of human beings. Globally the message is the same: people desperate to create a better future for themselves are exploited by individuals or organised gangs, who transport them over borders without any consideration for their safety, who demand huge payments for smuggling them, and who leave them indebted at the hands of pimps or other exploiters in the countries of destination.

Within Europe, the discovery during the summer of 2000 of 58 Chinese citizens, dead in a refrigerated truck, having asphyxiated whilst trying to enter the United Kingdom illegally became an eye-opener for many politicians and the public, however, the sad fact is that the bodies of desperate people trying to move to another country illegally are being discovered on a weekly basis and many more are never discovered when the overcrowded and un-seaworthy ships they are sailing on sink without trace in the shark infested waters of the China Sea's or the containers they are hidden in are washed overboard as the ships they are on navigate torrential storms that most of us will never witness.

Shortly after the incident in the United Kingdom, 300 illegal immigrants lives were at risk when the ship transporting them towards Italy ran into heavy seas just off the coast. They were fortunate, they were rescued by an Italian navy vessel. Unlike the 350 people who drowned off the coast of Indonesia, the eight Turks who died in Ireland starved of oxygen as a result of being locked in a container and the similar fate which took the lives of several Chinese families stranded on a dock side

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in South Korea last year. This year is no different, 24 reported drowned in the Dead Sea in the Middle East, 13 who suffocated in Burma, and 179 who perished during the first half of the year attempting to cross the Arizona desert to find a new life in United States of America. More disturbing is the plight of many Tanzanian citizens who pay the organised criminal gangs to take them to Europe by sea, only to be forcibly thrown into the seas off the coast of Africa.

During the same year, police in Nepal arrested a man on charges of selling more than 300 women and children into prostitution in India, after having promised them proper jobs or marriages. Traffickers are treating human beings merely as a commodity to be bought, transported, exploited and sold.

Making such trade possible is on the one hand a situation of poverty, economic crises, political upheaval and unrest, creating an urge or need for people to leave their homes. The United Nations High Commissioner for Refugees (UNHCR) now has responsibilities for as many as 21.5 million people, many of whom are potential victims for traffickers.

On the other hand there is the widespread demand for cheap labour and prostitutes in a large and growing number of countries.

In such a situation, migrants' smuggling becomes a very attractive market for criminal organisations. In 1999, the worldwide profits made by individual smugglers and smuggling networks, have been placed between US\$ 3 billion and US\$ 10 billion. By the end of this year, some sources say that the worldwide trade in human trafficking is worth around US\$ 30 billion a year. According to that estimation, trafficking in human beings is now the third largest source of profits for organized crime, behind drugs and arms trafficking.

These figures are of course estimates, and what they don't include is the un-measurable suffering that is imposed on these unfortunate human beings who are often physically and sexually exploited by the criminals involved.

These estimates can of course not be confirmed, but it's obvious that smuggling in people is a very lucrative business for criminal organisations, taking into account the prevailing low risk of being arrested and heavily sentenced.

The number of individuals estimated to be smuggled by criminal networks into countries of the European Union alone are in the region of 500 000 per year. From the Far East through Turkey and its neighbouring countries and from South America and Africa to the Western Countries of mainland Europe, which serve as major transit points for migrants and centres of human beings smugglers.

The one common link between all of these individuals is that they are desperate people who are willing to sacrifice their families, friends and homeland to make, what they believe is, a better life for themselves. They often pay many thousands of dollars to be transported. It is difficult to imagine the levels of desperation that these human beings have stooped to.

But try to imagine yourself as one of these 20 Chinese nationals recently found welded into a false bottom of a container which had been shipped from China to Europe. The height of the compartment was 50cm, they had a number of battery powered torches for light and oxygen bottles to provide air to breath. Between them they will have paid in the region of 500,000 US Dollars; half a million Dollars to the Snakeheads in China: those responsible for facilitating their movement. This is Organised Crime which is damaging the world economy and funding other types of crime; drug production and distribution, violation of international property rights and the trade in endangered species, for example.

While law enforcement can not treat the root causes of trafficking and alien smuggling, we can certainly contribute to reducing the trade in human beings by attacking the criminals who profit from illegal activities.

A major area of discussion is trafficking of women, a subject high on the world's political agenda. It has become an important issue for law enforcement.

It's not a new problem, having been debated for over a century. One of the first major international conferences was held in Paris in 1902, and here we are today, continuing discussions, more or less on the same topics as 100 years ago.

What do we mean by the expression "trafficking of women for sexual exploitation"?

Be aware that people might have different interpretations. However, it means basically the recruitment, transportation, and harbouring of women in order to submit them to mainly prostitution purposes, by the use of a control mechanism such as force, deception or coercion. Trafficking often includes an offence of illegal immigration, but differs because of the intended exploitation.

The main form of sexual exploitation is prostitution, which is the exchange of sexual services for payment. Within all societies, the existence of prostitution has been, and still is, a source of heated debate. It's necessary to take a look at this ageless debate to fully understand the problems surrounding trafficking.

Simply speaking, we can divide the approach to prostitution into three main groups:

- Prostitution can be regarded as a positive and acceptable fact of life, where prostitutes even enjoy a status as respected professionals.
- Prostitution can be viewed as a necessary social evil, a phenomenon that can not be removed.
- Prostitution might be viewed as a social evil that should be actively combated and discouraged.

The legal approach will accordingly mirror the general view of prostitution.

- The law can decriminalise the field of prostitution. Prostitution can be allowed to develop freely without state intervention. With what one can call a human rights approach to the issue, laws can provide rights for sex workers, giving them social benefits as any other professions.
- Laws can provide regulations for prostitution. Prostitutes can be obliged to register themselves, they can be submitted to compulsory health checks, brothels can be allowed to function within a licensing system and areas for street prostitution can be geographically defined. Limitless possibilities exist for regulation systems.
- The laws can criminalise prostitution. Anyone involved in the trade can be made offenders: sex workers themselves, clients, procurers, brothel owners. In a more tolerant approach, one can leave out certain groups, for example the prostitutes or the clients.

I would now like to provide a brief historic overview of the European approach to prostitution during the last couple of hundred years. I choose Europe as it is most documented and, in my view interesting.

In the early 19th century, prostitutes in the larger cities globally increased, prostitution became widely viewed as a dangerous urban social problem. At the same time, prostitution was accepted as a necessary social phenomenon, to contain the sexual urges of men. Prostitutes were identified as a source of spreading venereal diseases such as the then much feared syphilis. As long ago as 1835, a French Doctor published a document arguing for a system of regulations as a way of stopping the spread of sexually transmitted diseases.

At that time his ideas were accepted as the best approach towards eliminating the negative elements of prostitution, a system of strict regulation spread and by 1870 the whole of Europe had adopted the system in one way or another.

The main elements of this regulatory system were the mandatory registration of prostitutes, and the establishment of licensed brothels. Regular health checks were made compulsory, and prostitutes

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who were ill were hospitalised. Municipal regulations decided where the prostitutes could walk in the towns when not working in the brothels, and also could decide what they were allowed to wear.

It is important to notice that the police became a central element in this policy, being given the power to control the brothels and the prostitutes. Special police doctors were given the task of conducting health checks on the prostitutes.

In England the regulation system came into effect from 1850, when the police in London were given increased powers to control prostitutes. During the 1860's, a series of laws were passed, known as the Contagious Diseases Act's, which spread the regulation system to the whole British Empire which at that time involved many countries around the world.

Shortly after these laws were passed movements developed to have them abolished. People did not accept prostitution as just a health problem or that it could be regulated. Prostitution was viewed by many as a social evil that the state should not support by regulating the sexual exploitation of the prostitutes.

As a result regulations were removed or weakened. Police involvement was subsequently reduced and by 1888 many countries had changed their laws. The system of state regulated brothels continued however in certain countries until the middle of the 20th century, but prostitution moved outside the brothels and in to the streets and call-girl systems.

Today we see a great variety in the way many countries legislate on prostitution. In most the legislation comes under heated debate from time to time, underlining that prostitution still represents a dilemma for societies. There is no consensus on the nature of prostitution. Laws are shaped by cultural traditions and changing social and political forces, and debates on prostitution will tend to be a muddle of morals, feminism, pragmatism, human rights thinking and religion.

Laws tend to be compromises, in various ways accepting that prostitution will not disappear by using legislation. Certain countries still have several regulations, others prohibit prostitution. The majority of countries, however, have no regulations, but outlaw the exploitation of prostitutes, with a more or less tolerant approach towards the prostitutes themselves.

Modern legislation in developed countries is intended to send a message that prostitution should not be accepted and that human beings should not be treated as merchandise in sexual matters.

This is not the case everywhere, however, as in one Western European country they have decided to legalise brothels nearly 90 years after banning them. The new law came into effect in October 2000, and has opened the debate in other neighbouring countries. The logic is that by legalising the employment of prostitutes it will be possible to exercise more control over the sex industry and counter abuse. This remains to be seen, as many of the sex workers are unhappy about having to pay income tax on their earnings and having to ensure that the premises they work in are equipped in accordance with health and safety regulations. An example being the requirement for separate toilets and washing facilities for clients.

Written laws on prostitution do not give good guidelines on how a country actually handles prostitution. Frequently a very wide gap exists between written laws and actual enforcement practices. The conflicting views of society get passed down the line to law enforcement, leaving them with a very unclear impression on what area to prioritise. One thing is clear, however, the main priority has to be the prevention, identification and protection of children who are, or are likely to be, sexually abused within the commercial sex industry.

A growing number of countries are now experiencing an increase in visible street prostitution. The problems are not going to go away. It is therefore necessary to face up to reality, and the reality is that as long as there is a growing demand for the services, particularly of women, within the commercial sex industry then they have to be recruited from somewhere. Domestically, within the developed western

world, there are insufficient women prepared to enter the sex industry. As a consequence, the rapidly growing trade of trafficking has developed to service the demand.

This is, however, not a new phenomena. Women have been moved for prostitution purposes throughout history. However, in Latin America, Eastern Europe, Asia, and Africa, the numbers of women being moved and traded is disturbingly high.

By the late 19th century, women were seen working in foreign brothels all over the world. Questions were being asked. 'How could this be happening'? Stories were published in the newspapers about young virgins abducted from city streets and waking up in brothels in different countries. The public were horrified by the idea that young women were being forced into prostitution in uncivilised countries. Not long after the issue of this, the "white slave trade" was on the political agenda. The reports and discussions all focused on how white females could appear in foreign brothels, which at that time was perhaps to be expected.

At the turn of the century a massive migration wave took place, individuals and families were leaving their homes and travelling all over the world seeking work or a better life. However, many of those leaving were single men, and it is not surprising that women choosing to work as prostitutes would follow.

International meetings and conventions followed public pressure in an attempt to stop the trade in women. Eventually, the term trafficking in women replaced the expression "white slave trade".

Campaigners and public opinion resulted in the 1910 convention making it a crime to exploit the prostitution of minors, and outlawed the forced trafficking and prostitution of adults.

The First World War prevented nations from building on this convention, however, some 23 years later, in 1933, a further convention made it an offence to traffic adult women, even with their consent, to another country.

Laws were enacted in many countries and shortly after the 2nd world war, in 1949, the United Nations adopted a convention that remains the major international text on trafficking and prostitution. The convention condemns prostitution, but does not prohibit prostitution in itself. The convention demands that states must punish those who traffic, procure or entice another person for prostitution purposes or who exploit the prostitution of others, even if those people consent. Trafficking in the conventions sense simply means bringing someone into prostitution. It also outlaws brothels, and abolishes the registration of prostitutes.

However, the convention has not been a great success. Few countries have ratified it. For those countries who agree on the text, it was a disappointment that the UN did not set up any treaty body to monitor enforcement of the treaty.

As the convention condemns prostitution in general, it is not acceptable to countries that want to allow and regulate a prostitution sector for women who freely wish to be prostitutes, while outlawing forced trafficking. For those who want a comprehensive treaty on all forms of trafficking, for forced labour or other purposes, the convention is too narrow in its definitions.

Following the 1949 convention, the issue of trafficking more or less disappeared from the agenda in Europe, however, in less developed parts of the world the practice of trafficking women to new areas of growing population continued.

More recently, in 2000 a new international agreement, in connection with the United Nations Convention against Transnational Organised Crime, was opened for signature in Palermo, Italy. This was warmly welcomed and attracted more than the expected number of signatures. However, nearly 3 years on, none of those countries have ratified.

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A main part of this protocol deals with measures to protect the victims of trafficking, and for the first time we have a recognised definition of the term “Trafficking”.

- **Trafficking in persons** - shall mean the recruitment, transportation, transfer, harbouring 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 purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

Going back to the sex trade and its spiralling development. From the beginning of the 1970's and onwards, women from developing third world countries began appearing in the sex industry in Western Europe. This did not create any major political problems and prostitution was controlled on a national basis. Problems, however, did arrive after the fall of the iron curtain, dividing East and West Europe, in 1989. Women from Central and Eastern Europe began to appear on the sex scene. One could hear stories of forced prostitution, young girls from Eastern Europe wanting to work as au pairs and were deceived by organised crime gangs, given false papers, smuggled over borders, raped and threatened into prostitution. They were held as slaves and worked for no pay.

If one examines the global sex industry we can see clearly that the number of sex workers, pimps and other organisers who are operating in a country other than their own has increased dramatically in most, if not all regions of the world.

Women from developing countries are ever present, but globally the major shift is the movement of women from Eastern Europe. They are appearing as street workers, in various clubs and in private houses in residential areas. They are changing their locations often. They are often in possession of false documents. Interpol receives information from the various countries suggesting a high presence of women who must be classified as victims of trafficking, but it is not possible to estimate the number of victims accurately.

In respect of the organisers, the trend is moving towards nationally mixed groups, as well as co-operation between different nationalities. There is also evidence of an increase in the numbers of women involved as organisers of trafficking, some of whom are former prostitutes.

The number of investigations are low, and getting offenders convicted of trafficking crimes, and obtaining proper sentences for the ones who are convicted, seems difficult in all countries.

Demands on Society

On the political side, politicians are becoming aware of the suffering of victims, and of the dangerous way that organised foreign criminal groups are working their way into the sex industry. Nothing suggests that the supply side or the demand side will decrease in the coming years, so politicians are discussing three main issues:

- How can one Prevent the trafficking of women from countries; the main strategy being used requires funding for information campaigns among young women in areas of recruitment.
- How to Protect victims of trafficking; in this respect witness/victim protection schemes are being discussed, as well as measures to aid women who are sent back to their home countries with different reintegration efforts.
- How to Prosecute more traffickers; making the cross border exchange of evidence easier is a major challenge.

Interpol also believe that it is not just law enforcement's responsibility to eradicate the trafficking of women, it is the responsibility of many agencies, both Governmental and Non Governmental.

Demands on Law Enforcement

Societies demands will inevitably be placed on Law Enforcement, however, many countries are now destination countries, meaning that they have foreign prostitutes being exploited within the sex sector.

For these countries, the main aim is of course simply to:

Reduce the exploitation of foreign prostitutes, and dismantle trafficking networks.

For most however, there is no uniform national policy for law enforcement to approach trafficking. There is also a lack of active policy. Trafficking in women remains an invisible crime because the authorities in many countries do not pay enough attention to this type of criminality.

So what can be done? Victims themselves will seldom complain which places the initiative on law enforcement.

Countries must conduct a proper assessment of the situation. At the moment a general lack of knowledge by law enforcement of the sex industry is common place. Few countries have officers specifically appointed to identify aliens working in prostitution.

Generally investigators have some idea of the street prostitution situation, or even of the red light districts, but few know enough about the clubs, the escort agencies or the brothels in private apartments. Officers think they are aware of the situation, but their assumptions are too often based on narrow personal experiences and prejudices. So one has to start by gathering intelligence and, therefore, being in an informed position to provide an open minded assessment of the situation. Do we have foreign sex workers in our district? What countries are they from? What is their background? What conditions are they living under? Are they controlled by pimps? Who are the pimps? Very basic questions really.

After making an assessment it is imperative for countries to identify it's legal foundation and enter into co-operation with the prosecution service. Ensure both have the same understanding of the rules, so that a proper follow-up is made on the investigations.

To successfully tackle trafficking it is essential that countries allocate resources, devise a strategy and identify goals, which could be either investigation or disruption. Trafficking may be a complex phenomenon, but the reality is that it is just a brutal international pimping network.

It is pointless sitting and waiting for complaints to arrive. They do, but very infrequently. You will experience victim-led investigations, but the main thrust must come from investigations led by the intelligence that is collected. Successful investigations are generally the ones where there is a high use of surveillance, the use of informants, and good luck when it comes to seizure of documents.

Police should be giving thought to the question of how to organise investigations, considering if a specific unit should be responsible, or if other options are better. It can be linked to groups combating organised crime, as trafficking can certainly be defined as a phenomenon within organised crime. It all depends on the strategy choices that are made. It's certainly important to destroy the myth among certain investigators, that victims of trafficking are stupid women who have themselves to blame.

Victims

In trafficking cases, one of your main problems will be coping with the victims.

Who are the victims? Well, they are women with very different backgrounds. Some are resourceful people determined to improve their living conditions by going abroad, while others have learning difficulties or are thought of as outcasts of society. Some have no sexual experience before going abroad, while others are seasoned prostitutes.

The victim's backgrounds for entering the sex industry in another country can be roughly divided in three groups:

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- Women who have been completely duped and coerced.
- Women who are told half-truths about the nature of the work they will perform.
- Women who are informed about the work, but relinquish control to traffickers all the same.

Even women who know they will be working as prostitutes abroad under the control of pimps seldom imagine the extent to which they will become exploited in terms of living and working conditions.

What can you expect from a trafficking victim, and what do you do with them?

It can not be expected that trafficking victims will give evidence to the police or the courts. Their situation must to a certain extent be respected; they are often scared of reprisals against themselves or their families. They are often illegally residing in the country, so they also face deportation, and have little trust in the police. This means that you have to place a great deal of emphasis on the first contact you have with possible victims, so that it will be possible to gain a good level of confidence.

If you are lucky enough to get a victim to talk, you must consider the possibilities of her giving pre-trial evidence, if your legal system allows this. This can save the victim from a long period of fear and uncertainty awaiting a trial.

There must be co-operation with the immigration enforcers if the victims are staying illegally in your country. In some countries one can suspend the expulsion of a possible victim for a certain period, while transferring the women to an authorised organisation, which will provide accommodation and advice. This enables the victim to reflect on her experiences and decide in her own time whether or not she is willing to file charges, based on the assumption that victims will only be able to express themselves about their experiences after a longer period of time. If there are no such arrangements in your country, you must identify possible NGO partners, or develop a policy with the social services.

For “countries of origin”, or countries that women get trafficked from, the same process of assessment and strategy choice must be undertaken. They must seek to determine where women are going, and in what ways they are being exploited. Similarly, in transit the process must include information on where the women are from and where they are going. All this information is required to build up a picture of what is happening on a global basis. It is also necessary to assess whether it is possible to prosecute recruiters operating in your country.

Special consideration must be given to cases of missing women. We see a high number of women who manage to call home and who say they are being held captive and forced to work as prostitutes. When requests like this are passed on to the police, they must be given immediate attention.

INTERNATIONAL CO-OPERATION

The main aim of Interpol is to promote the widest possible mutual assistance between all criminal police authorities. It's my firm belief that trafficking investigations will not be successful if one does not fully exploit the possibilities of exchanging information with other countries. In trafficking cases, co-operation can be complicated by the fact that laws on trafficking are so different, but I want to urge investigators to use your contacts and develop new ones.

Interpol provides technical tools for sending and receiving requests between countries through National Central Bureaux, or NCB's. Every one of our 179 member countries has one such central link to the Interpol communications system. If information is needed from law enforcement anywhere in the world this can be obtained through our networks. Interpol can guarantee that the requests get transmitted via our systems, but we can't promise that the quality of the response from the country of request is up to their expectations.

An example of how Interpol communications networks recently assisted an investigation was where a Ukraine women who had been prostituting herself in Germany found the courage to tell the police she had been trafficked into that country by a Polish criminal and then sold to a pimp from Turkey who

raped her and made her work for him. She said she was married in her home country, had children who were ill, and for that reason became involved in prostitution. The Police asked Interpol to verify her background story. A simple but necessary request which we facilitated through our international network thus providing corroboration for the courts, making it easier for the judges to rely on her evidence.

The message that law enforcement around the world must accept is that the investigation of trafficking cases is not impossible, but they must be aware that the odds are against them in ways they will not experience in other criminal cases. The people who take on these tasks will, however, reap great rewards as the crimes they prevent are so brutal and totally unacceptable in modern societies.

The primary requirement by many countries is the need for updated and effective legal instruments in order to provide the foundation for co-operation in the field of trafficking and smuggling. I previously mentioned the very positive international development currently being undertaken by the United Nations in the creation of the convention against transnational organised crime. This convention is viewed as the best way forward and includes protocols on the trafficking of persons and the smuggling of migrants. The United Nations General Assembly adopted the text of the convention and the protocols, opened it for signature and attracted international media attention and far more signatures than expected. What is needed is ratification and legislation backing the convention.

Law enforcement needs to constantly update its knowledge of current trends and methods used to traffic and smuggle human beings. Trends are ever changing, and do not always follow expected patterns. For example in August this year, a group of women from Eastern Europe were rescued by the police from a hotel in Cambodia where they had been taken for prostitution purposes after being recruited to work as dancers in Japan. Cambodia, until now had been considered an unlikely destination for women from Eastern Europe.

In 1999, Interpol created a new group at the General Secretariat, the Trafficking in Human Beings Branch. In 2001 the branch was elevated to a Sub Directorate in its own right alongside, Public Safety and Terrorism, Drugs and Organised Crime and Financial and High Tech Crime. Resources have been strengthened and crime area responsibilities include not only trafficking in women and illegal immigration, but also offences against children, who are sadly, very often the victims of smugglers and traffickers.

The Trafficking in Human Beings Sub Directorate collates information from law enforcement agencies as well as from open sources, and seeks to support law enforcement and spread knowledge by participating in international meetings and by organising training when asked for.

Further evidence of Interpol's commitment to eradicating the trafficking of women was the passing of a resolution at the Interpol general assembly in October 1999 establishing an international working group on trafficking in women.

This has provided a structured platform for raising awareness, building competence and identifying best practices within law enforcement worldwide. The working group acts as a forum for exchanging information on current trends and investigations and as such provides ideas for possible projects and analyses work for the general secretariat to undertake.

One of the main aims of the working group will of course be to promote the widest possible international co-operation between law enforcement agencies. It is evident that trafficking investigations will not be successful if one does not fully make use of the possibilities of information exchange with other countries. Another aim of the working group is awareness raising within all sectors of society when it comes to combating trafficking in women for sexual exploitation.

Reports also suggest that victims of trafficking are afraid of talking to the police about their ordeals as they perceive the police as corrupted, hostile towards prostitutes and without real willingness to protect them against reprisals from the traffickers. In addition, reports also suggest that in too many places, foreign prostitutes are indeed treated as just criminals and illegal immigrants. They are subject

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to deportation without any serious efforts to gather evidence about the way they were recruited in their home countries; the way they were transported across borders or the way they were exploited by pimps in the places they worked as prostitutes.

There is little doubt that in many countries the low level of successful investigations are as a direct result of prevailing negative attitudes within the police. If that negative attitude exists in your country, energy and resources must be put in place to change them. We must remember that combating trafficking might be simpler than we believe, if it is given the right approach and the right priority.

Interpol also proactively involve themselves in the analysis of information and intelligence received in order to provide our member states with a strategic overview of trends. For example, in July 1999, Interpol launched Project "Bridge", a general project on illegal immigration focusing on organised crime groups involved in the illegal immigration of Chinese nationals. It was noted in the past that much of the information regarding illegal immigration cases concentrated on the illegal immigrants themselves and not the organisations, methods and routes utilised. The project's emphasis was placed on identifying the membership and hierarchy of organisations that work in numerous countries, to facilitate a more effective and efficient program for the collection of information on organised crime groups involved in trafficking in people and to assist operational units with ongoing investigations.

Interpol members involved in Project Bridge have appointed contact officers who meet regularly in working group meetings. The information gathered allows Interpol to identify organisations that operate both nationally and internationally and conduct analytical studies.

Project Bridge focuses on people smuggling and is a success. Consequently we have extended this analytical method to other crime areas. In 2000 a study concentrating on trafficking of human beings from Latin America to Europe was undertaken. This study confirmed much of what was suspected, however, the findings are interesting.

Little information was available concerning trafficking in Latin American women for sexual exploitation. The scarce estimates concerning the number of women trafficked range from 2,000 women leaving their country of origin to 100,000 Latin American and Caribbean women being trafficked per year. The factual information showed that in general, the women range in age from 17 to 28, were of urban origin and had attained a medium-high level of education with some holding university degrees.

The Latin American countries most affected by trafficking in women for sexual exploitation include Brazil, Colombia, the Dominican Republic, Ecuador, and potentially women from Argentina, Peru and Venezuela. The most frequent destination countries for the victims are Spain, Germany, Greece, Israel, Italy, Japan, the Netherlands, Portugal, Switzerland and the United States. Many routes used by the traffickers have been identified, however, the one that appeared most often in the framework of the analytical study is Colombia - Spain - Japan, although Japan was not the most popular destination.

The modus operandi employed by the traffickers involve a combination of the following tactics and confirmed what was already known:

- False promises of work abroad; in the majority of cases this involves work in childcare, housekeeping, waitressing or the hotel or entertainment industries. On rare occasions the women knew or suspect that they would be involved in prostitution but were not aware of the slave-like conditions in which they would find themselves.
- Debt bondage, in other words, upon arrival the women were told that they owed a certain amount of money for the voyage, etc. and must work to reimburse the debt.
- Retention of identity documents; often used to force the women into prostitution, controlling them and keeping them from fleeing or going to the police. This method was primarily employed when the women entered the country as potential tourists.
- Threats and the use of violence; mainly directed at the woman but occasionally extended to her family abroad. The threats most often involve physical violence, in particular when family is

concerned, or being turned over to police who, the women are told, will beat and rape them before repatriating them to their country of origin.

- Captivity was used in certain cases where the women were either locked in the brothel, a room or even chained to a bed.
- False identity documents were used on a few occasions to bring the women into the country clandestinely.
- Kidnapping has been employed in a small number of cases.

In general, the nationality of the offenders involved in the trafficking of Latin American women for sexual exploitation corresponded to that of the country of origin of the women, or that of the destination country. Various organized crime groups were mentioned as being vaguely implicated in the trafficking of women for sexual exploitation, however, more precise information on the identities of those involved was lacking.

Little information was forthcoming concerning the financial aspects of trafficking in Latin American women and where figures were mentioned it was not clearly indicated whether they referred to the profits or turnover. In one case, however, it was plainly stated that US \$2.5 million was earned over a two-year period from the trafficking of Mexican women and children to the United States for prostitution.

Following this study, the General Secretariat has now embarked on analysing the flow of women being trafficked into Western Europe. This project will focus, as does Project Bridge, on the organised criminal groups profiteering from the trafficking and despite its short life span to date has already provided valuable links with other crime areas.

To conclude, harmonisation of international legal instruments in the fight against human traffickers, at least between neighbouring countries, needs close co-operation between law enforcement agencies at the national and international level. An intensified comprehensive information exchange is of the utmost importance to avoid the effect of displacement of criminal activities.

In the present climate of general globalisation, a multi disciplinary approach which includes not only law enforcement, but also legislators, non-governmental organisations, development agencies, education, health and civil society is needed. In the future, Interpol will seek this approach and intends to continue to develop new methods of co-operation with the many organisations joining us in the fight against smuggling and trafficking in people.

We simply cannot allow the brutal criminality linked to smuggling and trafficking of people to continue. By working together, law enforcement authorities certainly have the means and ways to dismantle these criminal networks.

ASSESSING THE INVOLVEMENT OF ORGANISED CRIME IN HUMAN SMUGGLING AND TRAFFICKING

*Hamish McCulloch**

I. INTRODUCTION

It is a sad indictment of contemporary society that fighting crime seems to be on the political agenda of virtually every nation throughout the world; dramatically improved, more efficient and easily accessible transport and communication facilities have increasingly brought the international dimension of criminal law enforcement activity under the spotlight as the need for more effective means of co-operation has become indispensable. In that context it will be understood that a structure which enables police and other law enforcement agencies to co-operate on a global basis is essential to the criminal justice system. Interpol fulfils that role and considerable efforts are being made to develop the services that it can offer. One such area is that of illegal immigration and the trafficking of human beings.

Immigration is nothing new, it is a way of life that has been in existence since the beginning of human history. Mankind has from time in memorial moved from home to home to seek a better lifestyle, more fertile land, a better water supply, a warmer or cooler climate. Following the 2nd world war, nations advertised for people and families, encouraging them to migrate to their countries to increase the workforce and fill vacant positions in industry. However, as the world becomes more global, and access to information on living standards and quality of life in parts of the world previously inaccessible, the natural desire by individuals to move to those parts of the world has lead to the inevitable migratory problems that we now face. Currently, economic discomfort appears to be the main reason for the illegal immigration movement throughout the world, and is also a major factor in alien smuggling and the trafficking of people. Many illegal immigrants are initially economic migrants, attracted by the dream of a better life and frequently influenced by television and exaggerated accounts from family members or friends who are already abroad.

On the other hand many immigrants are taken from their homes and villages by force and deception. Large numbers of them are then exploited, either under the direct threat of violence or to pay their alleged debts for smuggling fees. Some are forced into prostitution, others to work long hours in sweatshops, factories and private homes, or an array of other forced activities.

Today smuggling organisations have a leading role in the illegal immigration and trafficking in persons and are supplementing their traditional criminal activities with alien smuggling. Why? Huge profits and the relatively low risk of detection, prosecution and arrest attached to trafficking compared to other activities of transnational organised crime and generally speaking, legislation is still more focused on the migrant than on the trafficker.

In 1999 the Interpol General Secretariat identified an alarming increase in the number of messages received from our member countries regarding illegal immigration investigations. Since then, the number of messages received regarding illegal immigration and trafficking in human beings have more than doubled each subsequent year.

These messages indicated that law enforcement was observing a growing sophistication in the smuggling of persons, including secret compartments and hydraulic lifts in vehicles used to transport illegal immigrants over land, and improved communication systems between the groups in the various countries. Investigations also showed that different methods of transportation were being used to move illegal immigrants through several countries using local criminal groups, which smuggling

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organisations often relied upon, as well as individual criminals who could supply passports, visas, escorts, safe houses, accommodation, couriers, drivers and other “support services.”

However, this information did indicate that while countries had been successful in disrupting or eliminating the organisation in one country, or several adjoining countries, the entire organisation was rarely dismantled, particularly in the transit or origin countries. Intelligence also revealed the ability of these smuggling organisations to quickly utilise alternative routes or methods after successful law enforcement interventions or operations, or if necessary, to completely move to another country, or region, and continue operations. Unsurprisingly, the links between ongoing investigations in several countries were not recognised until after the investigations had been completed.

So, having recognised the problem, The Organised Crime Projects Branch initiated Project Bridge to facilitate a more effective and efficient program for the collection of information on organised crime groups involved in illegal immigration and the trafficking of persons. The member countries identified that there is a need not only for Interpol’s communication system, but for timely intelligence and specialised analytical assistance in this field. In a working meeting held at the General Secretariat in June 1999, experts from 10 countries agreed there was a need to focus first on organised crime groups involved in the smuggling of Asian migrants, primarily Chinese. This decision was based upon the highly organised aspect of these groups and the growing number of active investigations in this area. The objectives of this project established at this meeting and a follow up international meeting in September 1999 were to collect information on members of groups involved in illegal immigration; specifically the routes, methods of transportation, safe houses, escorts, forged documents, and visas utilised by these groups. Emphasis was placed on obtaining information from active, ongoing investigations with numerous international connections. It was stressed that if reliable data and information on trafficking routes, the modus operandi of smuggling organisations, local crime groups utilised, and recruiters, passport and visa suppliers, escorts, providers of accommodation, couriers, and handlers in destination countries was received from member countries, then Interpol could conduct a comparative analysis.

Some of this information will be processed as strategic analysis for dissemination to member countries and International Governmental Organisations regarding trends, modus operandi, and statistical information. However, the primary objective of this project remains to collect information that will identify organisations that operate regionally or internationally and alert law enforcement of these links to other countries. By their nature, these organisations must be investigated by co-ordinated activities of law enforcement organisations to successfully dismantle the inter-linked smuggling infrastructure. Analysis will help the target countries, transit countries, and the countries of origin to develop appropriate counter-activities and to undertake adequate measures for the investigation and prevention of illegal immigration.

Exactly a year later, on the 21st and the 22nd of June in Pula, Croatia, Interpol hosted the third such meeting regarding Project Bridge, except this meeting was different in several aspects. Firstly, only three days earlier the horrific discovery of the bodies of 58 Chinese migrants had been discovered in a vehicle in Dover England. This discovery and the resulting media coverage emphasised what investigators attending the meeting from over 20 countries had always known - organised crime was heavily involved in these smuggling operations, but human “cargo” has resulted in new challenges for not only the investigators, but the smugglers. As one investigator from the United States noted in his presentation, unfortunately it often takes a horrible incident to draw the attention of the media and politicians to a problem that law enforcement organisations have been struggling to address with both insufficient resources and laws to combat the crime.

Another difference was that this project was actually working - comparative case analysis is being conducted on this project in order to find links between different investigations and to ensure co-ordinated investigation of related cases in different countries. Intelligence connecting countries and organisations have been found and this information is being provided to members and is assisting in investigations. The comparative case analysis focuses on the phenomenon from various angles, for example, case links can be established when several offenders repeatedly act in various smuggling events in different countries, or when illegal immigrants are in possession of contact addresses and

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telephone numbers which already appeared in other smuggling events. This system of analysis has already proved to be successful, bearing in mind that one of the principles of smuggling organisations is: trial until success. It has happened repeatedly that the same smuggled immigrants were registered and expelled several times at different border posts. Another important focus of the analysis is the *modus operandi*, including the choice of the routes, the escorting procedures (e.g. escorts meeting the groups in the transit area and change flight tickets) and the way of arranging for the travel documents. The organisations may well use a certain travel agency to book the flight tickets, the visas and passport are obtained, or falsified, in a special way or they might use blank documents originating from thefts. Analysing this type of operational information, case links have been established between organisations acting in several European countries and also between Europe, Asia and the United States and Canada. Results demonstrated at the meeting convinced several countries not previously contributing information to the project to provide valuable intelligence. At the present, contact officers for this project have been established in 43 countries, in all continents.

II. TRENDS IN ILLEGAL IMMIGRATION AND POST-SMUGGLING ACTIVITIES

A. The Relevance: Statistics on Migration

Depending on the different sources, statistics concerning migration vary considerably. According to the International Organization of Migration (IOM), there are currently from 20 million to 40 million irregular migrants in the world of a stock of 130 million international migrants. At any one time, about 4 million illegal migrants are on the move.

An estimated 100,000 Chinese are smuggled abroad every year, mainly from the Fujian province in the south, where in some villages up to 10 % of the population have emigrated over the last years. Some sources describe today's illegal migration as essentially being a Chinese problem and certain authorities in Hong Kong estimate that currently nine out of ten illegal migrants world-wide are ethnic Chinese. According to the U.S. Immigration and Naturalization Service (INS), up to 10,000 Chinese illegal immigrants could have reached American shores in 1999 by boat, five times more than in 1998. INS employees and the Pacific Forum in Hawaii put possible illegal immigration from China to the United States at 100,000 illegal immigrants per year, which, understandably, differs from the official IOM figure as these are all estimates. Even the official INS figure is an estimate and talks about 30,000 illegal Chinese aliens.

What we do know is that in Australia, identified unauthorised arrivals by sea have jumped from 157 in 1998 to 3,700 in 1999, the immigrants mainly being Chinese, and in Japan, 1,209 illegal Chinese migrants were apprehended in 1997. Official figures state that 428 illegal Chinese entered Japan in the first half of 1998, however, police authorities estimate that the overall number of Chinese who entered Japan in those years could possibly be ten times higher and in total, illegal immigration to Western Europe is estimated to be around 400,000 to 500,000 people a year. Britain estimates Chinese illegal entrants to the United Kingdom has risen to over 600 per month.

Chinese migration is stimulated by a strong Chinese overseas population. In the 195's, some 12 million Chinese were living abroad. In 1999, the number had tripled and of those 35 million Chinese abroad in 1999, two thirds live in Southeast Asia. It is estimated that China is currently home to a floating population of 100 million people.

Nevertheless, Asian migration is not exclusively linked to Chinese nationals. Within the continent of Asia, we must recognise Filipino, Indonesian, Bangladesh and Burmese migration as an important issue. Malaysia has a total of about 700,000 illegal immigrants, of which over 500,000 are Indonesian and Thailand is estimated to have 1,000,000 illegal immigrants, over half of which are Burmese.

In a 1999 IOM report, the People's Republic of China, the Philippines, Indonesia and Burma were named as being the top four source countries of irregular migration world-wide, and according to the Filipino Department of Foreign Affairs, of about 7 million Filipinos working abroad in 1999, 3 million were undocumented workers.

B. Profit - The Traffickers and Smugglers 'Raison d'être'

The world-wide profits made by individual smugglers and smuggling networks were placed between US\$ 3 billion and US\$ 10 billion in 1999. A 1996 Thai study reported that migrant trafficking only in Thailand generated US\$ 3.2 billion annually. As far back as 1994, the profits of Chinese trafficking networks were estimated to attain US\$ 2.4 to US\$ 3.5 billion. In 2000, some sources say that the world-wide trade in human trafficking is worth around US\$ 30 billion a year.

C. Migrants - Clients or Victims

I know that this conference is focusing on the specific issue of illegal smuggling and trafficking by air, however, it is important to understand the client or victim perspective, no matter which method is used.

The question of whether the migrants are clients, who want to migrate and create a new life, and who mainly profit personally from the services of groups such as the Chinese "Snakeheads", as the organised crime heads are known, - or victims, subjected to the violence of the trafficking networks, which mainly involves women who are often deceived and then blackmailed or forced into the sex industry, cannot be answered by either opting for one or the other solution. Migrant trafficking is not a criminal activity which is as easy to understand as drug trafficking, it not only concerns the organisation of the smugglers but also the role of the migrants. Their victimisation is mainly due to two factors:

- Very often, the "travelling-conditions are inhumane, the migrants being cramped into trucks or boats and fatal "accidents" occur quite frequently, one only has to remember the incident in Dover, UK where 58 Chinese lost their lives.
- After arrival in the destination country, the migrant is very often forced to work off their debts incurred due to the costs of transportation, by engaging in illegal activities linked to the criminal organisation responsible for the transportation.

In most cases, the migrants do not possess identity documents following their arrival in the destination countries. The documents initially given to them are either confiscated and used again, or destroyed by the trafficking organisation, or it is the migrant who is told to destroy them on arrival. This makes the migrants "non-citizens" in the target countries and puts them at the mercy of the traffickers. Their illegal status prevents them from entering the legal labour market. They are ineligible for social welfare, health insurance and education in the destination country. They are automatically in a situation of social marginality.

The criminal trafficking syndicates, therefore, forces the migrants to work in the illegal labour market to pay off the debts incurred as a result of their transportation. As a result, the migrants are unable to become independent from the smuggling networks.

And believe me, these debts are substantial. A passage to the United States is estimated to cost about US\$ 35,000. Chinese boat people coming to Australia are reported to be charged about US\$ 15,000 each. An illegal immigrant to Europe has to pay some US\$ 25,000 . If a debt is still owed and supposed to be paid directly after arrival, the migrant is frequently taken to a safe house so that he can be controlled until the debt is discharged. There, the migrants are kept as prisoners and even handcuffed in order to make escape impossible. They are tortured, beaten and raped until the debt is paid. "Migrants who cannot deliver the smuggling fee upon arrival are detained. Males have their fingers chopped off and mailed to relatives, females are being raped while their families back in China are on the phone, so that the family would come up with the money in a hurry."

Evidence of this has been found in the United Kingdom where there has been an increase in the number of kidnapping cases related to Chinese illegal immigration with the common features: all kidnapped are Chinese nationals from Fujinam province; all are facilitated by Snakeheads and all are held pending payments to the Snakeheads organisation.

If a migrant escapes from a safe-house or tries to break out of this vicious circle by leaving the area in which he is "employed", and recaptured, he is severely punished or even killed.

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As has been said, many people seek to reside illegally in another country to take advantage of the labour market. However, the demand for illegal labour is no longer as great as it was or is perceived by the immigrant, neither in restaurants, on farms or in factories. As a result many Chinese immigrants detained in the UK in 2000 reported that they were heading for, or were on their way to the United States, Canada or Australia searching for the countries where the market still exist .

Of major concern in the future are the 40,000 Chinese immigrants which were permitted by former Yugoslav president Slobodan Milosevic, to reside and settle in the country close to the Hungarian border. Chinese nationals were provided with Yugoslav citizenship to influence election result in this area. However, the majority of the Chinese immigrants did not want to stay in the region and as holders of Yugoslav passports, these Chinese nationals are allowed to enter the Hungarian territory without visas. I mentioned earlier the deaths of nearly 60 Chinese illegal immigrants in the United Kingdom, they had started the last part of their journey in Yugoslav territory.

In addition to the 40,000 Chinese that were granted citizenship in Yugoslavia, certain International Organizations estimated another 200,000 plus Chinese, residing in Russia awaiting their turn for immigration. We are talking about extremely large numbers of Chinese abandoning their home country, which draws the question what will happen to the Chinese national labour force. The answer is frightening if another 270 million people leave china in the next three years, it will not even effect their agricultural labour force. Where will they go, and what about India, who by 2007 it is estimated will be the most populated country in the world, exceeding China's estimated 1.8 billion.

III. ORGANISED CRIME INVOLVEMENT

When providing operational and analytical assistance to member states' investigations Interpol recognised organised crime groups involvement in every single part of one illegal immigration journey. Today smuggling organisations have a leading role in illegal immigration and trafficking in persons and are supplementing their traditional criminal activities, like drug trafficking, with alien smuggling.

When collecting information and intelligence on criminal organisations involved in illegal immigration some name or phone number, mentioned several years ago in a drug smuggling case very often appears in the illegal immigration case. Links between Chinese and Albanian criminal groups are also seen to exist with Eastern European organised crime groups who facilitate the transportation of immigrants through Russia, Ukraine, the Czech Republic or Hungary. As an example I will once again refer to the Chinese who died attempting to enter the UK. To highlight the interaction between different organised crime groups, there is evidence that Yugoslav, Hungarian, Dutch and Turkish organised crime groups were all involved in transporting these unfortunate individuals. Confirmation of the links between traditional organised crime activity and illegal immigration can be evidenced from the fact that the Dutch lorry driver involved, and the owner of the haulage company, were previously suspected of being involved in drug trafficking.

When considering these factors, alien smuggling is more complex than it first seems to be. It becomes obvious that illegal immigration is not a question of a few isolated cases of border crossing and smuggling of people - it is a serious organised crime problem threatening the majority, if not all, developed countries around the world.

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS IN INDIA

*Deepa Mehta**



I. STATEMENT OF THE PROBLEM

North India's premier newspaper 'The Tribune' dated 10th September, 2002 from Chandigarh reported in an article 'want to mint money, say \$ 200 to \$ 300 million per annum, without doing almost nothing? If yes, be an agent or sub-agent of a well-oiled conglomerate, run by dozens of "unscrupulous but powerful travel agents" based in Delhi or a foreign country, base yourself in a village or township in the Doaba region and successfully entice thousands of young foreign aspirants, each of whom is ready to pay anything from \$ 20,000 to \$ 30,000 for "permanent" settlement abroad.

This is no mere estimation. Official figures show that nearly 15,000 youth from Doaba and other parts of Punjab (Punjab is one of the many states of India) go to the U.S.A., Canada and other Western countries annually. Most of them go with the help of people based in different villages, who act as sub-agents or conduits of certain Delhi or foreign based "travel agents", running the flourishing "human cargo" business. The most popular method among young aspirants for settling in a country of their choice is to just intentionally misplace his or her original travel documents and then apply for fresh travel documents through embassies of different countries. The widespread use by unscrupulous agents, is evident from heaps of national status verification queries - forwarded by embassies of different countries to the local Regional Passport Office and the police authorities. And the number of those people who had "lost" their travel documents during their foreign trip has been on the rise during all these years.

The Regional Passport Office authorities, official sources revealed, received about 5500 verification queries during the past year, which were routed by them to the police authorities for the purpose. On the other hand, the office received about 625 such queries in 1999, followed by 582 and 632 during 2000 and 2001 respectively. The rise in number of course, is mind-boggling. "Though not all are wrong. But most who apply for a fresh passport intentionally misplace their travel documents so as to feign that they had not gone to that country through some illegal channel or were on a short visit as they had been accorded a visitor" visa," said an official adding that most such people act on advice given to them by their travel agents.

According to an official estimate, this way, people who work as sub-agents of those indulging in the human cargo racket, mop up about \$ 200,000,000 per year since they charge an amount of \$ 20,000 to \$ 30,000 per person and since the number of people actually landing in certain Western countries are estimated to be twice those who apply for fresh travel documents. "Actually if, on an estimate, 5,000 people apply for a fresh passport from abroad, the same number of people are those who either don't apply for a fresh passport or those who, had paid the money to travel agents in India, but had failed to get through", said a senior official associated with the verification process.

Police officials, admitted that the most favoured destinations were the USA and Canada and those indulging in the racket used varied routes, including Nepal and Mexico, for sending people to these two countries. The number of people who were not accredited travel agents but operated from various villages and townships of the Doaba region as sub-agents, according to the travel and trade industry sources, was between 125 and 150, but the police put the number at 500. "They don't have shops or

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offices and are generally those who have been to a foreign country once or twice or had adopted this profession after being deported. Their services are generally taken by people settled abroad, who want to get their relatives abroad at any cost”.

A notorious cheat Gurdip Singh was recently caught on September 19, 2002, and according to the Tribune of September 20, 2002, he confessed to having arranged green cards for over 200 immigrants under an amnesty offer by the U.S. government in 1982. Says Gurdip, “I command a lot of respect in the Doaba belt for sending their people abroad.” Gurdip used to arrange fake documents for illegal immigrants and charge money for it. After being caught by the FBI on December 23, 1989, for arranging green cards for the immigrants, he was released on January 31, 1990, after he turned state approver in the case. He was deported from Korea, Malaysia and Poland for sending illegal migrants through these countries.

There have recently been far more reports of smuggling migrants from India, reflecting an emerging migrant smuggling infrastructure that involves Indian agents recruiting migrants, transporting them to Europe or North America, collecting fees from them and perhaps providing them with jobs in the destination areas. The migrant smugglers located in the Paharganj area in Delhi generally charge \$ 7,500 to \$ 9,000 to send an individual to Europe.

II. CAUSES

What are the causes? Or what are the “pull” and “push” factors for migration? Why is it that an industry has emerged which involves helping migrants, for a fee, to secure visas, transportation and employment? Why has migration spurred the growth of illegal trafficking with the illegal flow of workers and a large market for forged documents?

The ILO secretariat has published a book entitled “Workers without frontiers - The Impact of globalization on International Migration”. According to the author, Peter Stalker, the flow of goods and capital between rich and poor countries is not large enough to offset the need for employment in poorer countries. Instead, social disruption caused by economic restructuring is encouraging people to look for work abroad. The total number of migrants around the world is now 120 million, up from 75 million in 1965 and is still growing. In a world of winners and losers, the losers do not simply disappear; they seek somewhere else to go. The ability to find good jobs and earn much higher pay is the prime reason for people to migrate. According to the ILO publication, the potential for migration is the difference in wage rates for occupations that are open to migrants. For instance, in the U.S., the sector in which the share of immigrants is highest is agriculture; in Belgium and the Netherlands, it is the extraction and processing of minerals; in Denmark, Germany, Australia and Canada, it is manufacturing; in France and Luxembourg, it is construction and civil engineering and in the U.K. it is services.

On this side of the globe, many countries are both sources and destinations for migrant workers. Thailand is host to migrants but also has Thai Workers spread across Asia. Similarly, skilled workers from India migrate to Indonesia and other East Asian countries.

In a number of Asian countries, the majority of migrants today are women, generally working as domestic servants in West Asia, Singapore and Hong Kong. The NIE (newly industrialized economies) of Singapore, Hong Kong, South Korea and Taiwan have all attracted large contingents of unskilled workers even as they try to control the inflow.

A Ministerial Conference on People Smuggling, Trafficking in Persons and Related Transnational Crime was held in Bali from 26-28 February which was attended by representatives from countries in the Asia - Pacific region and the Middle East. Ministers from these countries acknowledged that illegal movements were growing in scale and complexity world wide, including the Asia - Pacific Region. They noted with concern that many of the smuggling and trafficking activities were being orchestrated by criminal networks that were also involved in the trafficking of narcotics, document fraud, money laundering, arms smuggling and other transnational crimes. They also expressed deep concern about possible links between terrorist elements and people smuggling and trafficking operations and that these activities were now rivaling narcotics in profitability. Ministers affirmed that the root causes of

people smuggling and trafficking in persons were numerous and multi-dimensional, involving economic, social and political aspects. They reaffirmed that poverty, economic disparities, labour market opportunities and conflict were major causes contributing to the global increase in people smuggling and trafficking in persons. Ministers recognized that these problems should be addressed co-operatively and comprehensively.

III. INDIA - COUNTRY PERSPECTIVE

Let us examine the case of India. India, the world's most populous democracy with one billion people is both a host for and a source of migrants. Many Nepalese, have migrated to India. Census officials say that more than five million Bangladeshis have settled illegally in the northeastern region of India. According to Migration News July 2001 Volume 8 Number 7, it was estimated in May 2001 that there were at least 12 million illegal Bangladesh migrants in India's northeastern states. Most of the migrants are laborers in the dominant industry, tea production and in services. It is claimed that the presence of these illegal migrants poses economic and cultural problems.

India and Bangladesh share a 4,000-kilometer border. In fact, Dhubai, which is the last Assamese district, faces continuous influx from across the border. Bangladeshi migrants reportedly sneak in with the Indian farmers, who go across the border to cultivate. Though the Border Security Force issues token cards to these farmers, which they return on return, Indian officials can't check every individual. District officials also admit connivance of the local population in helping the infiltrators. Middlemen in the border villages are making huge sums of money from these infiltrators. Several instances in which these infiltrators were issued ID cards and residential certificates by village panchayats have come to light.

Why do people migrate to India? It is said that there are essentially two types of migrants from a country, the first due to political or religious reasons, and the other are economic migrants. In the first case the persons are given asylum in the adopted country, since it would be inhuman to send them back, knowing fully well that they will not have normal civil liberties and in many cases their lives will be in danger. Political asylum seekers usually tend to be small in number. Economic migrants do not receive such privileges and their number tends to be much larger and places a substantial monetary burden on the host country.

In the case of India there has been a stream of Hindu migrants from both Pakistan and Bangladesh since the independence of the country in 1947, but numbers have been small, and the absorption of this population has not been such a difficult task. Another group that has come to India from Bangladesh is that of the Chakmas. Chakmas live in a small hilly area of Bangladesh. While the Chakmas are being asked to go back, based on an assurance by the Bangladesh government, their future remains uncertain.

The case of economic migration into India is different. Sometimes, cases of illegal migrants acquire political overtones. Parties try to create a block of votes in order to win elections by granting such people ration cards, on the basis of which they get enrolled on the electoral rolls. Sometimes, they determine the fate of the election due to their concentration in certain pockets. Thus, the winner is chosen not by Indians, but by foreigners. Such migrants form significant blocks, and determine economic policies. As India is a poor country with a large number of unemployed people, illegal migrants are perceived as taking away jobs from legitimate citizens.

There is another side of the story. Illegal migrants from India are smuggled to other countries after paying smuggling fees. In 2001, 400 cases were registered at Police Station Indira Gandhi International Airport under sections of cheating, fraud and forgery of the Indian Penal Code and the Foreigners Act and 345 cases have been registered so far in 2002. During this year 205 persons have been arrested for attempting to travel with forged passports or visas.

In some cases, illegal migrants are unable to pay the full amount of fees demanded before they reach their place of destination. They endure even worse treatment at the hands of smugglers. According to the Los Angeles Times, May 5, 1998 a case in Florida involved 23 women from Vera Cruz,

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Mexico, some as young as 13 years old, who were enslaved in prostitution to pay off their \$2,000 smuggling fees. Similarly, when migrants from India and Nepal cannot pay their fees they are kidnapped and ransomed by their smugglers. Sometimes, repayment of debts is defrayed by migrants by serving as “mules” and carrying drugs. The Times recently reported on how Asian and African migrants are being smuggled into the United States through Central America. William D. Cadman, U.S. Immigration and Nationalization Service counter terrorism coordinator, in a recent testimony before Congress, said:

“Alien smuggling reaches far beyond our borders with Mexico and Canada - to the Caribbean, all regions of the globe and deep within the interior of the United States itselfOrganized crime syndicates and international terrorist organizations are known to use alien-smuggling operations to support and further their criminal objective.”

It is in this manner that smuggling of migrants becomes part of a wider network of transnational organized crime.

The National Seminar on Political Economy of Migration, held from August 17-19, 2001 in Bangalore focused on the issue of human trafficking, drug abuse, smuggling etc. Participants felt that porous borders, lackadaisical vigil and several other registration failures encouraged migration from the borders and recommended strict vigil and proper administrative infrastructures to check illegal migration.

The seminar also highlighted specific problems related to international migration. The participants recommended the revision of the existing international migration laws and the ratification of the United Nation's International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families of 1990 by the Government of India. Neighbouring countries Bangladesh and Sri Lanka have signed the convention. India is yet to do so. The participants felt that the fundamental human rights of migrants are too easily violated or ignored. The violation of their rights contributes to increasing social disintegration and declining respect for the rule of law. There is more need than even before to promote the development and applications of international standards, which underline a fundamental fact that “migrants” rights, are “human rights”.

IV. STRATEGIES TO COMBAT SMUGGLING OF HUMANS

The Bali Ministerial Conference on People smuggling, Trafficking in Persons and Related International Crime emphasized the fact that while it was very difficult for any individual state to counter people smuggling and trafficking in persons effectively without the support of other states, and while people smuggling, trafficking in persons and other forms of illegal migration were global problems involving source, transit and destination countries, which required comprehensive international action, the Asia - Pacific region could make an effective and important contribution to combating these criminal activities by developing practical co-operative measures to prevent, intercept and disrupt people smuggling, trafficking in persons and other forms of illegal migration. Subject to national laws and according to their respective national circumstances, nations could work towards:

- Developing more effective information and intelligence sharing arrangements within the region to obtain a more complete picture of smuggling and trafficking activities and other forms of illegal migration.
- Improving the cooperation of law enforcement agencies to enhance deterrence and to fight against illegal immigration networks.
- Enhancing co-operation on border and visa systems to improve the detection and prevention of illegal movements.
- Increasing public awareness of the facts of smuggling and trafficking operations to discourage those considering illegal movement and to warn those susceptible to trafficking, including women and children - enhancing the effectiveness of return as a strategy to deter illegal migration through the conclusion of appropriate arrangements.
- Cooperating in verifying the identity and nationality of illegal migrants, in a timely manner.

An important strategy to deter and prevent such activities was to adopt and strengthen legislation that specifically criminalizes people smuggling and trafficking in persons. The Bangkok Declaration on Irregular Migration; the ongoing work of the Asia Pacific Consultations on Refugees, Displaced persons and Migration; and the existing ASEAN mechanisms in combating people smuggling, trafficking in persons and related transnational crime, were of utmost relevance. The United Nations Convention against Transnational Organized Crimes and the protocols thereto were international instruments for preventing, criminalizing and combating people smuggling and trafficking in persons and individual countries needed to consider the benefits of signing and ratifying the Convention and its Protocols.

In the Bali Conference, Ministers also urged the international community to assist source countries to address the root causes of the illegal movement of people by providing emergency aid, development assistance, direct support programmes for displaced persons and to address the plight of refugees. They agreed on the need for capacity building programs to achieve sustained economic growth and sustainable development and for assistance to countries with large refugee populations. Ministers emphasized that consideration should also be given to encouraging more opportunities for legal channels of migration including access to the international labour market.

The United Nations Convention against Transnational Organized Crime is supplemented by the Protocol against the Smuggling of Migrants by Land, Sea and Air. The definition of smuggling of migrants includes procurement of illegal entry into a country of which the person is not a national or a permanent resident in order to obtain direct or indirect financial or other material benefit.

According to the General Provisions, the purpose of the Protocol is to prevent and combat the smuggling of migrants, as well as to promote co-operation among state parties to that end. Article 6 talks of criminalization and states that:

“Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally and in order to obtain, directly or indirectly, a financial or other material benefit:

- (a) The smuggling of migrants;
- (b) When committed for the purpose of enabling the smuggling of migrants;
 - i) Producing a fraudulent travel or identity document;
 - ii) Procuring, providing or possessing such a document;
- (c) Enabling a person who is not a national or a permanent resident to remain in the state concerned without complying with the necessary requirement for legally remaining in the state by the means mentioned in sub paragraph (b) of this paragraph or any other illegal means”.

Part II of the Protocol is concerned with the smuggling of Migrants by sea and Part III elaborates on Prevention, co-operation and other means such as exchange of information, border measures, security and control as well as legitimacy and validity of documents, training and technical cooperation and other prevention measures. Part IV consists of Final Provisions.

The International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families was adopted by the General Assembly on December, 18, 1990 and opened for signature, ratification and accession. The convention will come into force after ratification by 20 State parties. So far, 9 states have ratified the Convention.

An Ad hoc Committee on the Elaboration of a Convention against Transnational Organized Crime met in October 2000 for the finalization and approval of the additional international legal instrument against trafficking in and transporting of migrants.

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V. TRAFFICKING

Trafficking in human beings is the illegal trade of human beings, through abduction, the use of threat of force, deception, fraud or “sale” for the purposes of sexual exploitation or forced labour. This definition is based on the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children.

A definition of trafficking offered by the United Nations Special Rapporteur to the United Nations Commission on Human Rights in 2000 states that trafficking in persons means the recruitment, transportation, purchase, sale, transfer, harbouring or receipt of persons by threat or use of violence, abduction, force, fraud, deception or coercion (including the abuse of authority), or debt bondage, for the purpose of placing or holding such person, whether for pay or not, in forced labour or slavery - like practices, in a community other than the one in which such person lived at the time of the original act described.

The United Nations interregional Crime and Justice Research Institute estimates that four million individuals are traded every year. The international Organization for Migration estimates that at least 500,000 women are trafficked into Western Europe. This is a business that does affect men, but it is predominantly women who are being sold into sexual slavery. The illicit trade of people is now a multimillion, perhaps multibillion dollar criminally organized industry, on par with drugs trafficking.

Trafficking routes replicate migration routes, with a traditional movement from South to North.

A. Countries or Areas of Origin

Afghanistan, Albania, Bangladesh, Belarus, Bulgaria, Cambodia, China, Colombia, Croatia, Hungary, India, Indonesia, Jamaica, Kosovo, Latvia, Lithuania, Mexico, Myanmar, Nepal, Pakistan, the Philippines, Poland, Russia, Romania, Slovakia, Thailand, Ukraine, countries of the former Soviet Union, Vietnam.

B. Countries or Areas of Destination

Austria, Australia, Belgium, Canada, China (including Hong Kong and Macao), Cyprus, Dubai, the Federal Republic of Yugoslavia, France, Greece, Germany, Hungary, India, Israel, Italy, Japan, Malaysia, the Netherlands, Pakistan, Poland, Saudi Arabia, Singapore, Switzerland, Taiwan, Thailand, Turkey, the United Kingdom, the USA and the United Arab Emirates.

VI. CAUSES

Over the past decade, trafficking in human beings has reached epidemic proportion. No country is immune. The search for work abroad has been fuelled by economic disparity, high unemployment and disruption of traditional livelihoods. Traffickers face few risks and can earn huge profits by taking advantage of large numbers of potential immigrants. In many cases, drug traffickers have switched to trafficking human beings because it is more lucrative and relatively risk free.

In Asia, girls from villages in Nepal and Bangladesh are sold to brothels in India. Similarly, trafficked women from Thailand and the Philippines are increasingly being joined by women from other countries in South East Asia.

Trafficking in human beings is not confined to the sex industry. Children are trafficked to work in Sweatshops as bonded labour and men work illegally in the “three D - jobs” - dirty, difficult and dangerous. Children are often “sold” by unsuspecting parents who believe their children are going to be looked after, learn a trade or be educated.

The problems of trafficking are compounded by the fact that many women like to migrate. They do not want to live permanently in their villages and want to travel to urban areas. Many of the circumstances that are believed to lead to trafficking - widespread poverty, the low status of women and girls, and other social un-equities - are also reasons. Women and children often seek to migrate.

VII. A COMPLEX PROBLEM

There is no single way to identify a victim of trafficking. Trafficking is mainly a hidden problem, although many trafficking victims are in plain sight. Women and girls are often kept isolated and if they are allowed to go out, they are typically watched, escorted or guarded by associates. They are often raped, beaten, imprisoned, tortured, and made to live in life - threatening conditions. Trafficking victims often do not have their passports or other travel or immigration documents, because their abductors have confiscated them. Similarly, trafficking victims rarely have access to means of communication such as phones.

The complexity of the problem can be gauged by some of the newspaper headlines in 2001.

- U.K. National Plan launched to help protect most vulnerable children (19 Sept. 2001)
- Conference: Hidden Children - Funding London's solutions (19 Sep. 2001)
- Offenders could be electronically tagged, BBC News (3 Sept.2001)
- Children as young as five could learn about sex abuse, BBC News (3 Sept. 2001)
- US State Department - Trafficking in Persons Report July 2001 (3 Sep. 2001)
- Report on Victims of Trafficking and Violence Protection now available online (3 Sept. 2001)
- Thailand Hosts Meeting on child Sex Tourism (9 July 2001)
- Child Prostitution attracting foreign businessmen to Indonesia (11 April, 2001)
- Italian police bust sex slave ring (Apr. 2001)
- Nepal to India: Ending the Trafficker's Paradise (March 2001)
- Internet Pedophiles tracked down in global police operation (12 Feb. 2001)
- European Union ministers tackle sexual exploitation (9 Feb. 2001)
- She cost me \$ 800. And I can sell her for \$ 250 an hour (24 Dec. 2000)
- Japan: Reported Child Abuse cases Up Tenfold since 1990 (2 Nov. 2000).

VIII. INDIAN PERSPECTIVE

In cross border trafficking, India is a sending, receiving and transit nation. Receiving children from Bangladesh and Nepal and sending women and children to Middle Eastern nations is a common occurrence. India and Pakistan are the main destinations for children under 16 who are trafficked in south Asia. According to Masako Iijima, ("S. Asia urged to unite against child prostitution," Reuters, 19 June, 1998) more than 40% of prostituted girls rescued during major raids of brothels in Bombay in 1996 were from Nepal and in February, 1998, there were 200 Bangladeshi children and women awaiting repatriation in different Indian shelters. 13 boys, between the ages of 7-13 were recovered in Delhi while being smuggled to Arab countries for becoming jockeys in camel races on 19 February 1998. The children come from relatively poorer areas and are trafficked to relatively richer ones. In Bombay, children as young as 9 years are bought at auctions for up to US\$ 1500.

In India, Karnataka, Andhra Pradesh, Maharashtra, and Tamil Nadu are considered "high supply zones" for women in prostitution. Bijapur, Belgaum and Kolhapur are common districts from which women migrate to the big cities, as part of an organized trafficking network (Central Welfare Board. Districts bordering, Maharashtra and Karnataka, known as the "devadasi belt, also have trafficking structures operating at various levels. The women here are in prostitution either because their husbands deserted them, or they are trafficked through coercion and deception. Many are devadasi dedicated into prostitution for the goddess Yellamma.

According to Radhika Coomaraswamy, UN Special Report on Violence Against Women, 2 April 1997, Indian brothels hold many Nepalese women and girls of whom 35 per cent were taken on the false pretext of marriage or a good job. About 5,000- 7,000 Nepalese girls are trafficked to India every year. The official figures regarding importation of girls are 78 in 1997, 146 in 1998 and only 1 in1999. Of the trafficked girls, the average age over the past decade has fallen from 14-16 years old to 10-14 years old. Calcutta is one of the important transit points for the traffickers for Bombay and to Pakistan. Most of the women are trafficked out of Bangladesh through land routes along the border areas of Bangladesh and India, such as Jessore, Satkhira, and Rajshahi.

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The girls are sold by poor parents, tricked into fraudulent marriages, or promised employment in towns only to find themselves in Indian brothels. They're locked up for days, starved, beaten, and tortured until they learn to comply. Trafficking in women and girls is easy along the 1,740 mile-long open border between India and Nepal. Trafficking in Nepalese women and girls is less risky than smuggling narcotics and electronic equipment into India. Traffickers ferry large groups of girls at a time without the hassle of paperwork or threats of police checks. The procurer-pimp-police network makes the process even smoother. According to Soma Wadhwa, ("For Sale Childhood," *Outlook*, 1998) they are bought for petty amounts and are known to fetch much greater amounts in later transactions. Girls may not leave the brothels until they have repaid their debt, at which time they are sick, with HIV and/or tuberculosis, and often have children of their own. Any attempt to resist results in brutal torture. All their "earnings" are taken away by the so-called husbands or mistresses. The "husbands" occasionally write from fake addresses to their parents to avoid arousing any suspicion. The areas used by traffickers to procure women and girls are the isolated districts of Sindhupalchow, Makwanpur, Dhading and Khavre, Nepal where the population is largely illiterate.

IX. INDIAN LAW

The Principal Act of the Immoral Traffic (Prevention) Act, 1956 was originally enacted with the title "The Suppression of Immoral Traffic in Women and Girls Act, 1956 (58Aof 1956)". The Act was introduced in Lok Sabha with a view to implementing the International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of Prostitution of others signed in New York on 9th May, 1950. Under Article 23 of the said Convention, traffic in human beings is prohibited and any contravention of the prohibition is an offence punishable by law. The Statement of Objects and Reasons appended to the Bill states that legislation on the subject of suppression of immoral traffic does exist in a few States but the laws are neither informed nor do they go far enough. In the remaining States, there is no bar on the subject at all. Therefore, it was felt necessary and desirable that a Central Law should be passed which will not only secure uniformity but also would be sufficiently deterrent for the purpose. A special feature of the bill is that it provides that no person or authority other than the State Government shall establish or maintain any protective home except under a licence issued by the State Government. This will check the establishment of homes which are really in use for prostitution.

The Act has a limited scope and character. There is no provision in the Act which makes prostitution *per se* a criminal offence or punishes a person for indulging in prostitution. It defines prostitution as promiscuous sexual intercourse for commercial purposes. What is punishable under the Act is sexual exploitation for commercial purposes or to earn bread thereby. There is such exploitation in a brothel (Section 3) or when one knowingly lives wholly or in part on the earnings of prostitution of a woman or girl (Section 4) or procures, induces or takes a woman or girl for the sake of prostitution (Section 5) or detains a woman or girl in premises where prostitution is being carried on (Section 6).

Prostitution by itself is not an offence except when it is committed in the vicinity of a public place or somebody seduces or solicits a person for the purposes of prostitution. No order could have been passed against the petitioners for rescue from their rooms simply because they belonged to Badya caste whose profession is said to be singing and dancing. Medical examination revealed recent sexual intercourse but sexual intercourse by itself is not an offence (*Km. Sangeeta v. State and another*, 1996 Cr Ruling 129 (Delhi)). A perusal of the relevant provisions of the Act goes a long way to show that the purpose and object of the Act is not to abolish 'prostitute' or prostitution (*Ibid*). The Act provides a fertile ground for legal manipulation.

X. ACTION OF NGOS

The NGOs can play a major role in the rehabilitation of trafficked women. A major trafficking network was discovered by the Karnataka State Commission for Women in which 12-18 year old girls were being smuggled from various impoverished districts to contractors who run brothels in Goa. The contractors were paying the parents for their girl children under false pretenses. Durga Chimire, chairperson of a 98-NGO-strong pressure group National Network Groups Against Trafficking feels that the alarmingly low rates of female literacy, coupled with the traditionally low status of the girl child in Nepal have to be addressed to tackle the problem. There are several shelters run by various

Kathmandu based NGOs working against trafficking and rehabilitation of girls who manage to escape or are rescued from Indian brothels. This is not easy work. Relatives of the rescued girls generally do not want them back and Nepal's government is worried about the spread of HIV, as many of the trafficked girls contract HIV while in India. Rehabilitation of trafficked women and children is hampered by lack of government support and an agenda for their rehabilitation. The sending country may not come forward to claim them and younger children may not know where they originally came from. Moreover, a survey of trafficked women in India reveals their reasoning for staying in prostitution (in descending order of significance): poverty /unemployment; lack of proper reintegration services, lack of options; stigma and adverse social attitudes; family expectations and pressure; resignation and acclimatization to the life style (CATW - Asia Pacific, Trafficking in Women and Prostitution in the Asia Pacific). NGOs can contribute towards their health and well-being instead of their receiving treatment at the hands of unlicensed doctors, who give the women mood elevators, IV drips of colored water or medicinal herbs. Moreover, the women pay for this "treatment" with cash from moneylenders, and the Mafia collects a percentage from the "doctors." In fact, repatriation is perceived as a cheap way of getting rid of HIV infected girls.

In fact India has become one of the favoured destinations of paedophile sex tourists from Europe and the United States according to The Indian Express, 21 November 1997. Foreign tourists are frequenting India because of its non-implementation of laws, abundant child prostitutes and the false idea that there is a lower incidence of AIDS (Rahul Bedi, "Bid to Protect Children As Sex Tourism Spreads," 1997). Multinational tour operators, hotel companies, airlines and travel agencies set up the tourism agenda for Goa, India and the world over. In December 1997, a nine-year-old girl from Pune was found living with a 54-year-old Swiss national in a Goa hotel for over nine months. A local NGO filed a complaint with the police and the girl was sent to an observation home. When contacted, her father said she was there with his consent. The man was released following an investigation.

XI. POLICY

A number of investigations into this subject have revealed the need for more empirical research. There are no solid data on the extent of trafficking, the determinants and processes of trafficking, and the needs of trafficked persons who return. Gathering such basic information can be given high priority. Similarly, interventions such as intervention strategies need to be systematically assessed. There have been reports of women and girls being prevented from crossing the border despite their vehement protestations that they are traveling of their own free will.

The support services for returned trafficked girls and women must also be evaluated and improved. Returnees are often assumed by community members to be immoral and at fault in their own trafficking. They are also frequently thought to be infected with HIV/AIDS. Thus, they face a double stigma and require care and support to meet these challenges. Many trafficked persons may have originally left home because of dysfunctional situations, and may not be able to return to their families safely. Family assessment, therefore, should be improved, along with residential care for girls and women who cannot return home.

Anti trafficking interventions need to be refocused so that they do not infringe upon the human rights of women who wish to migrate but who are at risk of trafficking. Rather than attempting to frighten women into remaining at home, interventions could provide support systems to permit safe migration and to help women once they reach their destinations.

A view is that both HIV/AIDS and trafficking control programmes work with vulnerable and powerless populations, deal with stigma and discrimination against people infected with or affected by HIV and require similar rights - based responses. Rather than advocating that migration be limited, it calls for interventions to address the spreading of HIV without compromising the right of freedom of movement and the right to seek a better standard of living.

Although trafficking is a global phenomenon, governmental and non-governmental attentions and resources vary from region to region and country to country. The international community has classified trafficking of women as a serious abuse of women and punitive measures, prevention, rescue and

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rehabilitation have all been used to combat trafficking. However, there is still a lack of political will in terms of guaranteeing the human rights of trafficked women. This applied to countries of origin, transit and destination. Countries have failed to develop appropriate mechanisms of prevention and redress for victims of trafficking, and have also failed to enforce the existing law against assault, rape, kidnapping and extortion to prosecute traffickers.

There is a need to move from an agenda of rescue, rehabilitation and deportation to an approach that is designed to protect and promote women's human rights in countries of origin and destination.

The 1997 European Union Hague Declaration on the Question of Trafficking in Women calls on Member States to:

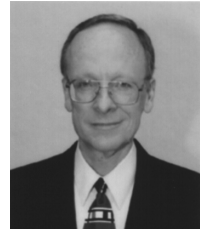
- Provide or explore the possibilities of providing national rapporteurs to gather and exchange information on trafficking.
- Undertake information campaigns in countries of destination and origin.
- Recognize that trafficked women are victims of crime and are not treated as illegal immigrants and deported.
- Provide victims of trafficking with time and support as they decide whether or not to press charges.
- Provide trafficked women with legal, financial and medical assistance.
- Provide women with temporary residence status and protection during criminal proceedings.
- Train the police and judiciary on the nature and characteristics of trafficking.
- Work within the framework of development co-operation to improve the economic and social status of women in the countries of origin.

The UN Convention on the Suppression of the Traffic in Persons (1949), and the supplementary convention on the abolition of slavery, the slave trade and institutions and practices of slavery have been signed by most of the SAARC countries, including Bangladesh, India, Pakistan and Sri Lanka. Another important step forward is coordinating an international convention against Transnational Organized Crime was signed by 140 countries and ratified by six. A total of 101 countries have signed its Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children and four have ratified it. States that ratify the Protocol are required to criminalize trafficking, punish offenders, protect victims and cooperate in seeking out traffickers.

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THE PRESENT SITUATION OF THE UNITED STATES RELATING TO TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS

*Richard L. Hoffman**



I. HUMAN TRAFFICKING IN THE UNITED STATES

When the United States Congress enacted the Trafficking Victims Protection Act, which took effect on October 28, 2000, Congress made several important findings concerning human trafficking. Those findings provided the basis for the new statute, which represents a new approach to the human trafficking problem in the United States.

Here are some of those findings, which reflect the official views of the United States government on the crime of human trafficking:

- (1) As the 21st century begins, the degrading institution of slavery continues throughout the world. Trafficking in persons is a modern form of slavery, and it is the largest manifestation of slavery today. At least 700,000 persons annually, primarily women and children, are trafficked within or across international borders. Approximately 50,000 women and children are trafficked into the United States each year.
- (2) Many of these persons are trafficked into the international sex trade, often by force, fraud, or coercion. The sex industry has rapidly expanded over the past several decades. It involves sexual exploitation of persons, predominantly women and girls, involving activities related to prostitution, pornography, sex tourism, and other commercial sexual services. The low status of women in many parts of the world has contributed to a burgeoning of the trafficking industry.
- (3) Trafficking in persons is not limited to the sex industry. This growing transnational crime also includes forced labor and involves significant violations of labor, public health, and human rights standards worldwide.
- (4) Traffickers primarily target women and girls, who are disproportionately affected by poverty, the lack of access to education, chronic unemployment, discrimination, and the lack of economic opportunities in countries of origin. Traffickers lure women and girls into their networks through false promises of decent working conditions at relatively good pay as nannies, maids, dancers, factory workers, restaurant workers, sales clerks, or models. Traffickers also buy children from poor families and sell them into prostitution or into various types of forced or bonded labor.
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- (8) Trafficking in persons is increasingly perpetrated by organized, sophisticated criminal enterprises. Such trafficking is the fastest growing source of profits for organized criminal enterprises worldwide. Profits from the trafficking industry contribute to the expansion of organized crime in the United States and worldwide. Trafficking in persons is often aided by official corruption in countries of origin, transit, and destination, thereby threatening the rule of law.
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- (11)Trafficking exposes victims to serious health risks. Women and children trafficked in the sex industry are exposed to deadly diseases, including HIV and AIDS. Trafficking victims are sometimes worked or physically brutalized to death.
- (12)Trafficking in persons substantially affects interstate and foreign commerce. Trafficking for such purposes as involuntary servitude, peonage, and other forms of forced labor has an impact on the nationwide employment network and labor market. Within the context of slavery, servitude, and labor or services which are obtained or maintained through coercive conduct that amounts to a condition of servitude, victims are subjected to a range of violations.
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- (21)Trafficking of persons is an evil requiring concerted and vigorous action by countries of origin, transit or destination, and by international organizations.
- (22)One of the founding documents of the United States, the Declaration of Independence, recognizes the inherent dignity and worth of all people. It states that all men are created equal and that they are endowed by their Creator with certain unalienable rights. [Of course, we now recognize that this phrase means not just all “men,” but all human beings, including men, women, and children.] The right to be free from slavery and involuntary servitude is among those unalienable rights. Acknowledging this fact, the United States outlawed slavery and involuntary servitude in 1865, recognizing them as evil institutions that must be abolished. Current practices of sexual slavery and trafficking of women and children are similarly abhorrent to the principles upon which the United States was founded.
- (23)The United States and the international community agree that trafficking in persons involves grave violations of human rights and is a matter of pressing international concern. The international community has repeatedly condemned slavery and involuntary servitude, violence against women, and other elements of trafficking, through declarations, treaties, and United Nations resolutions and reports.
- (24)Trafficking in persons is a transnational crime with national implications. To deter international trafficking and bring its perpetrators to justice, nations including the United States must recognize that trafficking is a serious offense. This is done by prescribing appropriate punishment, giving priority to the prosecution of trafficking offenses, and protecting rather than punishing the victims of such offenses. The United States must work bilaterally and multilaterally to abolish the trafficking industry by taking steps to promote cooperation among countries linked together by international trafficking routes. The United States must also urge the international community to take strong action in multilateral fora to engage recalcitrant countries in serious and sustained efforts to eliminate trafficking and protect trafficking victims.

The estimated trafficking figures, and much of the background information, on which the United States Congress relied in making these findings, came from a report that was published in April 2000 by Amy O'Neill Richard, an analyst employed by the United States State Department. The Richard Report still provides the latest and most complete publicly available analysis of human trafficking into the United States. The report is available on the Internet.

Ms. Richard is currently serving as the Senior Coordinator for Reports in the State Department's recently created Office to Monitor and Combat Trafficking in Persons. She was also involved in preparing the 2002 Trafficking in Persons Report, published by the State Department pursuant to the requirements of the Victims of Trafficking and Violence Protection Act of 2000.

The Richard Report defined human trafficking as including:

all acts involved in the recruitment, abduction, transport, harboring, transfer, sale or receipt of persons; within national or across international borders; through force, coercion, fraud or deception; to place persons in situations of slavery or slavery-like conditions, forced labor or services, such as

forced prostitution or sexual services, domestic servitude, bonded sweatshop labor or other debt bondage.

Statistics on human trafficking are difficult to obtain because of the covert nature of the crime. We can only estimate the number of instances of trafficking and the number of trafficking victims.

Ms. Richard estimated, based on approximately one year of research, travel, and consultations with law enforcement and other officials around the world for purposes of preparing her report, that 45,000 to 50,000 women and children are being trafficked into the United States each year. The Richard Report did not attempt to provide a separate figure for trafficked men because, although such trafficking is known to occur, and has been proven in some cases in the United States courts, there were fewer documented cases of male trafficking on which to base a national estimate.

As to the source regions from which women and children are trafficked into the United States, the Richard Report estimated that approximately 30,000 of the 45,000 to 50,000 women and children being trafficked into the U.S. annually were from Southeast Asia, 10,000 from Latin America, 4,000 from the Newly Independent States of the former Soviet Union, and 1,000 from other regions. There have been reports of human trafficking into, and within, at least 20 different states of the United States, with most of the reported cases occurring in New York, California, and Florida.

The primary source countries for people who are trafficked into the United States appear to be Thailand, Vietnam, China, Mexico, Russia, the Ukraine, and the Czech Republic. Other source countries for trafficking into the United States include the Philippines, Korea, Malaysia, Latvia, Hungary, Poland, Brazil, and Honduras. Within recent years, the Department of Justice has also brought cases charging trafficking of victims from Ghana, Indonesia, Uzbekistan, Cameroon, and Bangladesh.

Women trafficked into the United States have been used primarily in various aspects of the commercial sex business, including prostitution, strip shows, and massage parlors. They have also been used for sweatshop labor, domestic servitude, and agricultural work. Women have been recruited in their home countries to be trafficked into the United States most often through false promises of jobs in the U.S. as waitresses, nannies, models, factory workers, and exotic dancers, and through false promises of the high wages, good working conditions, and a wonderful life that they supposedly could expect to enjoy in the U.S. Recruiters in the source countries have reached these women through advertisements, through employment, travel, modeling, and matchmaking agencies, through the Internet, and sometimes through the women's own friends and acquaintances.

Women are trafficked across the borders into the United States in three main ways: by the illegal use of legitimate travel documents, by the use of false travel documents, and by illegal transportation across the borders without inspection. Many have entered the country on business and tourist visas, or on student, fiancée, and entertainer visas, and then have stayed beyond the time limits of their visas, and have become illegal immigrants in that way. Traffickers on occasion have succeeded in using the same travel documents over and over to bring in several different women. Traffickers have used and abused travel agencies in countries where such agencies are permitted to assist governments in processing visas. Traffickers have caused women to be brought into the United States pretending to be members of otherwise legitimate tour groups. Traffickers have taken advantage of corrupt government officials, who are paid by the traffickers to issue false travel documents, or just to look the other way, in the source country or the transit country. There have also been reported instances where this has occurred in the destination country, the United States. Other traffickers have made their own false travel documents, or have obtained the false papers from other sources.

The major ports of entry for women and children being trafficked into the United States over recent years have been the country's major commercial airports: Los Angeles International Airport, the John F. Kennedy Airport in New York, Miami International Airport, the O'Hare Airport in Chicago, and the San Francisco International Airport. Other significant entry ports have been in Atlanta, Georgia, Cleveland, Ohio, Houston, Texas, Orlando, Florida, and Washington's Dulles International Airport. Traffickers have flown women into Toronto and Vancouver in Canada, and then have transported the

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women overland into the United States. Others have brought women into the Northern Marianas Islands of Guam and Saipan. Once the women are inside the United States, traffickers have moved them around from city to city, or from town to town, in a circuit of cities that has included New York, Miami, Las Vegas, Houston, Reno, Seattle, Los Angeles, and San Francisco, among others.

Some trafficked persons, after having begun their trips to the United States voluntarily, have discovered, only after they arrived in the United States, that they were not free to move around or to change jobs. They have discovered that they were required to become prostitutes instead of working in the legitimate occupations that they had been led to expect. In one recent case, a girl was trafficked into the United States believing that she was going to be pursuing educational opportunities, only to discover that the family that she was relying upon wanted her to be its domestic slave instead.

Victims' travel documents, which may have been either legitimate or false, are often taken from them by traffickers. In cases where they had agreed to pay money to the traffickers to bring them into the United States illegally, their wages are often withheld until they can repay their smuggling fees. Those fees are often so large that, as a practical matter, they can never be repaid, particularly when traffickers, or illicit employers, keep adding new charges to the victims' debts, and fail to credit the payments that they have received from the trafficking victims. Traffickers have prevented women from leaving by using armed guards, violence, threats to harm the women themselves, threats to harm the women's families in the U.S. or in their home countries, and debt bondage. Traffickers have made examples of escapees who have been recaptured, by punishing them in front of other victims as a warning against attempting to escape. In addition to physical brutality, traffickers have threatened the women that if they do succeed in escaping, they will be treated as criminals by the U.S. government, arrested and deported.

The information gathered in the Richard Report indicated that most human trafficking into the United States had been done in the past by small crime rings, and loosely connected criminal networks. However, the Report also indicated that larger organized crime groups have been heavily involved in the human trafficking business outside of the United States, and that the involvement of these larger organized crime groups was likely to increase within the United States as well.

The Federal Bureau of Investigation -- the "FBI" -- has reported the involvement of Asian criminal enterprises in the migrant smuggling portion of the human trafficking business, with the most frequent involvement having been by Chinese, Vietnamese, and Korean criminal groups. Participation by Japanese, Filipino, Thai, Laotian, Cambodian, and Polynesian criminal groups has also been reported.

Some of these same criminal organizations have been found to be involved in the illegal prostitution business in the United States. The U.S. Immigration and Naturalization Service has found ties in some American cities, including Los Angeles, San Francisco, Sacramento, Las Vegas, and Dallas, among Asian organized crime figures, prostitution businesses, and Asian street gangs, where, for example, the local Asian street gangs have been employed by organized crime figures to protect and provide security for prostitution houses. It also appears clear that Russian organized crime groups have been involved not only in smuggling women, but also in trafficking them into and within the United States.

Recent investigations have confirmed that women are being moved around the United States in an apparently organized way, for purposes of prostitution. As Ms. Richard observed in her report, however, it has often been difficult to establish the existence and control of a central, organized, criminal authority in these cases, as opposed to looser, more informal, criminal networks. Such networks may consist of criminals who may simply know each other and trust each other, and therefore may choose to work together to make money in various different criminal enterprises, without answering to any common, higher level, criminal organization.

Although Ms. Richard found less data to support it, Ms. Richard's Report also discussed the trafficking of children into and within the United States, both for purposes of the sex industry and for labor. She cited instances of trafficking of Asian and Mexican girls in the sex industry, and trafficking of Haitian, Nigerian, Estonian, and South Asian children for purposes of domestic labor.

The Richard Report did not attempt to quantify the total profits being earned by the criminal human trafficking business in the United States. Ms. Richard reported upon and summarized a series of prosecuted cases, however, indicating that the profits from human trafficking were, and are, enormous. In just one example, a case where approximately 100 deaf and mute Mexican men and women were trafficked into New York City, and then forced to beg and sell trinkets, the profits over a four and one-half year period were estimated at roughly eight million dollars.

The International Crime Threat Assessment published in December 2000 by a United States government interagency working group is publicly available on the Internet. There has been no such publicly disclosed criminal threat assessment of this type since December 2000. The 2000 Threat Assessment described human trafficking as one of the major criminal threats to the United States.

The 2002 Trafficking in Persons Report (hereafter, the "TIP Report"), published by the United States State Department in June of this year pursuant to the requirements of the Victims of Trafficking and Violence Protection Act, is also available on the Internet. The TIP Report contains a country-by-country analysis of trafficking, based upon information collected from and through U.S. embassies and consulates around the world, non-governmental organizations, law enforcement agencies, the press, and many other sources.

Because of the statutory requirements pursuant to which the 2002 TIP Report was produced, the Report focused primarily upon countries outside of the United States. The Report indicated in its country-by-country listings the countries that are believed to be sources, or transit points, for persons being trafficked into the United States and into United States possessions. For the most part, the TIP Report agreed with the Richard Report's conclusions on this subject.

United States prosecutors, who are also called "federal" prosecutors, have used many different statutes over the years in their efforts to prosecute those involved in the trafficking of human beings.

Prior to the enactment of the Trafficking Victims Protection Act, United States federal prosecutors had a certain measure of success relying upon pre-Act federal laws to prosecute human traffickers, such as the law prohibiting conspiracies to violate constitutional rights, the law prohibiting involuntary servitude, the law prohibiting traveling in interstate or foreign commerce for purposes of prostitution, as well as the money laundering and racketeering laws when there were sufficient facts to support use of those statutes. Among the primary reasons for the enactment of the Victims of Trafficking and Violence Protection Act were the problems that arose in these prosecutions under other statutes. Problems arose both in terms of the elements that had to be proven for convictions on these other offenses and the difficulties that prosecutors had in obtaining the necessary witnesses, and in persuading those witnesses to testify against the traffickers, because of the witnesses' fears of retaliation against themselves and their families both in the United States and in the witnesses' home countries.

As you may know, the United States has two almost entirely separate legal systems. One system, in which I am involved as a federal prosecutor, functions at the national/federal level. The other system functions at the state and local level, and is administered for the most part separately by the prosecutors and courts of each state. Many criminal offenses violate both federal and state laws. Certain crimes related to human trafficking, such as prostitution, are prosecuted at the state level. There is often cooperation between federal and state prosecutors and investigators in deciding how particular cases should be handled.

I can provide you with statistics with respect to federal prosecutions of human trafficking offenses. In March 2001, the United States Attorney General, John Ashcroft, announced that combating trafficking in persons would be a top civil rights priority of the U.S. Justice Department. Since then, federal prosecutions in this area have significantly increased. According to figures provided to me by the Civil Rights Division of the Justice Department, in fiscal year 2001, the United States Department of Justice prosecuted 34 human traffickers. That was four times as many as had been prosecuted in fiscal year 2000. In fiscal year 2002, up to July of this year, the Department had prosecuted 37 additional human traffickers.

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As of July 2002, there were 120 open human trafficking investigations, which represents a 50% increase over the number of federal human trafficking investigations that were underway one year ago, and a four-fold increase over the number underway two years ago. From January 2001 to July 2002, the Department of Justice charged, convicted, or received sentences for 85 human traffickers in 18 different cases. From January 2001 to July 2002, the Department of Justice has charged, convicted, or received sentences for approximately 58 traffickers in 11 cases involving sexual exploitation.

As of July 2002, the Department of Justice had prosecuted 26 traffickers under the statutes created by the Trafficking Victims Protection Act of 2000, which I may sometimes refer to hereafter as the "TVPA." Fifteen of these traffickers are charged with having sexually exploited their victims. There have been 6 separate cases using the new TVPA statutes, 4 of which involved sexual exploitation. Under the United States Constitution, the Justice Department cannot use criminal statutes added by the TVPA to prosecute conduct that occurred prior to the enactment date in October 2000.

II. MIGRANT SMUGGLING IN THE U.S.

I will turn now to the present situation in the United States with respect to migrant smuggling.

The United States Immigration and Naturalization Service, which I may sometimes refer to hereafter as the "INS," estimates the number of persons illegally present in the United States at about 7 million. Data in the year 2000 United States Census suggests that the number may be at least 8 million. A study conducted by Northeastern University in Boston estimated that the number could actually be significantly higher than 8 million. INS officials have estimated that between 40 and 50 percent of the persons illegally present in the United States entered legally as temporary visitors, but then failed to depart the United States when their visas expired, when they were otherwise supposed to leave, or when they were ordered to leave. The portion of the illegal immigrant population entering legally, and then remaining illegally, in the United States was recently estimated to be increasing by at least 125,000 per year.

The INS and its uniformed law enforcement arm, the United States Border Patrol, do not publish current statistics that distinguish between illegal migrants who are smuggled into the United States, and migrants who have entered the United States illegally, or who remain in the United States illegally, without the assistance of smugglers. The INS and the Border Patrol do publish periodic reports relating to apprehensions of persons attempting to enter the United States illegally. The Border Patrol reports that since 1994, it has apprehended more than 11.3 million persons nationwide. The latest INS report shows that during the fiscal year that began on October 1, 2001, through the end of June 2002, more than 702,000 people were apprehended attempting to enter the United States by crossing the United States' southwestern border, which continues to be the most popular attempted illegal entry area in the country. More than 78 thousand apprehensions were made along that border during the month of June 2002 alone. During fiscal year 2001, which ended on September 30, 2001, a total of more than 1.2 million people were apprehended attempting to cross the Southwestern border. The INS and the Border Patrol apprehend thousands of migrant smugglers each year. The United States Coast Guard, which is responsible for interdictions at sea along the coasts of the United States, reports a total of approximately 4,000 interdictions at sea during fiscal year 2001, and approximately the same number thus far in fiscal year 2002.

As an interesting point of comparison, the INS reported in August 2002 that a total of 1,064,318 persons legally immigrated to the United States during fiscal year 2001. That figure includes 411,059 newly arriving persons who obtained immigrant visas outside the United States through the Department of State, and 653,259 persons already living in the United States who became permanent residents by applying for adjustment of their status. According to the INS, five countries accounted for 40 percent of the total number of legal immigrants, in the following descending order: Mexico (206,426), India (70,290), The People's Republic of China (56,426), the Philippines (53,154), and Vietnam (35,531). The United States, perhaps more than any other, is a nation of immigrants. An interesting recent study conducted by researchers at Northeastern University in Boston reported that as a result of waves of immigration, the foreign born population of the United States was nearly 15 percent in 1910, fell to 4.7 percent over the succeeding 60 years, and then has been rising steadily since

that time, with particularly strong gains in the 1980s and 1990s, to an estimated 12.4 percent in 2000. In the ten states with the largest estimated immigrant populations, the percentage of foreign born residents ranges from a low of 13.8 percent to a high, in the state of California, estimated at 27 percent of the population.

Returning now to the figures on illegal immigration, nationals from 188 different countries were apprehended by the INS and the Border Patrol during fiscal year 2000, which is the most recent year for which I was able to obtain this kind of information. Migrants from Mexico alone accounted for 96 percent of that total number. The next largest source countries whose nationals were apprehended by the INS and Border Patrol were Honduras, El Salvador, Guatemala, the Dominican Republic, Cuba, Canada, Colombia, Jamaica, The People's Republic of China, Ecuador, and Brazil. The Coast Guard during fiscal years 2001 and 2002 reported significant numbers of interdictions at sea of migrants from Ecuador, Haiti, Cuba, the Dominican Republic, the People's Republic of China, and Mexico.

Of course, despite increased enforcement efforts, migrants continue to desire to enter the United States in large numbers, and are apparently willing to pay large amounts of money -- some reportedly as much as \$60,000 to \$70,000 -- to be smuggled into the United States. As the INS and Border Patrol, patrolling the land borders, and the United States Coast Guard, operating at sea and along the seacoasts, increase their activities along one part of the United States' borders, or target particular modes of entry, migrant smugglers and would-be immigrants move to other areas, and constantly seek to discover new and different ways of crossing the border without being detected. As a result, many illegal migrants, with and without the assistance of smugglers, are not apprehended, and many continue to cross the southwestern border, and all of the other borders, of the United States.

The lengths to which migrants will go, and the dangers that they face, either willingly or unwillingly, in the course of their efforts to enter the United States, are sometimes remarkable. As you know, people have died in the United States, as well as in other countries, while they were trapped inside of commercial shipping containers. Two recently died inside a large abandoned truck trailer in Texas. Many have died, and many others have barely survived the abuse and the horrible conditions that they experienced, while trying to enter the United States by sea after having paid, or contracted to pay, large smuggling fees to Chinese "snakeheads" and other similar smugglers. Many would-be immigrants have died when smugglers abandoned them in the dangerous deserts, mountains, rivers, and canals located along the southwestern border of the United States. As of September 12, 2002, INS reported that a total of 289 migrants attempting to enter the United States had died so far this year. Most of the dead were Mexicans attempting to cross the southwestern border with the help of smugglers known in that area as "coyotes."

The INS described one case to me in which a man seeking, unsuccessfully as it turned out, to cross the southwestern border had himself actually sewn into the seat of a motor vehicle. The press has also reported cases of persons who have been caught trying to enter the United States from the north, over the Canadian/U.S. border, by crawling under railroad bridges high above the extremely dangerous waters of Niagara Falls.

The December 2000 International Crime Threat Assessment described migrant smuggling (which is called "Alien Smuggling" in the Threat Assessment) as one of the major types of international crime affecting the interests of the United States. The Threat Assessment described countries "under economic or demographic stress -- particularly China, India, and Pakistan in Asia, and Mexico, the Caribbean Island nations, and Central American states in the Western Hemisphere," as the major sources of illegal migrants to the United States. It reported that more than half of the illegal migrants currently in the United States are from Mexico, and that nearly 80 percent of foreign nationals illegally living or working in the United States are concentrated in the states of California, Texas, New York, Florida, and Illinois, with 40 percent living in California alone.

According to the 2000 Threat Assessment, an estimated 500,000 illegal migrants are brought into the United States annually by organized migrant smuggling networks, while an equal number of migrants enter the United States each year without the assistance of smugglers. Most of these illegal immigrants cross the border into the United States from Mexico or Canada. Most of them come from

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Mexico and Central America. As of 1999, the government estimated that 30,000 to 40,000 Chinese were being smuggled into the United States per year, either by ships that landed, or that were met by smaller smuggling boats, off the United States coasts, or by routes that brought the migrants through South and Central America, Mexico, and Canada.

The Threat Assessment listed several of the reasons why migrant smuggling and illegal immigration constitute “threats” to the United States. These included strains caused by these crimes upon social and economic resources and the undermining of wages and working conditions for legal employees. There are also concerns that organized crime groups, including Nigerian, Chinese, and Russian groups, employ illegal migrants, after they are smuggled into the country, to conduct other dangerous criminal activities within the United States. More recent concerns, which have been a particular focus of investigation and public debate over the past couple of years, relate to the links between migrant smuggling and illegal immigration, on the one hand, and terrorism on the other.

Migrant smuggling also raises serious human rights concerns. Migrants who desire to come to the United States, and even pay large amounts of money to smugglers to bring them to the United States, are often misled by smugglers as to what they should expect, abused by the smugglers during transit, and then exploited by the smugglers and by employers, sometimes working with the smugglers, after their arrival in the United States. The smuggled migrants are particularly vulnerable to such abuse because the migrants know that they are undocumented, and therefore, they may believe that they have no legal rights, or they may be fearful of asserting any such rights. Of course, it is at this point where migrant smuggling and human trafficking intersect, that is, where persons who have willingly entered the United States illegally, and often have paid large sums of money to do so, are tricked, threatened, coerced, or otherwise forced to work and live inside the United States in conditions resembling slavery.

The 2000 Threat Assessment reported that migrant smuggling into the United States, facilitated by organized migrant smuggling networks, was increasing, helped along by such factors as the easing of national border controls worldwide, the growth of commercial travel options, the wide availability of new technology capable of creating false, but legitimate appearing, identification and travel documents, and the rising sophistication of global criminal networks. The vast numbers of people seeking new economic opportunities in the United States, coupled with diminished opportunities for legal migration into prosperous developed countries that are seeking to control the flow of immigration, and increased border enforcement and interdiction of illegal migrants, have all contributed to the growth of the criminal migrant smuggling business.

Until the last few years, in the United States and elsewhere, migrant smuggling was treated by the criminal statutes and criminal sentencing guidelines as less serious, and therefore was viewed by the criminals as much less risky, than trafficking in other forms of contraband, such as illegal drugs. Migrant smuggling is also very profitable, and that fact has not escaped the notice of international organized crime, which increasingly has been adding migrant smuggling to its repertoire.

United States prosecutors have used several different statutes to prosecute those involved in migrant smuggling. The statute specifically directed at migrant smugglers covers unlawfully bringing migrants into the United States other than at a legal port of entry, bringing them anywhere in the United States, knowing that they are not authorized to enter, transporting them within the United States, harboring or concealing them, and encouraging or inducing them to enter illegally. Other statutes prohibit the employment of smuggled migrants, and the importation of aliens for prostitution or other immoral purposes. Federal prosecutors also use other statutes that apply to certain migrant smuggling cases depending upon additional facts that may be learned by the government during the investigation. These include the mail and wire fraud statutes, and the money laundering and racketeering laws.

In January 1999, the INS adopted a new so-called “interior enforcement strategy,” which focused on assessing and attacking what the INS at the time perceived as the greatest harms resulting from illegal immigration in the United States. The INS sought to target the infrastructure that supported illegal migration, large-scale smuggling organizations, fraud conspiracies, employers involved in widespread

immigration violations, and significant local law enforcement problems created by the arrival of illegal immigrants into a community. Applying that strategy, as of June 2002, INS had conducted approximately 50 major migrant smuggling investigations.

These investigations included the Robert Porges case, where an attorney was indicted and charged with conspiring with mainland Chinese smuggling organizations for nearly a decade to file over 6,000 fraudulent asylum applications in New York City. That case was prosecuted under the racketeering law. Mr. Porges pleaded guilty earlier this year, and agreed to forfeit 2 million dollars in cash that had been seized by the government, and additional millions of dollars in proceeds from the scheme.

In October 2000, an INS investigation called "Operation Forerunner," which at that time was the largest multi-national, anti-smuggling investigation ever conducted in the Western Hemisphere, resulted in the interdiction of 3,500 illegal migrants destined to the United States, and the arrest of 38 smugglers, including Jose Leon Castillo, whose organization was charged with responsibility for the smuggling of thousands of migrants into the United States during the previous five years.

During a 12-day period in June 2001, 75 migrant smugglers and illegal document vendors were identified, and 52 were detained for prosecution, outside of the United States in connection with an investigation called "Operation Crossroads International." In that investigation, initiated by the INS office in Mexico City, the INS assisted law enforcement agencies in 12 Latin American and Caribbean nations. The investigation led to the interdiction of 7,891 migrants from 39 different countries. All of the migrants had been headed for the United States and Canada. Almost 5,000 of the people interdicted during the investigation were non-Mexicans who were interdicted in Mexico as they attempted to travel through Mexico on their way to the United States.

In December 2001, a federal grand jury in Tennessee returned a 36-count indictment charging Tyson Foods, Incorporated, a major food processing company, with conspiracy to import and transport illegal aliens to work in Tyson's plants throughout the United States. The case includes forfeiture allegations covering 40 to 50 million dollars in illegal proceeds.

Also in December 2001, a Los Angeles-based commercial bus company, Golden State Transportation, and more than 30 employees of that company, were indicted in Arizona and charged with conspiring with migrant smugglers to move hundreds of illegal migrants from the southwest border to locations around the United States. A superseding indictment just returned by the grand jury in the Golden State Transportation case added money laundering charges to the initially indicted migrant smuggling charges, and also alleged forfeiture of a large amount of property. The Tyson Foods indictment culminated a two and a half-year investigation.

That, and the other investigations that I have just briefly described, have thus focused on disrupting and dismantling the larger of the corrupt and criminal organizations, both inside and outside the United States, that conduct and benefit from migrant smuggling into the United States.

III. EFFECT OF TERRORIST ATTACKS OF SEPTEMBER 2001

On October 26, 2001, within weeks after the September 2001 terrorist attacks upon the United States, Congress enacted the USA PATRIOT Act, which had several provisions affecting immigrants and immigration procedures, either directly or indirectly. Among other things, the Act contained provisions designed to increase and improve law enforcement scrutiny of the northern border of the United States, to increase and improve the monitoring of persons in the United States on student visas and of the status of other non-resident immigrants within the United States, and provisions designed to protect legal immigrants from the loss of benefits as a result of the attacks. The Act also contained findings of Congress condemning "backlash" attacks against Arab Americans, Muslim Americans, Americans from South Asia, and Sikh Americans.

One recent example of the ongoing public debate relating to the government's efforts to address the terrorism threat in the immigration context appeared in the published transcript of a hearing held by the Immigration and Claims Subcommittee of the United States House of Representatives Judiciary

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Committee, on June 19, 2002, as reported by Federal News Service. That transcript is available electronically via Lexis/Nexis.

As Joseph R. Greene, INS Assistant Commissioner for Investigations, testified during that hearing, the INS and Border Patrol, working with limited numbers of agents and officers, have had to revise their strategies, and have had to devote their resources in different ways, since September 2001, in an effort to focus upon investigations and enforcement operations deemed necessary in the effort to safeguard the nation and to prevent further terrorist attacks. There has been much public discussion about plans to move the INS and Border Patrol, along with certain other agencies and functions, into a new department of Homeland Security. There have been public announcements by the President, the Attorney General, and other high United States government officials concerning the devotion of federal investigative and law enforcement resources within the United States and elsewhere to similar terrorism-related tasks.

There has also been considerable public discussion of the efforts by the United States government to address civil rights issues that have arisen since September 2001. Issues relating to complaints arising from terrorism-related changes in migration procedures, and terrorism-related investigations, arrests, and detentions, are being addressed both in ongoing public debate and in the courts. Issues relating to prejudiced acts, described as “backlash” offenses, against persons belonging, or appearing to belong, to the same racial and ethnic groups as those believed to have perpetrated the attacks are also being addressed. As Ralph Boyd, the Assistant Attorney General for Civil Rights in the U.S. Department of Justice, testified to Congress in May 2002, the government is both prosecuting such backlash offenses aggressively and making efforts to assist the communities affected by them.

Thus, the events of September 2001 have affected the situation in the United States pertaining to human trafficking and migrant smuggling. Other than the obvious and publicly discussed effects bearing upon the government’s allocation of its investigative and law enforcement resources, details of the present effects, and of tactical and strategic plans to address them, cannot be disclosed at this point. The long-term effects have yet to be seen and calculated.

Recent INS reports have shown some decline in illegal entry attempts over the past year. However, it is not clear whether this change is due to the would-be migrants’ fears of increased law enforcement, or due to perceived problems in the U.S. economy, which may have made the U.S. seem to be a less attractive destination for those seeking economic opportunities.

EFFECTIVE COUNTERMEASURES AGAINST THE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS

*Richard L. Hoffman**

I. INTRODUCTION

Human Trafficking and Migrant Smuggling present very complex and difficult problems. I will not suggest otherwise, and I will not suggest that these problems can be easily solved. I will try to describe for you the efforts of the United States government, together with other governments and non-governmental organizations, to address these problems, and some of the difficulties that we have encountered, and some of the successes that we have experienced, in doing so.

II. COUNTERMEASURES AGAINST HUMAN TRAFFICKING

When the United States Congress enacted the Trafficking Victims Protection Act, which took effect on October 28, 2000, Congress made several important findings concerning human trafficking. Several of those findings set forth the reasoning behind the key provisions of the new statute, and explained why Congress had concluded that it was necessary to adopt a new and different approach to combat human trafficking in the United States.

Here are some of those findings, which reflect the official views of the United States government on the crime of human trafficking:

- (5) Traffickers often transport victims from their home communities to unfamiliar destinations, including foreign countries away from family and friends, religious institutions, and other sources of protection and support, leaving the victims defenseless and vulnerable.
- (6) Victims are often forced through physical violence to engage in sex acts or perform slavery-like labor. Such force includes rape and other forms of sexual abuse, torture, starvation, imprisonment, threats, psychological abuse, and coercion.
- (7) Traffickers often make representations to their victims that physical harm may occur to them or others should the victim escape or attempt to escape. Such representations can have the same coercive effects on victims as direct threats to inflict such harm.
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- (9) Trafficking includes all the elements of the crime of forcible rape when it involves the involuntary participation of another person in sex acts by means of fraud, force, or coercion.
- (10) Trafficking also involves violations of other laws, including labor and immigration codes and laws against kidnapping, slavery, false imprisonment, assault, battery, pandering, fraud, and extortion.
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- (13) Involuntary servitude statutes are intended to reach cases in which persons are held in a condition of servitude through non-violent coercion. In United States v. Kozminski, 487 U.S. 931 (1988), the [United States] Supreme Court found that section 1584 of Title 18, should be narrowly interpreted, absent a definition of involuntary servitude by Congress. As a result, that section was interpreted to criminalize only servitude that is brought about through use or threatened use of physical or legal coercion, and to exclude other conduct that can have the same purpose and effect.

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- (14) Existing legislation and law enforcement in the United States and other countries are inadequate to deter trafficking and bring traffickers to justice, failing to reflect the gravity of the offenses involved. No comprehensive law exists in the United States that penalizes the range of offenses involved in the trafficking scheme. Instead, even the most brutal instances of trafficking in the sex industry are often punished under laws that also apply to lesser offenses, so that traffickers typically escape deserved punishment.
- (15) In the United States, the seriousness of this crime and its components is not reflected in current sentencing guidelines, resulting in weak penalties for convicted traffickers.
- (16) In some countries, enforcement against traffickers is also hindered by official indifference, by corruption, and sometimes even by official participation in trafficking.
- (17) Existing laws often fail to protect victims of trafficking, and because victims are often illegal immigrants in the destination country, they are repeatedly punished more harshly than the traffickers themselves.
- (18) Additionally, adequate services and facilities do not exist to meet victims' needs regarding health care, housing, education, and legal assistance, which safely reintegrate trafficking victims into their home countries.
- (19) Victims of severe forms of trafficking should not be inappropriately incarcerated, fined, or otherwise penalized solely for unlawful acts committed as a direct result of being trafficked, such as using false documents, entering the country without documentation, or working without documentation.
- (20) Because victims of trafficking are frequently unfamiliar with the laws, cultures, and languages of the countries into which they have been trafficked, because they are often subjected to coercion and intimidation including physical detention and debt bondage, and because they often fear retribution and forcible removal to countries in which they will face retribution or other hardship, these victims often find it difficult or impossible to report the crimes committed against them or to assist in the investigation and prosecution of such crimes.

These findings make it clear that Congress recognized in October 2000 that human trafficking is a complex, multi-faceted, and transnational issue, involving organized crime and corruption, human rights, economics, migration, labor, public and individual health, and social services, and that this new twenty-first century criminal enterprise requires a twenty-first century coordinated response.

The Trafficking Victims Protection Act of 2000 is a significant part of that response. The Act provides law enforcement with better statutory tools to prosecute trafficking cases, provides for longer jail sentences, and establishes several programs that focus on prevention of trafficking and protection of trafficking victims. The United States Attorney General has allocated resources to the Civil Rights Division of the Department of Justice to combat trafficking more effectively, and the Department of Justice is working closely with other parts of the United States government to address the problem. Our anti-trafficking strategy combines prosecution, protection, and prevention.

III. PROSECUTION

A. The United States has Substantially Increased Trafficking Prosecutions

Let me begin with a discussion of our prosecution efforts. As I explained in my other paper, human trafficking investigations, indictments, and convictions have increased substantially since the enactment of the Trafficking Victims Protection Act, and cases brought under pre-Act statutes are also being pressed to conclusion.

Just recently, the Department of Justice won a conviction in West Palm Beach, Florida, against a defendant who conspired with others to hold women and girls from Mexico in involuntary servitude. The Defendant, who had been charged in 1998, but who had fled to Mexico in 1997, was arrested for

illegal re-entry into the United States in May 2002. The defendant was taken into custody on his outstanding FBI warrant, and arraigned on the pending federal civil rights charges. The defendant is alleged to have smuggled young Mexican females into the United States to work in brothel houses in a number of Florida cities. As part of his subsequent guilty plea agreement, the defendant admitted that the victims had been forced to work at the brothel houses as prostitutes until they paid the defendant's family a \$2,000 smuggling fee. Some victims were locked in a room with no windows and given no money. The victims were forced into prostitution in order to pay their smuggling fees and were threatened with beatings and reprisal attacks against their families in Mexico. Several victims, many of whom were underage, attempted to escape but were hunted down and returned to the brothels, where they were punished by beatings and confinement.

In another recent case, four defendants were charged on conspiracy and sex trafficking counts related to their scheme to recruit minor girls and young women from rural areas in Mexico, transport them across the border into the United States, and force them into prostitution. Four victims, ranging in age from fourteen to eighteen at the time of recruitment, were wooed by a pair of brothers, who promised them love and a better life in the United States. Once the girls arrived in the United States, however, the girls were forced, through nearly constant threats and physical abuse, to work as prostitutes in a brothel in New Jersey. They were forbidden to leave the house or to talk to each other. If they violated the house rules, they were beaten. By the time local police raided the brothel in February 2002, some of the girls had been held there, against their will, for more than a year.

As I explained in my first paper, the source countries for these prostitution rings are spread throughout the world. Earlier this year, the United States charged five defendants with devising a scheme to lure young women to travel from Indonesia to the United States by promising to arrange restaurant jobs and housing for them in New York City. Once they arrived in New York, the women were held and forced to work as prostitutes at brothels, without pay, until each had earned and repaid \$30,000 in transporting fees.

While the purpose of much human trafficking is to acquire women and girls for prostitution, individuals have also engaged in human trafficking to acquire domestic servants. In a recent case in Berkeley, California, a wealthy real estate owner from India, L.B. Reddy, had his estate managers seek out pretty young girls—some as young as 11 years of age—of the Untouchable caste, remove them from their families, and keep them in his compound in India where they would be available for his sexual predation when he visited from the United States. Reddy smuggled several of the girls into the United States under fraudulently obtained visas, placed them in conditions of forced labor in his restaurants, and kept them in his apartments so as to have them available for his sexual abuse. Domestic servitude cases often have such a sexual component.

Trafficking cases include other types of forced labor. In a recent case in south Florida, three defendants, who were subcontracted by businesses to put together crews of migrant agricultural workers, pled guilty to conspiring to induce victims into slave labor through physical violence, and by cultivating the workers' addiction to crack cocaine.

B. Training Prosecutors and Law Enforcement Personnel

The recent increase in human trafficking prosecutions in the U.S. reflects the increased attention focused on this crime by President Bush and Attorney General Ashcroft. The Attorney General has held three press conferences or media events to discuss trafficking. He personally announced the addition of new positions in the Civil Rights Division of the Department of Justice, to coordinate trafficking prosecutions. Additional attorneys in Washington, however, are not enough. Local prosecutors need to be aware of the trafficking problem and ready to prosecute traffickers in their communities. Training prosecutors and law enforcement personnel is an important component in the process of increasing and improving trafficking investigations and prosecutions.

At the federal level, the Department of Justice has issued a guidance memorandum to all federal prosecutors detailing the law enforcement tools available under the Trafficking Victims Protection Act. During the past 18 months, the Department has provided training for federal victim-witness coordinators and prosecutors. In addition, the Immigration and Naturalization Service held a training

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session for its agents and is adding a human trafficking component as part of the regular training programs for Border Patrol personnel.

This month, at the National Advocacy Center in Columbia, South Carolina, the Department of Justice is presenting its most comprehensive national human trafficking training session thus far, holding a two-day seminar for federal prosecutors and agents from throughout the United States. This training will discuss how to identify trafficking victims, protect victims' rights, and provide for their safety. Prosecutors and agents are being taught how to ask the appropriate questions when they come into contact with someone who is undocumented, especially to distinguish between trafficking and smuggling schemes. In too many instances in the past, law enforcement officials have arrested an undocumented person and deported her, without asking the questions that would have indicated that she is a trafficking victim entitled to protection and assistance, rather than someone who was smuggled into the United States voluntarily without force, fraud, or coercion. The better that law enforcement becomes at identifying and meeting the needs of trafficking victims, the more successful federal prosecutors can be in prosecuting trafficking cases to a successful conclusion.

At the state and local level, the Justice Department is coordinating and collaborating with local police and community service agencies to provide training on human trafficking issues. The Department has conducted programs at local police departments and at child service agencies to disseminate information about ways to identify trafficking victims. The Department has also worked with the International Association of Chiefs of Police to help alert the approximately 20,000 police departments around the United States about the tragedy of human trafficking.

C. Outreach Efforts

Investigating trafficking cases presents unique challenges. Trafficking victims are among the most vulnerable members of society. They often come to the United States from countries where people fear the government and the police. They typically lack documents, and they fear deportation. Coming from this background, it is not surprising that in the past trafficking victims have rarely sought out law enforcement assistance, or made formal complaints when they were abused.

Unlike many other types of crime, human trafficking rarely happens where it can be witnessed by third parties who are likely to come forward and inform law enforcement or file a complaint. The abuse of trafficking victims typically occurs in brothels or private homes, where third parties are not present. Because the victims are rarely, if ever, allowed outside these buildings, people in those communities will largely be unaware of the victims' condition. Modern day traffickers also tend less often to use outright force, which they may think is more likely to be discovered by law enforcement. Instead, traffickers often use more subtle forms of psychological coercion such as the threat of serious harm to family members in a victim's home country. It is even more difficult for third parties to identify and report victims of these more subtle methods of coercion.

The Department of Justice is addressing these problems through an aggressive outreach campaign. The Department maintains open communication with victims' service providers and non-governmental organizations, also known as "NGOs." The NGOs include women's shelters, crisis centers for victims of sexual assault and domestic violence, and immigrant and refugee service organizations. These organizations often employ individuals who speak the victims' native languages. They are the types of organizations that victims are likely to learn about, and likely to be willing to trust. Victims who have contacted and established trusting relationships with NGOs, and who have received helpful and supportive services from them, are more likely to be willing to come forward, often with the NGOs' help, to report their abuse to law enforcement.

Another part of the outreach program of the Department of Justice has been the establishment of a toll-free telephone complaint line to handle complaints and questions about potential trafficking cases. The Department utilizes a telephone service that allows Department personnel to use interpreters to speak with callers in many different languages. Since February 2000, when the Department set up this hotline, the number of trafficking investigations has increased four-fold. Fifty percent of the new investigations have been a result of a telephone referral. The vast majority of cases arise from information provided by service providers. NGOs and our toll-free telephone

hotline have provided information leading to new cases, as well as major leads in on-going investigations, and are more productive in this area than other types of information sources traditionally used in criminal investigations.

D. New Statutory Provisions

The more aggressive training and investigatory efforts just described have permitted Justice Department prosecutors to pursue the wider variety of trafficking cases made possible by the Trafficking Victims Protection Act. The Act provided strong new tools to help prosecutors bring these cases. The Act created several new trafficking-related crimes to reach a wider variety of instances of human trafficking. It strengthened pre-existing criminal penalties. It afforded new protections to trafficking victims, and provided that they be treated as victims, rather than as immigration criminals to be deported. It also made available certain benefits and services to victims of severe forms of trafficking.

First, the Act recognizes that means other than physical force can be used to control victims. Modern traffickers often use subtle forms of coercion, including tactics such as threatening to report victims to immigration authorities or threatening the families of victims or others remaining in other countries. The Act expands the reach of earlier U.S. anti-trafficking laws to prohibit these other methods of controlling victims, including psychological coercion, trickery, and the seizure of documents. Specifically, the Act prohibits obtaining the services of a person by:

- 1) threats of serious harm to, or physical restraint against, that person or another person;
- 2) means of any scheme, plan, or pattern intended to cause the person to believe that, if the person did not perform such labor or services, that person or another person would suffer serious harm or physical restraint;
- 3) means of the abuse or threatened abuse of law or the legal process.

Congress enacted this new provision so that :

prosecutors will be able to bring more cases in which individuals have been trafficked into domestic service, an increasingly common occurrence, not only where such victims are kept in service through overt beatings, but also where the traffickers use more subtle means designed to cause their victims to believe that serious harm will result to themselves or others if they leave, as when a nanny is led to believe that children in her care will be harmed if she leaves the home. In other cases, a scheme, plan, or pattern intended to cause a belief of serious harm may refer to intentionally causing the victim to believe that her family will face harms such as banishment, starvation, or bankruptcy in their home country. [This provision] will in certain instances permit prosecutions where children are brought to the United States and face extreme nonviolent and psychological coercion (e.g. isolation, denial of sleep, and other punishments). A claim by an adult of a false legal relationship with a child in order to put the child in a condition of servitude may constitute a scheme, plan or pattern that violates the statute, if there is a showing that such a scheme was intended to create the belief that the victim or some other person would suffer serious harm.

The Act increased the criminal penalties imposed on human traffickers. Violations of several sections of the anti-trafficking laws now are punishable by a prison term of up to 20 years, up from the previous 10 years maximum sentence. If a death results, or kidnaping, sexual abuse or attempted murder are involved, an individual found guilty faces up to life in prison.

Another new provision of the law provides that those who engage in recruiting, harboring, transporting, or in other ways assist those who violate the trafficking laws are guilty as if they themselves had violated the laws. In legal terms, anyone participating in this phase of trafficking is guilty as a “principal,” and not merely as an accessory or aider and abetter. Anyone convicted under this new provision is subject to a 20 year prison term or even life imprisonment in certain situations.

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A third new provision specifically addresses the problem of sex trafficking of children or by force, fraud and coercion. This provision makes it illegal to recruit, entice, harbor, transport, provide, or obtain a person, knowing that the person will be engaged in commercial sex, if the person is under 18 years of age or the person is induced by force, fraud, or coercion, and the statute also makes it illegal to benefit financially as a result of these actions. Under this provision, if the victim is less than 14 years old, the defendant faces life in prison. If the victim is between 14 and 18 years old, then the defendant faces up to 20 years in prison.

A fourth new provision of the law addresses the problem of the increasing number of victims held in service not by force or threats, but by the confiscation of, and denial of access to, actual or purported identification or immigration documents. This provision criminalizes the conduct of a person who knowingly destroys, conceals, removes, confiscates, or possesses any actual or purported passport or other immigration document while in the course of violating or intending to violate a human trafficking law, or who does these things to prevent or restrict or to attempt to prevent or restrict, without lawful authority, the person's liberty to move or travel, in order to maintain the labor or services of that person, when the person is or has been a victim of a severe form of trafficking This provision carries a maximum penalty of up to five years in prison. "Sex trafficking" is defined by 22 U.S.C. 7102(9) to include: "the recruitment, harboring, transportation, provision, or obtaining of a person for the purpose of a commercial sex act."

Two other new statutes added by the TVPA provide for monetary penalties to be assessed against those convicted of human trafficking. The first statute provides for restitution for trafficking victims. The court is required by this statute to order a convicted defendant to pay the full amount of the victim's losses. This includes the greater of the gross income or value to the defendant of the victim's services or labor, or the value of the victim's labor as guaranteed under the minimum wage and overtime laws of the United States. This section also includes costs of medical care, rehabilitation, transportation expenses, and other similar costs incurred by the victim. The second new penalty statute subjects any property that was used to commit or to facilitate the commission of the crime to forfeiture, and also requires the forfeiture of any proceeds earned as a result of the trafficking. The new forfeiture statute also provides for civil forfeiture of property used to commit or to facilitate the commission of human trafficking offenses, and of proceeds of such offenses. Such a civil forfeiture case may be prosecuted even where assets are available for seizure, but the criminal defendants cannot be found or cannot be brought to trial.

Finally, the TVPA includes several provisions designed to protect human trafficking victims. These include creation of a special T visa which permits victims who cooperate with prosecutors to remain in the United States, as well as provisions to provide medical and health coverage and to satisfy other humanitarian needs. Protecting victims, which I will discuss separately, is critical to any human trafficking prosecution, especially when the victims are potential witnesses.

Thus, the TVPA not only expands the definition of the crime of trafficking in persons to include the more subtle methods of coercion used by modern day traffickers, and provides for stronger punishments for traffickers, it also supports training to make local officials aware of this problem, and close coordination with NGOs and others who are likely to receive leads because they have gained the trust of trafficking victims. Local service organizations play a vital role not only in generating information that will allow us to apprehend and prosecute offenders, but also in providing services to and protecting victims.

IV. PROTECTION

A. Policies to Protect Victims of Trafficking

Perhaps the most important change brought about by the Trafficking Victims Protection Act Victims is the changed approach toward trafficking victims. The new law clearly provides that such people are victims.

Many victims of human trafficking are undocumented. Too often, they have been branded with the label of undocumented aliens. Victims of trafficking likewise often are women and young girls who

have been forced into prostitution or have been forced to engage in other commercial sex acts. Too often, they have been branded with the label of prostitutes.

Under the Trafficking Victims Protection Act, the United States views trafficking victims as crime victims and treats them as victims, not criminals. The law also recognizes the importance of helping such victims to rebuild their lives. This focus on victims is not only humane; it is also advisable from a law enforcement perspective. Successful prosecutions require in-country witnesses who feel safe, secure, and able to testify.

B. Trafficking Victims Face Unique Challenges

Victims who are trafficked across borders are particularly vulnerable. They are usually undocumented. They are unfamiliar with the laws, culture, and language of the foreign country into which they have come. They are mistrustful of local law enforcement, who are sometimes in league with the traffickers. In their eyes, they have no one to run to and no place to seek help. Traffickers exploit these vulnerabilities by confiscating victims' identity documents and threatening to have them jailed or deported if they try to escape. Many trafficking victims suffer physical and sexual abuse, violence, and extreme psychological coercion and manipulation. The physical and emotional abuse takes a devastating toll.

C. Responsive Policies

1. Victim Assistance

As a general rule, U.S. law entitles victims of severe forms of trafficking to receive assistance and support to the same extent as refugees. Victims of severe forms of trafficking who are under eighteen years of age are automatically eligible for these benefits. Victims over the age of eighteen are eligible for benefits upon certification by the U.S. Department of Health and Human Services, in consultation with the Department of Justice. The Department of Health and Human Services will certify a victim of severe forms of trafficking over the age of eighteen years if the victim 1) is willing to assist in every reasonable way in the investigation and prosecution of severe forms of trafficking in persons, and 2) has either made a bona-fide application for a T visa with the Immigration and Naturalization Service, or is a person whose continued presence in the United States the Attorney General is ensuring in order to effectuate prosecution of traffickers.

Once deemed eligible, trafficking victims immediately receive assistance related to the protection of life and safety. This includes medical care, crisis counseling, and other mental health assistance as well as intervention programs for victims of criminal activity, short-term shelter, and housing assistance. In cases involving sexual assault or trafficking into the sex industry, victims may opt to receive free testing for HIV and other sexually transmitted diseases, as well as counseling by a medically trained professional on the accuracy of such tests and the risk of transmission of such diseases to the victim.

Immediate information regarding the availability of such services, and the immediate provision of services, are important. Trafficking victims are typically disoriented. They find themselves in a new country; they do not have local community contacts; they do not speak the language. To secure their physical and psychological safety, the Department of Justice employs victim specialists to ensure that victims receive information about their rights and referrals to necessary services.

2. Access to Information

Language often poses a barrier to communication between the victims and prosecutors. Victims should understand the services available to them. Informing victims of their rights in their native languages helps foster an increased sense of safety.

U.S. regulations require that victims receive reasonable access to translation and interpretation services if they are not able to communicate in English. In addition, victims must receive information about pro bono and low-cost legal services, including immigration services. This is necessary to ensure that victims are informed of, and have meaningful access to, the variety of services available. Specifically, federal officials are responsible for ensuring that trafficking victims are informed, in a language they understand, of:

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- i) Pro bono (free) and low cost legal services, including immigration services
- ii) Available federal government assistance (victims who are minors and adult victims who are certified by the Department of Health and Human Services are eligible for assistance that is administered or funded by federal agencies to the same extent as refugees; others may be eligible for more limited benefits)
- iii) Victim service organizations, including domestic violence and rape crisis centers
- iv) Protections available, especially against threats and intimidation, and the remedies available as appropriate for the particular individual's circumstances
- v) Rights of individual privacy and confidentiality
- vi) Victim compensation and assistance programs
- vii) Immigration benefits or programs that may be relevant to trafficking victims
- viii) Right of restitution
- ix) Right to notification of case status
- x) Availability of medical services

Several agencies of the government have worked together to develop brochures designed to provide standardized victim assistance information to trafficking victims. These brochures provide basic information or points of contact about victims' rights and potential services and benefits that may be available to victims, depending on their eligibility. Where information more specific to a geographic area is required, local representatives of the various federal agencies supplement the general information provided in the brochure. These brochures are being distributed for federal agencies to use when encountering victims of trafficking.

3. Federal Grants and Private Sector Assistance

In addition to providing assistance directly to victims, the Department of Justice also provides grants to both domestic and international NGOs to provide additional assistance to victims. This year alone the Office for Victims of Crime at the Department of Justice will provide \$10 million in grants to NGOs to develop, expand, or strengthen victim service programs for trafficking victims. The Department of State, likewise, has funded a Johns Hopkins University Project called The Protection Project that developed an interactive database on United States and international legislation protecting women and children from commercial sexual exploitation. The database includes a comparative analysis of laws and penalties, country-specific situation reports, maps, case studies, and victim testimonials.

4. Immigration Status and Continuing Presence

The T visa is a special visa, which the United States provides to certain trafficking victims. A T visa provides trafficking victims with legal immigration status, allowing them to remain in our country. U.S. law permits the issuance of 5,000 T visas per year.

The T visa specifically allows trafficking victims and accompanying dependent children to remain in the country for the duration of the criminal prosecution against the traffickers, provided that the victim is willing to comply with reasonable requests to assist in the investigation or prosecution of the traffickers. In short, the T visa ensures that trafficking victims are not deported during this period.

In addition, victims and their dependent children who receive a T visa are also eligible to apply for permanent residence after three years if they have complied with reasonable requests from law enforcement. However, if a victim prefers to return to the country of origin, the United States will develop a plan for a safe return.

In addition to the T visa, a U visa may soon be available to undocumented individuals who have suffered substantial physical or mental abuse as a result of being the victims of certain crimes, including trafficking, that violate federal, state, or local laws. By statute, 10,000 U visas may be issued annually. Trafficking victims may also be sponsored or apply for other immigration benefits for which they may be eligible. Recipients of a T visa and U visa are eligible for employment authorization.

5. Physical Protection

In addition to assistance to address immediate health and safety needs, federal officials will arrange for victims to receive reasonable protection from suspected traffickers to prevent intimidation or recapture. Victim assistance coordinators work with prosecutors to ensure that victims are aware of the legal remedies available to protect them. These include a number of civil law remedies such as temporary restraining orders and protective orders. If a victim is at risk of being recaptured by the traffickers, prosecutors are prepared to use all practicable means to protect the victims and their families from harm, threats, and intimidation. Prosecutors in particular take care to ensure that the names and identifying information of victims are not disclosed to the public to reduce the risk that the suspected traffickers will know that the victims are cooperating with the government. The goal is to secure the victim and the victim's family from threats, reprisals, or intimidation by the traffickers.

V. PREVENTION

Preventing the crime of trafficking in persons is the most challenging goal of the Trafficking Victims Protection Act. Of course, the most effective method of prevention would be to eliminate poverty, inequality, and economic desperation around the world. That, unfortunately, is unlikely to happen anytime soon, so what can be done in the meantime?

A. **National Task Force**

On February 13, 2002, President Bush signed an Executive Order (EO 13257) creating the President's Interagency Task Force to Monitor and Combat Trafficking in Persons. This task force consists of the Secretary of State, the Attorney General, and the Secretaries of Labor and Health and Human Services, the Director of Central Intelligence, and the Administrator of the United States Agency for International Development.

This task force is charged with coordinating the implementation of the Trafficking Victims Protection Act, examining and reviewing national and international efforts to combat trafficking, assisting with the development of the State Department's Annual Report on Trafficking in Persons, ensuring cooperation among federal government agencies on this issue, and consulting with governmental and non-governmental organizations about trafficking in persons. As a result of the Executive Order, senior government officials play a major role in the prevention of trafficking.

B. **Public Awareness Campaign**

The United States is engaged in public awareness campaigns both at home and abroad. These awareness campaigns are aimed at educating at least three different groups: trafficking victims; those at risk of becoming trafficking victims; and the general public.

With respect to those who have already been trafficked, the public awareness campaigns are intended to educate victims about their rights and how to seek help, about the measures in place to ensure their safety, recovery, and safe return to their home countries, and how to contact appropriate law enforcement authorities. The goal is to inform victims of the protections available to them and thus to encourage them to report traffickers either to law enforcement officials, or to others who will then report the crimes.

With respect to potential victims and the general public, the goals are both to prevent additional victims from being trafficked and to increase the general public's awareness of this issue, and thus to increase the likelihood that the general public may observe and report trafficking crimes.

Current public awareness efforts include speeches, presentations, pamphlets, brochures, posters, advertisements in mass media, and similar methods. To reach victims, potential victims of trafficking,

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and language-minority members of the general public, outreach materials have been produced in languages other than English that are spoken by significant numbers of trafficking victims. Brochures about trafficking are available at 27 U.S. Embassies in 24 different languages.

The Attorney General of the United States has spoken publicly several times about the efforts of the United States government to protect trafficking victims. These included press announcements about the expansion of prosecution efforts to combat trafficking, and an announcement specifically addressing the T visa protections now available to victims.

To supplement these public announcements, the Department of Justice has produced, in cooperation with other federal government agencies, two brochures about the protections available to victims of trafficking. These brochures are aimed at both law enforcement agencies and NGOs to inform them about the issue, to help them in identifying instances of trafficking, and to provide information about assistance available to victims.

The Department has also engaged in major efforts to work with NGOs and to make public presentations on trafficking. The Civil Rights Division's Special Counsel for Trafficking in Persons and other Civil Rights Division attorneys have spoken about the Department's anti-trafficking efforts at numerous conferences and with many organizations who provide victims services.

The Department of Justice has also initiated a community outreach program to work with local community groups, victims' rights organizations, immigrants' rights organizations, shelters, houses of worship, and others. The Department wants to inform victims of the protections and services that are available to them, and to encourage victims and others to report suspected trafficking crimes. Working with NGOs, including faith-based NGOs, may be particularly effective in countries in Central America and the Caribbean because victims will often turn to church organizations when they are in need. Church officials have provided valuable leads that have led to significant raids on trafficking rings.

Working with local community groups and NGOs is important because most victims and potential victims belong to language minority groups in the U.S., and may have little access to mainstream media. Increasing awareness among those who operate victim-oriented NGOs is often the best way to reach victims or potential victims. Targeting outreach efforts to non-English language media is also important. A recent article entitled *Fields of Shame: Exposing a shocking case of modern-day slavery*, in a Spanish language magazine called "Latina," targeted to women, focused on the experiences of a particular group of victims who fought against abusive trafficking practices. The Department of Justice cooperated with the author of this article, providing comments from senior Department officials as well as access to prosecutors and Border Patrol agents. Similar articles, written with extensive cooperation from government officials, have appeared in major newspapers such as the Miami Herald and the Washington Post, two of the United States most widely circulated newspapers.

In addition, the Department is advertising the toll-free trafficking telephone complaint line using public service announcements, and distributing information on worker exploitation to immigrant and other communities. By these efforts, the government can both inform potential victims of their rights and signal to them that help is available. These efforts are consistent with our goal of making the American public aware of this problem and how to report it.

C. International Efforts are Necessary to Curb the Flow of Trafficking of Victims

Effective prevention requires stemming the flow of trafficking victims at its source. Most victims of trafficking are brought to the United States against their will. The United States is working with source countries to address the problem of trafficking.

The Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT) at the Department of Justice has held training sessions in many countries throughout Eastern Europe, Central Asia, and South Asia. These training sessions are designed to emphasize legal reforms such as legislation, investigative techniques, appropriate penalties for traffickers; protection of victims and witnesses; the benefits of multi-agency approaches to combating trafficking; and the value of outreach to NGOs. Civil Rights and Criminal Division attorneys have helped to train legislators and law

enforcement officials in more than 20 countries, including Poland, Bosnia-Herzegovina, Bulgaria, Kosovo, Macedonia, Romania, Greece, Thailand, and former Soviet republics including Ukraine, Kazakhstan, Uzbekistan and Krygyzstan. In addition, the Federal Bureau of Investigation has worked closely with law enforcement agencies in Romania, Albania, and Bulgaria to develop witness assistance programs.

The United States has supported over 110 anti-trafficking programs in approximately 50 countries. These programs include economic alternative programs for vulnerable groups, education programs, training for government officials and medical personnel and development or improvement of anti-trafficking laws.

This year, the Department of State brought more than 250 international visitors to the United States to meet with experts in trafficking issues and to examine United States efforts to stop human trafficking. Entities such as the U.S. Agency for International Development (USAID) actively support the prevention of trafficking activities around the world in 25 countries with more than \$6 million in funds. The Department of Labor recently negotiated a cooperative agreement to conduct a two-year anti-trafficking project in Eastern Europe a program which is meant to prevent the trafficking of women by creating viable economic alternatives for at-risk women. Approximately 13,500 women will be trained annually under this program.

The Departments of State, Justice and Labor are working with Costa Rica to develop a comprehensive program to combat sexual exploitation of children in Costa Rica. This program will address law enforcement training, social support, NGO engagement, public affairs, and legal reforms. Once this program is fully developed, we hope that it will serve as a model for broader regional cooperation. As another example, the Department of State has worked closely with the El Salvadorian Attorney General's Sex Crimes Division to provide training and establish relationships with U.S. government attorneys to address the prosecution of sex crimes.

The U.S. government also works closely with NGOs active in victim assistance. Casa Amiga, a service provider located in Mexico in the border town of Ciudad Juarez, is one such example. The United States helped fund Casa Amiga, which engages in efforts to conduct training for law enforcement, to assist victims of violence (including victims of trafficking), and to reach out to the community.

The Trafficking Victims Protection Act recognizes the international scope of the trafficking problem and requires the Department of State to engage in aggressive international efforts to curb trafficking in source countries. An important aspect of this effort is working with countries to encourage them to adopt strong domestic anti-trafficking efforts.

The Act established within the Department of State the Office to Monitor and Combat Trafficking and charged this office with the preparation of analytical reports on trafficking. In July 2001, the Department of State issued the first annual Trafficking in Persons Report. The report presented information gathered from over a hundred embassies and consulates as well as numerous non-governmental and press reports.

These annual reports assess the anti-trafficking efforts of 89 countries, selected because they have been found to be countries of origin, transit or destination for one hundred trafficking victims or more. In each annual report, these 89 countries are grouped into tiers based on the State Department's assessment of the efforts of the government of each country to combat trafficking. Countries whose governments fully comply with the Act's minimum standards for the elimination of trafficking are placed in Tier 1. Countries whose governments do not fully comply with those standards are placed in Tier 2 if they are making "significant efforts to bring themselves into compliance" with the standards, and in Tier 3 if they were not making such efforts.

The TVPA defines the "minimum standards for the elimination of trafficking" necessary for a country to bring itself into Tier 1. Generally, these include: criminal prohibition of trafficking; criminal punishment of traffickers commensurate with the gravity of the crime; and sustained efforts to

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eliminate trafficking. For example, a source country for trafficking victims will be scrutinized to determine what efforts it is making to prevent and criminalize the recruitment of victims. The Act also sets forth three factors to be considered in determining whether a country is making significant efforts to bring itself into compliance with these minimum standards. These considerations are: 1) the extent of trafficking in the country; 2) the extent of governmental noncompliance with the minimum standards, particularly the extent to which government officials have participated in, facilitated, condoned, or are otherwise complicit in trafficking; and 3) what measures are reasonable to bring the government into compliance with the minimum standards in light of the government's resources and capabilities.

The Trafficking Victims Protection Act contains specific provisions directed at countries that, by 2003, still remain in Tier 3. Countries rated in that third tier of nations will be subject to certain actions, principally termination of non-humanitarian, non-trade-related assistance. Such countries may face U.S. opposition to assistance (except for humanitarian, trade-related, and certain development-related assistance) from international financial institutions, specifically the International Monetary Fund and multilateral development banks such as the World Bank. The President of the United States may waive these penalties in specific circumstances.

The June 2002 release of the 2002 Trafficking in Persons Report has already generated many responses from countries listed by the Report in Tiers 2 and 3. The United States is meeting with representatives of each country to discuss the Report and to suggest concrete follow-up steps. In addition, throughout the year, the United States will continue to work with foreign NGOs to obtain feedback on whether the Report's descriptions are accurate in light of the NGOs' experiences working with trafficking victims in the affected countries.

D. Border Inspections

Finally, increased border inspections and monitoring with an emphasis on trafficking can be helpful. The U.S. Government has several agencies that monitor the borders. These agencies include, among many, the Border Patrol, the Customs Service, and the Coast Guard. These agencies cooperate closely to reduce the numbers of undocumented persons entering the United States. The United States is making efforts to secure its borders and to implement policies to screen people entering or exiting the country to determine whether they may be trafficking victims.

VI. COUNTERMEASURES AGAINST MIGRANT SMUGGLING

The efforts to combat migrant smuggling in the United States involve investigators, prosecutors, and other agencies within the United States government, and also the cooperation and assistance of other governments and non-governmental organizations.

As I explained last week, the United States Immigration and Naturalization Service since 1999 has been applying its "interior enforcement strategy," focusing on assessing and attacking the infrastructure that supports illegal migration, large-scale smuggling organizations, fraud conspiracies, employers involved in widespread immigration violations, and significant local law enforcement problems created by the arrival of illegal immigrants into U.S. communities. Applying that strategy, as of June 2002, INS had conducted approximately 50 major migrant smuggling investigations, including the successful cases that I described last week.

In June 2001, the INS announced progress that had been made on its "Global Reach" initiative, which has emphasized overseas deterrence of migrant smuggling since it began in 1997. The INS, as of mid-2001, had established 40 overseas offices with 150 U.S. positions to provide a permanent presence of immigration officers overseas to work on deterring migrant smuggling in both source and transit countries. The INS also trained more than 45,000 host country officials and airline personnel in detecting fraudulent documents, and intercepted more than 74,000 fraudulently documented aliens attempting to transit these countries to the United States.

In January 2002, to enhance domestic security, the INS initiated a multi-jurisdictional enforcement initiative aimed at targeting migrant smuggling organizations specializing in the movement of U.S.-

bound aliens from countries that are of interest to the national security of the United States. Information available to the INS indicates that terrorist organizations often use human smuggling organizations to move around the globe. Several significant alien smugglers have been arrested and charged with alien smuggling violations as a result of this ongoing initiative and significant smuggling pipelines have been severely crippled.

Meanwhile, in the year 2000, the Department of Justice created its Alien Smuggling Task Force. The Task Force was created because the Department recognized that the smuggling of migrants had evolved into a major organized criminal activity, and required a coordinated response.

The mission of the ASTF is to coordinate the Department's efforts to combat smuggling. The Task Force works with the INS, the FBI, and the Civil Rights Division, and also with other departments and agencies of the United States government, to develop a coordinated approach to migrant smuggling issues. It also provides a central contact point for the U.S. Attorneys Offices around the country to assist them in prosecuting migrant smuggling cases, and in applying the stronger anti-smuggling statutes that have been enacted in recent years.

Criminal prosecutors and investigators are being trained to pursue migrant smuggling organizations, and other persons benefiting from migrant smuggling, by using many different statutes and investigative methods. In addition to the statute specifically directed at migrant smugglers, which covers unlawfully bringing migrants into the United States other than at a legal port of entry, bringing them anywhere in the United States, knowing that they are not authorized to enter, transporting them within the United States, harboring or concealing them, encouraging or inducing them to enter illegally, the statute prohibiting employment of smuggled migrants, and the statute prohibiting importation of aliens for prostitution or other immoral purposes, federal prosecutors may also use other statutes that apply to certain migrant smuggling cases depending upon additional facts that may be learned by the government during the investigation, such as the mail and wire fraud statutes, and the money laundering and racketeering laws.

In the Tyson Foods case that I described earlier, the charges now include money laundering and money laundering conspiracy as well as migrant smuggling violations. In the case where two Mexican migrants died after being confined in a tractor-trailer truck container in Texas, the recent superseding indictment charged not only migrant smuggling violations, but also racketeering, in violation of 18 U.S.C. 1962(c), and interstate travel in aid of racketeering, in violation of 18 U.S.C. 1952.

The elements of the primary migrant smuggling offenses, are charged under various subsections of 18 U.S.C. 1324. The penalties for violation of these statutes can be severe. The maximum penalties start at five years. They increase to 10 years for certain offenses done for commercial advantage or private financial gain. They increase further to 20 years in certain cases where the conduct causes serious bodily injury or places a life in jeopardy, and even further to life imprisonment or the death penalty in certain cases where the charged conduct results in a death. The statutes also provide for monetary fines, and for forfeiture of vessels, vehicles, and aircraft used in the offense and proceeds of the offense. These statutes are designed not only to punish the individual smugglers, but also to dismantle the smuggling organization, and to take away the financial incentive for smuggling.

In order to obtain convictions under these statutes, prosecutors must overcome a number of difficult hurdles. They must prove that the defendants actually knew that the migrants were illegal aliens or that the defendants recklessly disregarded the migrants' illegal status. They must prove that the migrants were aliens, and were in the United States illegally. In transportation cases, they must prove that the defendants were transporting the migrants "in furtherance of" a violation of the immigration laws.

In United States courts, prosecutors may prove these cases with information obtained from, among other sources, lawful border interviews, searches and seizures, and consensual recordings, and also from properly authorized non-consensual electronic surveillance. It is obviously helpful, and often necessary, to obtain testimony from the smuggled migrants themselves. That raises issues and problems for prosecutors similar to those that arise in human trafficking cases: we must have the

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smuggled migrants in hand, at least long enough for a lawful deposition to be taken; we must obtain the migrants' testimony by lawful means; and we must deal somehow with the migrants' fear of testifying against the smugglers.

The United States government recognizes that migrant smuggling is a global problem that cannot be addressed successfully without international cooperation. In addition to working together with other nations on smuggling investigations and interdictions, the U.S. is seeking to persuade other nations to adopt effective laws to deter smuggling which, at a minimum, should provide criminal penalties for migrant smuggling, impose fines on carriers involved in smuggling, and provide ways to seize the assets of criminal smuggling organizations. Smugglers will always seek out and exploit the weakest link in the international chain, so nations must work together to make it more difficult for smugglers to operate anywhere in the world.

In some of the successful investigations that I have described to you, such as Operation Crossroads International, transnational cooperation resulted in the successful interdiction of large-scale smuggling schemes before the smuggled migrants even reached the borders of the United States. As is true of human trafficking, the best way to combat migrant smuggling is to prevent it from happening in the first place, and for that to occur, transnational cooperation is essential.

VII. CONCLUSION

Trafficking in persons and migrant smuggling are an insidious combination of international crime and human rights violations. They demand a unique blend of strong law enforcement responses and humanitarian responses.

Stopping the smuggling of migrants is necessary not only to protect our borders, but also to prevent the many kinds of harm that are done to would-be migrants who place themselves in the dangerous hands of smugglers, and to cut off a massive source of income for transnational organized crime.

Stopping trafficking in persons poses unique challenges to prosecutors, who must not only track criminal groups operating in two or more countries, but must also attend to the complex needs of the victims. The ability to focus on victim's needs in such cases is both essential in helping victims begin to rebuild their lives and crucial to the ability of prosecutors to find witnesses who are willing to come forward and cooperate in the investigation and prosecution of the traffickers.

INTERNATIONAL COOPERATION IN COMBATING TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS

*Severino H. Gana, Jr.**



I. INTRODUCTION

Characterized by shrinking space and time and disappearing borders linking people's lives more deeply and more immediately than ever before, the present era of globalization has brought about mass human migrations. Human migrations are caused either by wars, social and political turmoil or by economic reasons. This event has ushered in the birth of international criminal syndicates engaged in the lucrative trade of human smuggling and trafficking in persons.

Thus, the world has experienced and continues to experience unprecedented flows of illegal migrants. People smuggling and trafficking networks have become a major part of transnational organized crime and more complex in their operations than ever before. They threaten the integrity of States' borders, national security, national sovereignty and the rule of law. As the operations of the syndicates engaging in lucrative trade become more systematic and complex, the need for effective solutions and for international cooperation in dealing with the problem has become extremely urgent.

International cooperation to stem the operations of the syndicates and its effects has become necessary. Unless States cooperate and consolidate their efforts towards solving the problem and develop legal frameworks and implement them, transnational criminal syndicates will continue to engage in this type of activity with impunity.

In this paper, I shall deal mainly with treaty-based and non-treaty based forms of international cooperation in stemming or eradicating the people smuggling and trafficking in persons problem. Focusing mainly on possible cooperation in extradition and legal assistance in criminal matters, as well as informal cooperation procedures which are swift and effective.

II. CONSTITUTIONAL BASIS OF INTERNATIONAL COOPERATION BY THE PHILIPPINES

Adopting the generally accepted principles of international law as part of the law of the land, the Philippines adheres to the policy of cooperation in its dealings with all nations. This policy is enshrined in the present Philippine Constitution which provides that "The Philippines renounces war as an instrument of national policy, adopts the generally accepted principles of international law as part of the law of the land, and adheres to the policy of peace, equality, justice, freedom, cooperation and amity with all nations."

Consistent with the policy of international cooperation, the Philippines has become a party to various multilateral treaties. These multilateral treaties include the ones intended to address transnational organized crime and to protect the vulnerable sectors of society, such as women and children. Thus, it signed and ratified the United Nations Convention Against Transnational Organized Crime and its accompanying Optional Protocol to Prevent, Suppress and Punish Trafficking in Persons. Especially Women and Children and the Protocol Against the Smuggling of Migrants by Land, Air and Sea.

The Philippines is also a party to various bilateral treaties aimed at setting the legal framework or mechanism for international cooperation in preventing, suppressing and the punishment of crimes.

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These legal mechanisms include extradition treaties and treaties on mutual legal assistance in criminal matters.

Extradition treaties seek the surrender of accused and convicted persons to the Requesting State. Treaties on mutual legal assistance in criminal matters, on the other hand, provide a wider scope of assistance that generally encompass the taking of testimony or statements of persons; providing documents, records, and items of evidence; serving documents; locating or identifying persons or items; transferring persons in custody for testimony or for other purposes; executing requests for searches or seizures; assisting in proceedings related to forfeiture of assets, restitution, and collection of fines; and other forms of assistance not prohibited by the laws of the Requested State. The two treaties complement each other.

At present, the Philippines has nine (9) extradition treaties and two mutual legal assistance treaties in criminal matters that are in force and effect. It has an extradition treaty with: Australia; Canada; the Federated States of Micronesia; the Hong Kong Special Administrative Region; Indonesia; the Republic of Korea; Switzerland; the United States of America; and the Kingdom of Thailand. It also has a treaty on mutual legal assistance in criminal matters with Australia and the United States of America.

Of these States, the United States has a substantial number of requests for extradition and legal assistance averaging 70% and the rest are shared by the other Philippine treaty partners. Most of our outgoing requests for extradition and legal assistance are sent to the United States.

Recently, the Philippines has concluded an extradition treaty with the People's Republic of China and a treaty on mutual legal assistance in criminal matters with the People's Republic of China, Hong Kong Special Administrative Region and Switzerland. These treaties are not yet in force pending compliance by the parties with their respective domestic laws for the treaties' effectivity. The requirement for the validity and effectivity of a treaty or international agreement, insofar as the Philippines is concerned, is provided in Section 21, Article VII of the Philippine Constitution which provides: "No treaty or international agreement shall be valid and effective unless concurred in by at least two-thirds of all the members of the Senate".

The conclusion of treaties by the Philippines shows its firm commitment to cooperate with the international community in the suppression of crimes. Specifically, it is intended to place international cooperation on a firm footing by providing predictable rules for cooperation and to make more transparent the possibilities of such cooperation with other States.

Although nine extradition treaties and two mutual legal assistance treaties are in force and effect, no request has yet been made for offenses involving human smuggling and trafficking in persons.

If there is a request for extradition in connection with the offense of human trafficking, the Philippines will have to contend with the issue of the existence of dual criminality, which is a requirement for extraditability. The reason is that the Philippines has no specific law that deals squarely with human trafficking. There is, however, a Bill titled the "Anti-Trafficking in Human Beings Act of 2001" pending in the Philippine Congress that seeks to criminalize human trafficking in all its forms.

Pending the enactment of the bill into law, law enforcement authorities use existing laws to penalize those involved in human trafficking, which laws may be used in determining the presence of double criminality in case there is an extradition request. These laws include: (a) the "Special Protection of Children Against Abuse, Exploitation and Discrimination Act" (Republic Act No. 7610); (b) the "Migrant Workers and Overseas Filipino Act" (RA No. 8042); (c) "An Act to Declare Unlawful the Practice of Matching Filipino Women for Marriage to Foreign Nationals on a Mail-Order Basis and Other Similar Practices Including the Advertisement, Publication, Printing or Distribution of Brochures, flyers and Other Propaganda Materials in Furtherance Thereof and Providing Penalty Therefor" (RA No. 6955); and (d) the "Philippine Passport Act of 1996" (RA No. 8239). It is noted that these laws punish the modes used for committing trafficking in persons.

III. A TREATY IS PLACED ON AN EQUAL FOOTING WITH PHILIPPINE DOMESTIC LAWS

A treaty or international agreement is on an equal footing with domestic legislation. The Philippine Supreme Court has made this clear in resolving the issue concerning the conflict between a municipal law and an international agreement, in this wise:

*The doctrine of incorporation, as applied in most countries, decrees that rules of international law are given equal standing with, but are not superior to, national legislative enactments. Accordingly, the principle *lex posterior derogat priori* takes effect - a treaty may repeal a statute and a statute may repeal a treaty. Where a treaty and a statute are on an equality, a new treaty prevails over an earlier statute, but it is also the case that a new statute prevails over a treaty.*

Thus, before the national courts of the state where the statute has been enacted, that which is later in date must prevail, unless the treaty contains provisions of international law which have been adopted in the Constitution as part of the law of the land, in which case the treaty must prevail.

IV. PHILIPPINE LAW GOVERNING EXTRADITION

The Philippine Extradition Law (Presidential Decree No. 1069), which was issued in 1977 by then President Ferdinand E. Marcos, is the law that governs the procedure for extradition in the Philippines. It is intended to “guide the executive department and the courts in the proper implementation of the extradition treaties to which the Philippines is a signatory.” It defines extradition as “the removal of an accused from the Philippines with the object of placing him at the disposal of foreign authorities to enable the requesting state or government to hold him in connection with any criminal investigation directed against him or the execution of a penalty imposed on him under the penal or criminal law of the requesting state or government.”

The definition approximates the international definition of extradition, which refers to “the process by which persons charged with or convicted of crime against the law of a State and found in a foreign State are returned by the latter to the former for trial or punishment. It applies to those who are merely charged with an offense but have not been brought to trial; to those who have been tried and convicted and have subsequently escaped from custody; and to those who have been convicted *in absentia*’.

The Philippine Extradition Law is supplemented by jurisprudence developed by the courts in the course of resolving extradition cases and by the Rules of Court of the Philippines, which apply to extradition cases only insofar as practicable and when not inconsistent with the summary nature of the proceedings.

A. Absence of a Specific Law Governing the Execution of Requests for Legal Assistance

Unlike extradition, mutual legal assistance in criminal matters in the Philippines does not have an implementing law for the execution of requests. Nonetheless, through practice, mutual legal assistance treaties have been considered to be self-executory and are, therefore, enforced even in the absence of any domestic law. For the purpose of executing requests for legal assistance, the Rules of Court are applied insofar as pertinent.

B. Some Legal and Practical Problems or Difficulties in Dealing with Various Requests for Extradition and Mutual Legal Assistance in Criminal Matters

Generally, most of the objections raised against extradition are constitutional ones. This is understandable considering that the Philippines operates within the framework of the Constitution that provides for the rights of individuals that may be invoked against the Government and exercise of governmental powers.

Persons sought contend that extradition and extradition treaties are unconstitutional for they violate human rights, deny them due process and allow extraterritorial application of foreign laws.

There is difficulty in resolving the constitutional issues raised in extradition proceedings because of the paucity of jurisprudence on the matter. Indeed, as of this date, there are only three (3) cases

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decided by the Philippine Supreme Court touching on extradition. Considering that resort to extradition and mutual legal assistance in criminal matters are generally new to both bench and bar, parties often rely on United States jurisprudence which somehow has a persuasive effect in this jurisdiction towards the gradual formulation of the country's own jurisprudence on the matter. Nonetheless, decisions arrived at by the Philippine Supreme Court establish the following jurisprudence:

1. An Extradition Treaty is Not an Ex Post Facto Law

The Philippine Supreme Court, in the case of *Wright vs. Court of Appeals*, held that the RP-Australia Extradition Treaty's retroactive application with respect to offenses committed prior to the Treaty's coming into force and effect does not violate the constitutional proscription against ex post facto laws. The Treaty is neither a piece of criminal legislation nor a criminal procedural statute. *"It merely provides for the extradition of persons wanted for prosecution of an offense or a crime which offense or crime was already committed or consummated at the time the treaty was ratified."*

2. The Person Sought is Not Entitled to Notice and a Hearing During the Evaluation Stage of the Extradition Process

In another case, the Philippine Supreme Court held that the person sought is not entitled to the due process right to notice and hearing during the evaluation stage of the extradition process. Hence, a potential extraditee has no right to demand copies of the extradition request and its supporting documents and to comment thereon while the request is still undergoing evaluation by the Department of Justice. In that case, the Court held:

An extradition proceeding is sui generis. It is not a criminal proceeding which will call into operation all the rights of an accused as guaranteed by the Bill of Rights. To begin with, the process of extradition does not involve the determination of the guilt or innocence of an accused. His guilt or innocence will be adjudged in the court of the state where he will be extradited.

Hence, as a rule, constitutional rights that are only relevant to determine the guilt or innocence of an accused cannot be invoked by an extraditee especially by one whose extradition papers are still undergoing evaluation.

3. Provisional Arrest Based on a Facsimile Copy of the Request and Accompanying Documents is Valid

(i). When a fugitive has been located in a foreign country, it is often important to effect his arrest at once, upon request, to prevent his further flight. For this purpose, most extradition laws and treaties provide that the fugitive may be arrested and temporarily detained for a period of time to enable the requesting State to furnish the necessary documentation in support of its request for extradition.

Considering the time factor, while the Philippine Extradition Law allows a request for provisional arrest to be sent either through diplomatic channels or by post or telegraph, in the advent of modern technology, the telegraph or cable have been conveniently replaced by a facsimile machine. Therefore, the transmission of the request for the provisional arrest of a fugitive and the accompanying documents, namely: a copy of the warrant of arrest against the fugitive; a summary of the facts of the case against him; particulars of his birth and address; a statement of the intention to request his provisional arrest and the reason thereof; by fax machine, more than serves this purpose of expediency.

Moreover, the request for provisional arrest of a fugitive and its accompanying documents are valid despite lack of authentication. There is no requirement for the authentication of a request for provisional arrest and its accompanying documents in both the Philippine Extradition Law and the RP-Hong Kong Agreement for the Accused and Convicted Persons. Authentication is required for the request for surrender or extradition but not for the request for provisional arrest.

(ii). Extradition courts grant bail in extradition cases, giving the opportunity to the person sought to flee to another jurisdiction. Thus, in one case, the person sought by the United States of America fled from the Philippines after posting a cash bond despite the issuance of a hold-departure order.

(iii). The Philippine Extradition Law has flaws rendering it more advantageous to the person sought. It uses the term accused, although the person sought is not accused of a crime in the Philippines, making it easy for the person sought to invoke the constitutional rights of the accused. It does not provide for an appeal in case the Requested State representing the Requesting State loses the case in the extradition court. Neither does it specify the specific provisions of the Rules of Court that are to apply in extradition cases.

(iv). Insofar as requests for legal assistance in criminal matters is concerned, there is no domestic law or rule providing for the procedure in executing requests for legal assistance. Thus, lawyers executing the request face problems on how to deal with specific requests.

(v). Strict bank secrecy law has, to a certain extent, derailed, if not impeded, the execution of requests for the examination of bank records and freezing of deposits that proceed from the commission of an offense. This is particularly true of foreign currency deposits. While it may be argued by the Department of Justice that the treaties supersede the bank secrecy deposit law inasmuch as the Mutual Legal Assistance Treaties came at a much later time, counter-arguments are made that there is no repeal or amendment on the bank secrecy law, absent express repeal in treaties. Just like in extradition proceedings, the Department of Justice is cautious in the implementation of Mutual Legal Assistance Treaties because of the absence of any definitive jurisprudence on the matter.

V. FORMAL PROCEDURES INVOLVED IN THE PROCESSING OF REQUESTS FOR EXTRADITION AND MUTUAL LEGAL ASSISTANCE IN CRIMINAL MATTERS RECEIVED FROM TREATY PARTNERS

A. Extradition

The Philippine Extradition Law provides that the Secretary of Foreign Affairs has the first opportunity to make a determination on whether a request for extradition complies with the requirements of the law and the relevant treaty. Such as the submission of the original or authenticated copy of the decision or sentence imposed upon an accused; or the criminal charge and the warrant of arrest; a recital of the acts for which extradition is requested containing the name and identity of the accused; his whereabouts in the Philippines; the acts or omissions complained of; the time and place of the commission of those acts; the text of the applicable law or a statement of the contents; and such other documents or information in support thereof.

Once all of these requirements are complied with, the request and supporting documents are forwarded to the Secretary of Justice who shall then designate a panel of State Counsels from the International Affairs Division (IAD) to handle the case.

In practice, the role of the Department of Justice, through its IAD, is not limited to the filing and handling of requests in court. If it deems necessary, the IAD may also request the foreign state to submit additional supporting documents pursuant to Philippine procedures to make sure that only those requests which comply with both the treaty and domestic requirements are processed.

Once all of the supporting documents are in order, the panel of State Counsels will, on behalf of the requesting state, prepare a petition for extradition and then file it with a Regional Trial Court for hearing. It has been the practice of the Department of Justice to request the arrest of the person subject of the extradition upon the filing of the extradition petition. The judge shall then issue a warrant of arrest if in the court's opinion the immediate arrest and temporary detention of the potential extraditee will best serve the ends of justice. If the Judge issues an order of arrest, the person subject of the extradition is arrested and detained at the National Bureau of Investigation (NBI) Detention Center.

The person sought may also be provisionally arrested pending receipt of the formal request for extradition as long as it can be proved that there is urgency in the provisional arrest, such as when the subject person is a flight risk.

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In such a case, the moment the Department of Justice receives, from the requesting state a request for provisional arrest of the person sought to be extradited, the Department of Justice then forwards the request to the NBI. The NBI, for its part, files, for and on behalf of the requesting state, an application for the provisional arrest of the subject person with the Regional Trial Court, which, upon determination, will then issue an order of arrest. Thereafter, the subject person is arrested and detained at the NBI Detention Center.

Upon the conclusion of the hearing of the extradition case, the court renders a decision either granting the extradition or dismissing the petition. Decisions of the Regional Trial Courts acting as extradition courts are appealable to the Court of Appeals, and may also be brought by certiorari to the Supreme Court.

The decision of the court shall be promptly served on the extraditee if he was not present at the reading thereof, and the clerk of court shall immediately forward two copies thereof to the Secretary of Foreign Affairs, through the Department of Justice.

Extradition requests vary considerably in complexity and time taken to resolve. The complexity of an extradition request is dependent on the remedies availed of a potential extraditee to oppose the petition. Hence, the time taken to resolve an extradition case can vary from a few years, if a fugitive wishes to contest extradition and exercise avail of the remedies available, to a few months if a fugitive consents to extradition or voluntarily surrenders.

B. Mutual Legal Assistance in Criminal Matters

Insofar as Mutual Legal Assistance Treaties are concerned, the present procedure being followed is that the moment the Department of Justice receives the request for legal assistance in criminal matters, the request is assigned to a State Counsel who will go over the request. If the request is meritorious, he then files an ex-parte application before a Regional Trial Court having jurisdiction over the bank or institution where the target accounts or documents may be found. The application is accompanied by a prayer that the court issues an order freezing the target accounts or authorizing the Department of Justice to examine the documents requested or to perform acts necessary to comply with the assistance requested.

If a request does not require a court order, the lawyer assigned just coordinates with the agencies concerned in the execution of a request.

VI. INFORMAL COOPERATION AS AN EFFECTIVE TOOL IN COMBATING CRIMES AND IN BRINGING THE PERPETRATORS TO THE BAR OF JUSTICE

The absence of treaties with other countries does not prevent the Philippines, through its concerned agencies and authorities, from extending the desired assistance to States in the suppression of crime. For in those countries where the Philippines has no treaty, the Philippines extends assistance, which I shall call "informal cooperation," provided there is an undertaking from the Requesting State to extend the same assistance if the Philippines needs it in the future. After all, cooperation is not a one-sided affair.

This is particularly true with Japan. Notwithstanding the absence of a treaty on mutual legal assistance in criminal matters, the Philippines has had a number of requests from Japan for assistance in gathering testimonial evidence and, sometimes, object evidence. Hence, although the Philippines does not have any formal extradition or legal assistance in criminal matters treaty with Japan, this does not stop both countries from cooperating with each other in an effort to enforce their respective criminal laws.

We have also, in a number of instances, deported Japanese nationals who fled to the Philippines in the hope of avoiding prosecution in Japan. The deportation has served the purpose of extradition.

There are no hard and fast rules governing our cooperation with Japan. While the requests are normally coursed through the appropriate diplomatic channels, it is not unusual for an advance copy to

be sent directly to my office so that by the time we receive the official request, the documents requested or person sought is already available or in custody.

To better illustrate the workings of this “informal procedure,” I would like to cite a few actual cases as examples:

a. In connection with a Murder and Arson to an Inhabited Structure in Nagoya-shi, Japan, in January of 1993. The defendants Kosume Yoshimi and Pablito Franco Barlis conspired with William Gallardo Bueno and Joemarie Baldemero Chua in killing Kosume Shozaburo and in burning his house. The Japanese Police requested the Philippine National Police, through the International Criminal Police Organization (ICPO), to interrogate Joemarie Baldemero Chua, an accomplice who had fled to the Philippines.

During the course of the trial proceedings, accomplice William Gallardo Bueno’s testimony at Nagoya District Court conflicted with Joemarie’s statement taken by an investigator of the Criminal Investigation Unit of the Philippine National Police.

In view thereof, it was difficult to determine whose statement was true. Therefore, it became necessary to request a Public Prosecutor in the Philippines to interrogate Joemarie again, in the presence of a Japanese Public Prosecutor, about the particulars and circumstances of the conspiracy to commit murder and arson, including the roles of the three Filipino accomplices, the reward and the details of the actual execution of the crimes.

On February 5, 1996, Mr. Hiroshi Shimizu, Chief Prosecutor of the Nagoya District Public Prosecutors Office of Japan, wrote a letter to the judicial authorities of the Republic of the Philippines requesting assistance in the criminal investigation of Murder and Arson to an Inhabited Structure against Mr. Kosume Yoshimi and Pablito Franco Barlis, which was under trial at Nagoya District Court.

A Note Verbale No. 88-96 was issued by the Embassy of Japan in Manila to the Department of Foreign Affairs requesting the cooperation of the authorities of the Philippine Government in the said investigation. The Philippine Department of Foreign Affairs indorsed all documents to the Department of Justice. On March 25, 1996, then Secretary of Justice Teofisto T. Guingona Jr., issued a Department Order designating me to assist the Japanese Public Prosecutor in Iloilo City on March 26 to 28, 1996 in interviewing one Joemarie Baldemero Chua in relation to the criminal cases.

Immediately, we all proceeded to Iloilo City and I personally conducted clarificatory questioning on the person of Joemarie Baldemero Chua. He was assisted by a lawyer from the Public Attorney's Office. Joemarie Chua voluntarily and freely narrated the incident that happened on January 8, 1993. The Japanese Public Prosecutor and his assistant went back to Japan with the sworn statement of Joemarie Baldemero Chua.

Kosume Yoshimi was sentenced to life imprisonment for Murder and Arson to an Inhabited Structure at Nagoya District Court on November 11, 1997 and his Koso-appeal was dismissed by the Nagoya High Court on November 19, 1998. Pablito Franco Barlis was sentenced to imprisonment with labor for thirteen years for Murder and Arson to an Inhabited Structure at Nagoya District Court on February 26, 1998 and the sentence became final. William Gallardo Bueno was sentenced to imprisonment with labor of fifteen years for Murder and Arson to an Inhabited Structure at Nagoya District Court on May 11, 1995 and the sentence became final.

b. On January 12, 1990, the Osaka Maritime Police and the Osaka Customs Police arrested Akira Fujita in Manila who had been wanted for purchasing and shipping handguns from the Philippines in connection with the smuggling of 40 handguns by a Yamaguchi-gumi (Yakuza) syndicate member from the Philippines.

The police investigation has revealed that Fujita conspired with one Hironori Takenouchi of Izumi City, a Yakuza member. Fujita allegedly purchased 40 handguns and 800 rounds of ammunition with

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one million and several hundred thousand yen he received from Takenouchi and concealed the guns and ammunition inside the furniture he shipped to Japan. Fujita was subsequently convicted and was sentenced to seven years imprisonment on July 19, 1990.

On October 8, 1997, the Interpol Tokyo informed Interpol Manila that Akira Fujita departed from Japan on the Pakistan Airlines flight bound for Manila on October 7, 1997. An official of the Japanese Embassy in Manila requested my assistance and provided information on the whereabouts of Fujita.

I immediately referred the case of Fujita to the Chief of the Intelligence Division of the Bureau of Immigration, and two days later, or on October 9, 1997, at about 6:30 p.m. of the same date, Fujita was arrested by immigration agents. After one week, he was deported to Japan.

c. On March 8, 1999, Mr. Norio Ishibe, the Chief Prosecutor of the Akita District Public Prosecutors' Office, requested the judicial authorities of the Republic of the Philippines assistance in a criminal investigation. The facts of the case are as follows:

Defendant Akihito Ishiyama was a postmaster of Tokiwa Post Office in Akita, Japan. He was a custodian of cash at the Tokiwa Post Office as part of his work responsibilities. At around 6:00 p.m., October 23, 1998, he appropriated the amount of 32,305,500 yen from Tokiwa Post Office for his own use, in violation of Articles 253 and 235 of the Japanese Penal Code.

Defendant Ishiyama disclosed to an investigator that he left Japan for the Philippines with cash totaling about 33,000,000 yen and gave 970,000 yen to a certain Mina, and left 30,000,000 yen with Sunny Laxa, the common-law husband of Mina.

To confirm the defendant's statement and to ascertain how the money he got was spent, one Japanese Public Prosecutor and an assistant were dispatched to conduct interviews of witnesses. I was designated by the Chief State Prosecutor of the Philippines to assist them. With this designation, I, together with the Japanese Public Prosecutor and his Assistant, found the witnesses in one of the provinces. They voluntarily and freely gave their respective sworn statements.

The Akita District Court sentenced Akihito Ishiyama to imprisonment with labor for four years and six months for embezzlement, larceny and fraud on September 1, 1999 and the sentence became final.

d. On September 1, 1998, Mr. Hidea Iida, the Chief Public Prosecutor of the Osaka District Public Prosecutor's Office, wrote a letter to the judicial authorities of the Republic of the Philippines requesting assistance in criminal cases of Abandonment of Corpse and Violation of the Firearms and Swords Control Law against Chow On Park. Mr. Park allegedly intended to abandon one Haruo Nishikawa who was shot by Ho Ji Chong alias Hiroshi Matsuda.

Defendant Park received about 30 million Japanese yen in cash as a reward for the criminal act from the Ho Ji Chong alias Hiroshi Matsuda on November 28, 1997. The defendant's wife, Marucilla Park Ruby Cristina alias Ruby Arai, entered the Philippines with the cash on December 6, 1997 upon the defendant's order. Marucilla asked her cousin Bernardo Marilou to keep 5,480,000 yen in a safe-deposit box at Westmont Bank and 19,000,000 yen in a safe-deposit box at China Banking Corporation. Because the defendant received that money as a reward for the criminal act in this case, the money had to be seized and confiscated as evidence.

Japanese Public Prosecutor Haruhiko Fujimoto and his assistant were dispatched to Manila. Designated by the Chief State Prosecutor to assist them, I was able to persuade Ruby Marcilla Arai to turn over the money kept in the safe deposit box of China Bank Corporation. She personally handed to me 24,480,000 yen. I delivered the money to the Department of Foreign Affairs (DFA). The DFA turned over the money to the officials of the Japanese Embassy in Manila who delivered it to the Osaka District Public Prosecutors Office.

Chow On Park alias Haruhiko Arai was sentenced to imprisonment with labor to two years for Abandonment of Corpse and violation of the Firearms and Swords Control Law. The 24,480,000 yen and

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a hand gun at Osaka District Court were confiscated. His Koso-appeal was dismissed on November 4, 1999.

e. On June 29, 2001, a Japanese national, Mr. Shunichi Yamada was apprehended by the Philippine National Police at the Ninoy Aquino International Airport for attempting to smuggle two (2) firearms to Japan. He was about to board Northwest Airline flight 26 for Kansai International Airport of Japan.

The said firearms were concealed inside the x-ray safety film case inside his baggage. He was charged with Illegal Possession of Firearms at the Pasay City Prosecutors Office and the said criminal case was dismissed by the Public Prosecutor for lack of evidence.

In Japan, any person who makes preparations for the importation of handguns (possession, purchase and packing of handguns for the purpose of illegally importing such to Japan) outside the territory of Japan shall be punished unless otherwise specially provided for in the law, according to the Firearms and Sword Control Law of Japan.

On September 25, 2001, Officials of Interpol, Tokyo made a request for a copy of the entire case records against Shunichi Yamada and the two (2) firearms to establish pertinent facts regarding the circumstances of the case.

A Note Verbale No. 749-01 dated November 07, 2001, was issued by the Embassy of Japan in Manila to the Department of Foreign Affairs requesting the cooperation of the authorities of the Philippine Government in the said investigation. The Philippine Department of Foreign Affairs indorsed all documents to the Department of Justice.

On December 13, 2001, the Secretary of Justice, through the Chief State Prosecutor in response to the said note verbale, forwarded the two (2) handguns, rounds of ammunition, the copy of the entire records and the safety cases where the firearms were concealed.

Based on the evidence received, Kyoto Prefectural Police arrested Mr. Yamada on January 09, 2002. Kyoto District Public Prosecutors Office prosecuted Yamada on January 30, 2002. Kyoto District Court sentenced Yamada to two years and six months in prison on June 27, 2002.

It may be worth mentioning that the average time it took us to comply with these requests for assistance is about one (1) week. The absence of any procedure in these cases helped reduce bureaucratic red tape and cut down on the time element. Also, it appears that most witnesses were willing to cooperate once it was explained to them that only their testimony would be needed and that they would not be extradited or charged. Furthermore, after explaining to potential witnesses or accessories that only the proceeds of the crimes would be confiscated but no charges would be brought against them, they willingly gave up the proceeds.

It is important, therefore, that those involved in legal assistance be able to meet potential witnesses to be able to allay their fears. Once this initial fear was properly addressed, the witnesses became cooperative.

On the aspect of "surrender," the procedure used was basically deportation. The legal justifications for deportation would be their illegal entry, through the use of falsified documents, or their previous blacklisting. Thus, even if they were able to enter, they are still legally subject to deportation when found.

Indeed, recently, there were a number of instances when fugitives from Japan and other countries, like the United States and South Korea, were returned to their respective countries where they committed crimes through the modes of deportation or exclusion, thereby serving the purpose of extradition.

May I cite three (3) actual cases as examples:

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a. On March 07, 2002, U.S. Consul Theodore Allegra wrote a letter to the Philippine Commissioner of Immigration and Deportation requesting the apprehension and deportation of one Mr. Jeffrey Alan Pollinger, an American citizen and a federal fugitive. He is the subject of a federal warrant of arrest issued on February 22, 2002 by the United States District Court, for the Central District of California charging him with violating Section 1073 of Title 18 of the United States Code (lewd acts against a child). Mr. Pollinger allegedly sexually abused an eight-year old girl on several occasions in January 1998. The U.S. Department of State revoked his U.S. Passport issued on June 08, 2000.

On May 16, 2002, the respondent was apprehended by the Intelligence Agents of the Bureau of Immigration and Deportation. Subsequently, the corresponding deportation charge against respondent Pollinger was filed with the Board of Commissioners for violation of Section 37(a)(7) of the Philippine Immigration Act of 1940, as amended. On May 17, 2002, the Board of Commissions issued the Summary of Deportation Order finding him as being undesirable and ordered to be deported to his country of origin. On May 18, 2002, he was escorted to take a Continental Airlines flight to the United States.

b. On January 31, 2002, the Consul of the Embassy of the Republic of Korea in Makati, Philippines requested the deportation of one Mr. Sam Kim, a Korean national, who was a fugitive wanted by the Korean authorities for seven (7) counts of Fraud. On February 01, 2002, the corresponding charge sheet was filed by the Special Prosecutor of the Bureau of Immigration and Deportation. Immediately thereafter, the Board of Commissioners issued the Summary Deportation Order for violation of Section 37(a)(7) of the Philippine Immigration Act of 1940, as amended. He violated the conditions of his admission as a temporary visitor for working without the appropriate visa and for being an undocumented alien.

c. On August 10, 2001, Embassy of Japan, First Secretary Takahiko IIRI requested the deportation of Mr. Ryiyi Tanaka, a Japanese fugitive, who was issued a warrant of arrest by the Tokyo Summary Court for punching and kicking Mr. Hiroyuki Anna in his face and robbing him of 13,105,615 yen. On August 18, 2001, Mr. Tanaka was apprehended at the parking lot of the international airport when he was there to welcome a Japanese friend who had just arrived from Japan.

On August 21, 2001, the corresponding charge sheet was filed with the Board of Commissioners for violation of Section 37(a)(7) in relation to Section 45(a) of the Philippine Immigration Act of 1940, as amended. Mr. Tanaka is a Japanese criminal fugitive and a member of the Japanese Boryorku-dan (Yakuza) who fled from Japan to the Philippines through the use of a spurious Japanese passport under the name of Manasabe Watanabe, hence, an undocumented alien. He was ordered to be deported to his country of origin on August 21, 2001 by the Board of Commissioners.

What these cases indubitably show is that even outside of a formal framework, where two governments are willing to share resources, information and expertise and develop close working relations, real feasible solutions can occur. If non-treaty based cooperation can be done with Japan in those above-mentioned cases, it can also prosper in the fight against human smuggling and trafficking in persons.

VII. CONCLUSION

In the fight against transnational organized crimes, like human smuggling and trafficking in persons, the Philippines recognizes the serious and growing need for international cooperation, particularly in mutual legal assistance, extradition, and law-enforcement and technical assistance and training. It is in the interest of the international community that crimes do not go unpunished, lest they sap the foundation of civilized society. Let us all unite and create a crime free world.

FORCED MIGRATION AND REFUGEES' RIGHTS

*Dr. Diego Rosero**



I. INTRODUCTION

Illegal migration is an increasingly difficult challenge for most countries. Traditional immigration control tools such as valid passport and visa requirements, border examination and in-country enforcement measures are being increasingly challenged by the sheer numbers of people on the move as well as by sophisticated methods to falsify documents and the involvement of organizations profiting from migrant smuggling. As increasing numbers of migrants are by-passing entry controls and competing for jobs, negative if not openly antagonistic domestic reactions have been elicited.

On the other hand, refugees are forced to migrate because of human rights violations and conflict in their countries and find themselves in an especially vulnerable situation abroad; host States are expected to do their utmost to avoid further rights violations in their territories. As many refugees have to flee without proper documentation and have no option other than to use people smugglers in order to reach safety, their proper identification and separation from other economic migrants is a key challenge that requires not only adequate legislation but also properly trained immigration personnel. Law-enforcement officials need to be aware of basic human rights rules protecting refugees and asylum-seekers.

II. INTERNATIONAL HUMAN RIGHTS RULES APPLICABLE TO ASYLUM SEEKERS AND REFUGEES

The most important international treaties on the subject are the *Convention Relating to the Status of Refugees* (hereinafter CSR)¹ and its *1967 Protocol*². They define who is a refugee and establish a set of rights attached to such status.

Regional treaties and declarations have expanded the refugee definition in the last few decades: in Africa, the *1969 OAU Convention*; in Latin America, the *1984 Cartagena Declaration* -the Declaration's refugee definition has been included in some national legislation in the area. In the closely related subject of group refugee determination through alternative forms of protection, in Europe, the EU has already agreed upon a plan over the granting of Temporary Protection regarding certain populations, in an attempt to harmonize the national systems applied throughout the 1990s for the protection of refugees from the Former Yugoslavia. UNHCR also has had its Mandate expanded for refugees fleeing *en masse* -without resort to individualized status determination; perhaps the better-known examples in East Asia started with Chinese fleeing to Hong Kong in the 1950s, followed by Indochinese in the 1970s and 1980s (before the 1989 Comprehensive Plan of Action); more recently, Myanmarers (in Thailand and Bangladesh) and East Timorese.

In sum, refugees recognized under the CSR, refugees fleeing civil and international wars as well as events seriously disturbing public order³ and asylum-seekers are all in need of international protection⁴. We will not touch upon in this paper other categories of persons in need of international protection such as IDPs and stateless persons.

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¹ Final text approved at the special UN Conference in Geneva on 28 July 1951; entry into force: 22 April 1954

² Protocol relating to the status of refugees of 31 January 1967; entry into force: 4 October 1967.

³ Using elements of the expanded definition of the OAU Convention, the Cartagena Declaration and EXCOM Conclusion No. 22.

III. WHAT INTERNATIONAL REFUGEE PROTECTION INCLUDES?

International protection encompasses a range of specific human rights related to asylum seekers and refugees: the right to seek asylum, protection against forcible return, various rights in asylum countries -including what is seen from another perspective as entitlements to “humanitarian assistance”, the right to return, among others. In turn, refugees have the obligation to respect the laws, regulations and measures taken for the maintenance of public order in the country of asylum⁵.

A. The Right to Seek Asylum

The right to seek asylum is found in the *1948 Universal Declaration of Human Rights*: “Everyone has the right to seek and to enjoy in other countries asylum from persecution”.

The right to seek and enjoy asylum has been respected in most situations of displacement in the past decades. As of today, over 12.1 million refugees have found asylum -though of varying quality. Most of these refugees have not been officially recognized as such under the CSR but under the “expanded” refugee definition and remain mostly in developing countries.

The exercise of the right to seek asylum requires the refugees’ very ability to cross international borders. Not all persecuted can do so. First, if they were to leave their own country legally, refugees would need to obtain a passport and maybe an exit visa from the very government they try to escape persecution. If they are forced to leave illegally, they risk being shot at by border guards -as thousands trying to cross the various “iron” or “bamboo walls” have experienced. Second, refugees should be able to gain entry into a safe country: Whenever they intend entry illegally in neighboring countries, this often involves serious risks: how could refugees cross borders closed for security reasons if these are strictly guarded and perhaps scattered with land mines? If they intend entry legally, how to do so if entry visas are required -and routinely denied by industrialized countries to the destitute of the world? How would they be able to even board a plane or ship for safety if airlines and other carriers that may bring refugees to various industrialized countries are requested to conduct document controls to detect forgeries and are routinely punished if nevertheless some individuals manage to arrive? And even after some refugees arrive with proper documents, they may still be denied entry by an immigration officer who feels the stated purpose of entry (tourism, business, etc.) may hide a purpose to stay? Too often some immigration officers ignore asylum applications whenever there are no witnesses to such denials of access and as we have been told in some countries, for reasons as mundane as “just to avoid a lot of extra work”.

People smuggling and trafficking have complicated the issue further, as more and more refugees and asylum-seekers use the same channels as illegal economic migrants in order to reach an asylum country. However, taking into account the above circumstances, is it far-fetched to conclude that it is close to impossible for most refugees to enter legally in countries of asylum? If so, there should be no surprise to find that Iraqis, Afghans and Turks, the highest smuggled nationalities of individuals entering illegally into 28 industrialized countries today, also have the highest refugee recognition rates.

B. Obligations of Governments: Provide Protection Against *Refoulement* and Against Expulsion

The protection of the CSR to refugees can only be effective through the respect by Governments of two basic rights: the protection against *refoulement*, and the right to remain in the territory until a durable solution is found.

Non-refoulement is the refugees’ right not to be returned to persecution, either in their country of origin or in other countries in which they would be at risk. This right mirrors an obligation for States to refrain from being instrumental to the persecution by other States of their nationals on grounds of race, political opinion, religion, nationality or for membership in a particular social group. Refugees are protected from forcible return not only after entry but also or at borders, airports or on the seas⁶. Recognizing its importance, article 33 CSR does not allow reservations by the signatory parties.

⁴ Other categories of persons also in need of international protection are internally displaced persons, returnees (former refugees who are repatriated voluntarily) and stateless individuals.

⁵ CSR Art. 2

The protection against refoulement is widely accepted as a principle of international customary law; this conclusion is based on consistent practice combined with States' recognition that the principle has a normative character. Apart from the CSR, it has been included in various forms under international human rights treaties, inter alia the 1984 UN Convention against Torture, the 1969 OAU Convention, the American Convention on Human Rights and the European Convention on Human Rights (regarding protection against return to torture); it has also been reaffirmed by the UN General Assembly⁷ and by the States members of EXCOM⁸.

One constraint is that many countries, especially among the developing ones, have no legal or administrative structures to distinguish between different categories of persons coming into their territories. If no clear legislation to separate refugees from economic and other migrants smuggled into the country exist and if no administrative guidelines or training are available to immigration officers, how could they be expected to avoid sending people back to persecution?

A State without the basic capacity to identify systematically who is a migrant and who is a refugee would find it extremely difficult to deal with an onslaught of arrivals of increasingly complicated cases. Opting to ignore the problem in the hope that it will be transferred to other countries, is not only selfish and is already affecting good neighborly relations, but this behavior contributes for the problem to grow. More and more people are already coming and remaining illegally in the territories of countries ignoring the problem, while their ports, land and airports are increasingly being used by criminal organizations.

I must also emphasize that the countries not parties to the Refugee Convention do have international responsibilities towards upholding the protection of refugees.

C. Protection of Refugees' Rights in Asylum Countries

The CSR was the first comprehensive international human rights instrument applicable to a special category of persons; it pre-dated agreements applicable to all individuals at the international level. By 2002, an array of Covenants and Treaties have complemented the rights of refugees in asylum countries: the *International Covenant on Civil and Political Rights* (ICCPR), the *Covenant on Economic, Social and Cultural Rights* (ICESCR); the *Convention on the Elimination of All Forms of Racial Discrimination* (CERD), the *Convention on the Elimination of All Forms of Discrimination against Women* (CEDAW), the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT), the *Convention on the Rights of the Child* (CRC), among other Conventions.

IV. DETENTION OF REFUGEES AND ASYLUM-SEEKERS: INTERNATIONAL STANDARDS

Refugees and asylum-seekers who commit crimes in the country of asylum, or who have committed crimes abroad and are prosecuted by local courts exercising legitimate penal jurisdiction, if found guilty, are to serve their sentences in equal circumstances as nationals of the country. In this section, when we discuss "detention", we will not refer to punishment for common crimes resulting in detention, but only to "administrative detention" under the powers of the immigration authorities for violations of regulations on border controls.

⁶ 1951 Refugee Convention Art 33, Prohibition of expulsion or return ("refoulement")

"1. No Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

2. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."

⁷ See United Nations Declaration on Territorial Asylum, adopted by the UN General Assembly on 14 December 1967. Art.3.1 "No person referred to in article 1, paragraph 1, shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution." (Emphasis added)

⁸ See for instance, EXCOM Conclusion No. 6: protection for refugees from refoulement both at the border and within the territory, irrespective of whether or not they have been formally recognized as such.

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International Standards on Detention of Refugees and Asylum-seekers

The CSR provides that refugees shall not be punished for illegal entry or stay under certain conditions (article 31)⁹. In addition, the ICCPR's Article 9:1 is especially relevant, as refugees and asylum-seekers benefit from its provisions as any other individual:

"Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law"

The ICCPR Committee has ruled that the right to liberty in Art. 9 does include all deprivations of liberty, whether in criminal cases or in other cases, including immigration detention¹⁰.

What if the procedures established by law are violating the guarantees of liberty in the national Constitution? Are there remedies for such situations? Are habeas corpus procedures available to asylum-seekers kept in indefinite detention because they are non-deportable? These are fundamental questions that are constantly been addressed by national courts¹¹ -now, including those in Japan.

The practice of most industrialized countries suggest that by keeping the minimum possible number of asylum-seekers in detention, they agree that their mandatory detention would only serve to victimize, in the asylum country, those already persecuted abroad -defeating the CSR's very purpose in the process.

Finally, international law is moving towards the punishment of the organizers of illegal migration and their accomplices, and not against the persons smuggled, including asylum-seekers. In this respect, the two Protocols (on the Smuggling of Migrants¹² and Against Trafficking of Persons) of the Convention Against Transnational Organized Crime state that:

"Nothing in this Protocol shall affect the rights, obligations and responsibilities of States and individuals under international law, including international humanitarian law and international human rights law, in particular, where applicable, the 1951 Refugee Convention"

⁹ "Article 31 - Refugees unlawfully in the country of refuge

1- The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2- The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country"(emphasis added)

¹⁰ ICCPR Committee General Comment 8 of 1982.

¹¹ In the US, recent decisions have held indefinite detention of non-deportable aliens by the INS to be unconstitutional. The Supreme Court in *Zadvydas v. Davis* and *Ashcroft v. Kim Ho Ma* (June 2001), held that view even in cases where the aliens have criminal records. In another landmark decision, the 6th Circuit Appeals Court in *Rosales Garcia* (2001) found a violation of the US Constitution by the INS in the case of a Cuban national with prior criminal records who completed his prison sentence, but who could not be deported due to a refusal of the Cuban Government to re-admit him: "We conclude that Rosales' confinement can only be considered excessive in relation to the purpose of protecting the community from danger and enforcing an immigration order that is, at present, unenforceable...Rosales' detention has crossed the line from permissive regulatory confinement to impermissible punishment without trial"... (Full text of the decision is found in the *Int'l Journal of Refugee Law* 13, #3 - 2001)

¹² Convention Against Transnational Organized Crime. Protocol against the smuggling of Migrants by land, sea and air. Art. 19 - UN G.A. resolution 55/25, annex III, 55 U.N. GAOR Supp. (No. 49) at 65, U.N. Doc. A/45/49 (Vol. I) (2001). The same provision is contained in Art. 14 of the Anti-trafficking Protocol.

V. CONCLUSION

Immigration control and the fight against syndicates involved in people smuggling must be pursued strongly but avoiding violations of human rights of refugees and asylum-seekers. Countries that are not parties to the Refugee Convention are also obliged to avoid sending people back to situations of torture or persecution. Human Rights Conventions which have been ratified by virtually all the countries present are also applicable to refugees. Most of the countries present are also parties to the Convention Against Torture which prohibits sending anyone back to a situation of torture. It is provisions like this one that are as much national law as the immigration rules, that must also inform the daily decisions of immigration officers to deport individuals who may have entered or stayed in violation of immigration rules. These are basic rules of humanity in what is becoming an inter-dependent world.

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BEIJING BORDER CONTROL OF THE ENTRY AND EXIT ADMINISTRATION

*Man Ju You**

I. THE OVERALL SITUATION OF SMUGGLING OF MIGRANTS IN CHINA, AND THE ATTITUDE, STANDPOINT AND COUNTERMEASURES OF THE CHINESE GOVERNMENT AGAINST ILLEGAL MIGRANTS

This paper summarizes the organization of China's entry and exit administration and its chief functions; attitude and standpoint of the Chinese government against illegal migration; and the tough measures adopted by the Chinese government against illegal migration. The paper also gives a brief introduction to the general situation and current tendency of illegal migration in China as well as some statistical figures.

II. AN INTRODUCTION TO CHINESE ENTRY AND EXIT ADMINISTRATION AND ATTITUDE, STANDPOINT AND COUNTERMEASURES OF THE CHINESE GOVERNMENT AGAINST ILLEGAL MIGRANTS

A. Brief Introduction to Chinese Entry and Exit Administration

The Bureau of Entry and Exit Administration is subordinated to the Ministry of Public Security of P.R.C. Its functions include the control of entry, transit, residence and travel of foreigners as well as issuing visas and travel document to them; approval of exit and entry of Chinese citizens when they go abroad or go to Hong Kong, the Macaw Special Administration Region and Taiwan for private purposes and issuing passports and other certificates to them; conducting the inspection on travelers as well as means of transport entering and exiting China at all open ports; and dealing with cases that break the entry and exit administration laws and regulations of China.

At present, China has 265 frontier inspection stations at ports open to the outside world in its 30 provinces, autonomous regions and municipalities. Among them, there are 72 land ports, 138 seaports and 55 airports. With the further carrying out of China's open-up policy, all the frontier inspection stations have the heavy burden of inspecting millions of travelers. However they seriously perform the task of combating illegal migration.

B. Attitude and Standpoint of the Chinese Government Against Illegal Migration

Illegal migration has become more and more of a serious problem that draws the attention of all countries. In my opinion, the main causes of illegal migration are an unbalanced world economy, warfare and natural disasters. Illegal migration caused by these reasons has a trend of being even more serious in recent years and became a world issue that violates the normal order of exit and entry of countries, brings out other criminal activities and in turn will produce an impact on the stability of the society. Therefore, it is a common issue we are all facing together. Although it is difficult to eliminate this issue completely in a short period, I believe it can be effectively contained through the joint effort of us all.

The Chinese government has consistently promoted and encouraged the legal entry and exit of international travelers, and stands firmly in strictly prohibiting illegal immigration, and has adopted all necessary measures and done its utmost to ban illegal migration.

To be frank, there are some Chinese who are smuggled abroad in different ways. The Chinese government's policy on this matter is to accept all repatriation of the illegal migrants after verification by China's competent department that they were departing from Mainland China. Those who are

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smuggled by sea shall be repatriated by ship in groups all together. We cannot agree with the practice of some countries that select and keep some of the smugglers while repatriate the rest. Neither do we agree with the policy of allowing illegal migrants to stay in the name of “refugees”. This is because such practice and policy may give illegal migrants more illusions and attract more people to risk human smuggling.

C. Measures Adopted by the Chinese Government to Combat Illegal Migration in Recent Years

1. Strengthening the Management of International Travel Documents and Improving Quality and Anti-forging Techniques in Chinese Passports and Other Certificates

The public security authorities of China have made great efforts to improve the quality of entry and exit certificates. The Chinese private passport has been redesigned eleven times. Now the 12th version of the Chinese private passport has been put into use. The quality of the passport has been greatly improved with the introduction of intaglio printing, rainbow printing, laser-printing and microform marks. All these technological advances have made the 12th version passport difficult to be counterfeited. Besides, computer networks have linked all the entry and exit administration departments at the municipal level and above; all passport information is stored on a national database. Then we will set up networks connecting ports between ports and ports between documents issuing offices. There is no doubt that all these measures will play a positive role in fighting illegal migration.

2. Enhancing Exit-Entry Frontier Inspection and Fighting Illegal Crossing of National Borders

The Chinese entry-exit frontier inspection stations are in charge of inspection of all international travelers. Chinese citizens departing China not only have their passports but also their visas examined. By doing this, persons holding forged or fraudulent visas shall be prevented from departure. Such special practice protects the legitimate rights of the Chinese citizens on the one hand, and keeps the forged documents bearers from leaving China on the other hand. Compared with the non-exit-inspection practice of some countries, it shows the responsible concept of the Chinese government towards the international community in matters of anti-illegal migration.

3. In the Campaign Against Illegal Migration, the Following Measures are Adopted in our Inspection Work

(i) Establishing information notification system. China is a large country with long borders and many open ports. To collect and send information about illegal migration in the shortest time is of great value to joint action and full-scale guarding of all frontier stations all over the country. For instance, after we get information about forged certificates and documents held by illegal migrants as well as their routes and methods of smuggling, we immediately send the information to all ports to enhance their inspection.

(ii) Improvement in facilities of passport inspection. We purchased an “EDISON system” from the Netherlands and a “documentary 3000 system” from Switzerland and Britain, and installed them in our major frontier inspection stations with the aim of identifying visas and passports and collecting useful information in the fight against illegal migrants. With the help of the new equipment, the ability of our inspectors to detect forgeries has been greatly improved. We are planning to purchase more identifying apparatus and install more inspection stations.

(iii) Enhancing training. Now all our newly recruited inspectors are graduates from colleges and universities from all over the country. Before they take the inspection job, they must take a half-year's professional training. Only those who pass the qualification exam can join the inspection task. Regular advanced training and expert lectures are arranged for all inspectors to improve their juristic knowledge and inspecting skill. For instance, we have yearly nation-wide training courses for inspectors to improve their ability to crack down on illegal migration.

(iv) Conducting strict control and patrols at sea. To crack down on human smuggling along coastal areas, the Coast Armed Police Force (CAPF) has been set up in provinces of Guangdong, Guangxi, Fujian, Zhejiang and Hai'nan. The CAPF are well equipped, and can effectively and swiftly enforce

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their duty. In 1999, there were 1,300 cases of illegal migration detected in the coastal area with 9,129 illegal migrants and 925 organizers involved.

(v) Detecting and severely punishing the organizers of illegal migration. The existence of organizers of illegal migration (in Chinese they are called “snake head”) is widely considered as one important cause of illegal migrations. Therefore severe punishment of the smuggling organizers is urged to add to the campaign against illegal migration. The criminal law of P.R.C. stipulates that organizers of illegal migration shall be sentenced to a period of imprisonment from 2 to 7 years, together with a fine. For very serious cases imprisonment from 7 years to life is possible, as well as a fine or confiscation of property. In recent years, a number of illegal migration organizers have been arrested and prosecuted. According to incomplete statistics, in 1999, the Chinese frontier inspection stations arrested over 200 organizers of illegal migration. Meanwhile the names of organizers abroad are on our control list, so that they cannot enter China to conduct any illegal activities.

(vi) Strengthening international cooperation. Up to now, in the field of containing illegal migration, China has established effective cooperation with over 40 countries, and has signed agreements or memorandums with over 30 countries. On January 13th 1999, we learned that a number of persons would be smuggled to USA from Shanghai. Shortly after receiving the message we contacted the representative of Immigration and Neutralization Service (INS) of the United States in Beijing. On April 24th, the INS officers successfully arrested 2 illegal migrants and 2 escorting American Vietnamese on the spot while they were destroying their passports and forged visas right after arriving at Los Angeles airport. In Shanghai, the related criminals were detained at the same time. We have also experienced many other successful cooperative efforts with other countries, including the Netherlands and Italy.

(vii) Heightening the consciousness of Chinese citizens against illegal migration through the mass media. With the concept that the illegal migrants are not only misfeasors but also victims, we process propaganda to the public on the aftermath of smuggling. In areas where the illegal emigration issue is serious, relevant institutions of local governments and social organizations are motivated to publicize the harm of illegal migration and confirm the government's standpoint against human smuggling. Newspapers, radio and television programmes are broadly used.

III. OVERALL SITUATION AND TREND AS WELL AS STATISTICS ON SMUGGLING OF MIGRANTS FROM 1997 TO 2001

A. The Overall Situation of Illegal Migration

1. Illegal Migrants Detected from 1997 to 2001

Table 1. Statistics on Illegal Migration Detected from 1997 to 2001

Year	Number of Entry & Exit Visitors	Number of illegal migrants intercepted in China						
		Total	Forgery Number	%	Other Means	%	Organized Smuggling	%
1997	131198920	6635	2326	35.06%	3917	59.04%	392	5.91%
1998	142965080	6624	3064	46.26%	3219	48.60%	341	5.15%
1999	163512420	7027	4183	59.53%	2390	34.01%	454	6.46%
2000	187243600	7073	4067	57.50%	2642	37.25%	364	5.15%
2001	201897844	5558	3350	60.27%	1901	34.20%	307	5.52%

Notice: other means refer to hiding in means of transport, assuming other's name and taking unlawful procurement

(i) With the increase in the number of exit and entry passengers, the number of illegal migrants detected is also on the rise.

(ii) Bearing forged travel documents is the chief means of smuggling in open ports. And the percentage of forgery bearers has been increasing year by year. The Chinese government has been alerted to this trend.

(iii) The annual number of illegal migration organizers detected by the Chinese frontier inspection institutes is 5 to 6% of smugglers detected. Some of the organizers are Chinese, yet most of them are foreign nationals who hold legal travel documents and are difficult to detect. They are wirepullers of illegal migration and should be the focus of our strike.

2. Forged Documents from 1997 to 2001

Table 2. Breakdown of Forged Travel Documents from 1997 to 2001

Year	Number of forged certificates and documents						
	Total	Forged Stamp	%	Forged Visa	%	Forged Certificate	%
1997	2326	386	16.60%	423	18.19%	1517	65.22%
1998	3064	361	11.78	427	13.94%	2276	74.28%
1999	4183	339	8.10%	502	12.00%	3342	79.89%
2000	4067	234	5.75%	652	16.03%	3181	78.21%
2001	3350	498	14.87%	897	26.78	1955	58.36%

(i) The percentage of forged certificates is on the increase. The main methods of forgery are photo-substitution, data-page substitution and data-page alteration. Photo-substitution is the most common forgery, rating as much as 50% of the total. Although an entirely counterfeit travel document is seldom used because of the technical difficulties, it still can be detected in practice owing to forgers using advanced computer technology.

(ii) The number of forged visas has increased rapidly. The loss of blank visas by some countries provides chances for the human smuggling syndicates.

(iii) The Chinese government conducts strict control over the exit of its citizens for private purposes, especially over citizens who go abroad for the first time. Forgers may counterfeit exit and entry stamps on a forged passport to make it look like one that has been used before; therefore the forgery of exit and entry stamps has also taken a certain proportion in the total number of forged documents.

3. Distribution of Illegal Migrants and their Destinations

(i) Illegal emigrants in China come from three sources: natives of the boundary area, natives of the coastal area and foreigners from developing nations.

(ii) The destinations of illegal migrants are mainly the developed western European countries. The developed countries have an advanced economy with a high living standard and income. Some of these countries also provide welfare benefits to asylum seekers and some even grant amnesties to illegal migrants. They are believed to be the main attraction to illegal migrations.

(iii) The illegal migrants mostly hold forged passports from China, Japan, Korea, US, Canada, Singapore, Malaysia, France and New Zealand. The forged visas involve countries of Brazil, Venezuela, Ecuador, Paraguay, Australia, US, South Africa, Bolivia, Spain, Greece, Belgium, Portugal and Panama.

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4. Illegal Migrants Detected by Major Frontier Inspection Stations 1998-2001

**Table 3. Figures Of Illegal Migrants Detected by Major Frontier Inspection Stations
1998-2001**

List	Year	Station Name	Number Detected	Year	Station Name	Number Detected
1	1998	BEIJIN	1316	2000	BEIJING	673
2	1998	HONGQIAO	711	2000	GAOQI	622
3	1998	BAIYUN	696	2000	HONGQIAO	406
4	1998	GONGBEI	300	2000	LUOHU	345
5	1998	LUOHU	268	2000	BAIYUN	231
	Year	Station Name	Number Detected	Year	Station Name	Number Detected
1	1999	BEIJIN	1259	2001	BEIJING	1391
2	1999	HONGQIAO	1060	2001	LUOHU	923
3	1999	GAOQI	711	2001	BAIYUN	539
4	1999	LUOHU	643	2001	HONGQIAO	408
5	1999	GONGBEI	388	2001	PUDONG	280

The above frontier inspection stations are the biggest open ports in China. With the increasing number of international travelers, illegal migration detected has increased at the same time. And it also can be concluded that the forged document bearers tend to choose busy ports with good transport facilities for departure.

5. Situation of Foreign Illegal Migrants in China

It is well known there are some Chinese citizens smuggled abroad. Meanwhile, China is also troubled by illegal immigrants from overseas. It has negative effects on China's social stability and economic development. In recent years, the illegal migrants have started to flow into China from some neighboring countries. The illegal migrants staying in China amount to tens of thousands. They are mainly scattered in the Guangxi Autonomous Region, Guangdong, Yunnan, Jilin and Liaoning provinces. From 1995 to 1999, the number of persons that have gained illegal entry, illegal residence and illegal employment in China amounts to over 70,000. However, 30,000 of them have been repatriated.

Table 4. Forged Documents Held by Foreign Illegal Immigrants in China (1997-2001)

Year	Total	Number of forged certificates and documents					
		Forged Number	%	Other Means	%	Organized Smuggling	%
1997	270	124	45.93%	122	45.19%	24	8.89%
1998	256	109	42.58%	93	36.33%	54	21.09%
1999	255	128	50.20%	71	27.84%	56	21.96%
2000	452	192	42.48%	206	45.57%	54	11.95%
2001	638	527	82.60%	51	7.99%	60	9.40%

From the graph above, it shows:

(i) The number of foreign illegal immigrants in China has been increasing with the development of China's economy. A considerable number of them reside and work illegally in China. The problem has raised the Chinese government's attention.

(ii) The illegal migrants in China are mainly from Sri Lanka, India, Pakistan, Afghanistan, Ghana, Barbados, North Korea, Albania and Cameroon.

(iii) About 20% of illegal migrants are organizers of illegal migration. They induce, transport, and assist Chinese illegal migrants, and supply forged certificates and documents.

Table 5. Forged Documents Held by Foreign Illegal Immigrants in China (1997-2001)

Year	Number of forged certificates and documents						
	Total	Forged Stamp	%	Forged Visa	%	Forged Certificate	%
1997	124	6	4.84%	30	24.19%	88	70.97%
1998	109	18	16.51%	21	19.27%	70	64.22%
1999	128	16	12.50%	19	14.84%	93	72.66%
2000	192	23	11.98%	47	24.48%	122	63.54%
2001	287	59	20.56%	132	45.99%	96	33.45%

In the case of foreign illegal migrants with forged travel documents entering China; bearing forged passports of other countries is the most common method. Forged passports involve passports of more than 20 countries, U.S., Greece, Austria, Germany, Canada, Malaysia, Singapore and so on are among some of them.

B. Modus Operandi for Users of Forged Travel Documents to Enter and Exit

At present, the illegal crossing of national borders is syndicated, internationalized and intellectualized. The methods of falsification are more sophisticated and use advanced technology. This demands that immigration authorities of all countries take more effective measures to meet the challenge.

1. The Situation of Illegal Migration and Forged Certificates in China

(i) Twice substitution of data-page. Users of these kinds of forgeries are mostly from certain coastal provinces. It is not easy for natives of those areas to get visas legally owing to the high frequency of illegal migration from those areas. Therefore, forgers substitute the inside front cover and inside back cover of the passport so that the issuing places have been changed into that of other provinces. After obtaining visas, the original covers are placed on this passport. After arriving at the visa-issuing country, the bearers would manage to turn to their real destination country. In such kind of forgery, the information on the passport corresponds to the holder; there is no substitution of photo; and the visa is genuine as well. All these factors make it more difficult to be detected. Up till now, we have detected hundreds of South Korean visas of such unlawful procurement.

(ii) Bearing legal certificates for departure, then taking forged certificates and documents to a third country. When a Chinese citizen going abroad, submits their valid passports and visas to border check posts for examination some illegal emigrants apply for visas that are easier to get, then they go to the visa-issuing countries as a springboard on the strength of genuine documents and then turn to a third country. (their Ultimate destination) Most of the illegal migrants detected in Dover used this method. Cases of this kind have been increasing in recent years.

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(iii) Switching boarding passes. The illegal migrants prepare two sets of travel documents for switching. With a boarding pass for a domestic flight or transit flight, the illegal emigrant sneaks into the control area for international flights. Then he will switch his boarding pass with that of the international flight held by his cahoots who have plotted with him. After switching, he will destroy his legal travel documents and take the flight with a forged one.

(iv) Colluding with staff of the port. Some human smuggling syndicates buy off staff at the ports to allow the smugglers to evade frontier inspection. In certain seaports, some captains of international traveling ships were bribed to build hidden cabins in their ship to carry illegal migrants. Or they go through departure procedures for illegal migrants in the name of crewmembers. On 25th and 30th of April 2000, 7 illegal migrants were found hiding in containers to Britain, with the assistance of port staff. On 2nd May 2000, 4 illegal migrants of the same kind were detected. Because of the participation of port staff, such illegal migration has a better chance of succeeding.

(v) Bearing stolen travel documents and visas. We have put information of stolen and lost certificates and documents reported by other countries onto our blacklist. Many illegal migrants using stolen travel document have been detected. According to our investigations, such kinds of smuggling activities are usually organized by syndicates. The seals and signatures on these documents are delicately forged. The syndicates are well informed, once one such case is detected, similar modus operandi will be avoided immediately.

III. INTERNATIONAL COOPERATION

To make more progress in containing and cracking down on international illegal migration, the Chinese entry and exit administration authority is willing to enhance cooperation with counterparts of all countries and regions in a more comprehensive field. This includes:

A. Wider Exchanges of Information and Intelligence

To crack illegal migration, comprehensive cooperation between countries is urged. No single country can do the job all by its own. Exchanges shall include: informing each other of illegal migration tendencies; enforcement and achievement on combating illegal migration, especially information about illegal migration syndicates and organizers of illegal migration; and the latest trends of illegal migration. Cooperation shall include: assisting counterpart's investigation on illegal migration; exchange techniques; equipment; technology for identifying fraudulent documents; and notification of lost or stolen certificates and documents.

B. Strengthening the Cooperation on Repatriation of Illegal Migrants

China has always taken a positive and cooperative attitude on accepting illegal Chinese emigrants. Those verified through our embassy abroad to be Chinese citizens are allowed back. We have cooperated very well on this issue with countries of Mexico, Australia, US, Japan, Italy, Netherlands and regions of Hong Kong and Macau. From 1998 to the beginning of 2000, we have received 80,000 repatriated illegal Chinese emigrants.

Besides we require the repatriation of those illegal Chinese emigrants who claim to be so called "political asylum seekers". We suggest the involved countries exchange information with us about illegal immigrants directly coming from Mainland China. The information may include name, date of birth, and passport number, port of departure, time of departure. We believe such exchange will be of great help to our combat against illegal migration.

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS: SITUATION AND SOLUTIONS IN THE CONTEXT OF NEPAL

*Kiran Paudel**

I. INTRODUCTION

As we are going to discuss The Effective Administration of Criminal Justice to Tackle Trafficking in Human Beings and Smuggling of Migrants, in the Nepalese context, it would be better to divide the subject into two divisions:

- i. The effective administration of criminal justice to tackle trafficking in human beings, and
- ii. The effective administration of criminal justice to tackle smuggling of migrants.

Though a lot of people are going outside the country for foreign employment, they do not intend to migrate to that country. Here, it is necessary to say that each and every person going outside to seek employment does not find himself in the same position as he had thought. Some of them are told that a very charming job is awaiting and they go there anyway. But getting there they find that the job is hazardous. A lot of agencies established for the purpose of exporting skilled and unskilled labour are cheating the person whom they provide the service to.

On the other hand, there are a lot of people in different countries who are living illegally. They reach at the destination as a tourist or some other status, which is accepted, and are lost. The intention of such people is not to be a migrant in that country. They only want to stay there to earn a lot of money and fly back, if they are not caught. These people are doing this by their own efforts.

Here I am mentioning these things because the number of people of the second category is increasing gradually. It may be possible that a group of offenders may start to commit this offence in an organized way. And in the meantime the people seeking foreign employment, changing their mind, may come under the influence of such group. In the same way, the agency that is cheating its client may change its role and start the smuggling of migrants. And, we are discussing here how such a situation can be controlled.

While talking about the effective administration of criminal justice to tackle trafficking in human beings we are mainly concerned with the trafficking in women and girls. It is because male trafficking is very rare in Nepal. That's why this paper mainly concentrates on the present situation and the solution of trafficking in women and girls. The main objective of trafficking is to sell them at the places where prostitution is carried on in an organized way.

Thinking that it would be very interesting to know how we have been trying to tackle the problem and are not achieving the goal, I will give a very short historical glimpse of both sides here.

II. HISTORICAL BACKGROUND

In the modern history of Nepal, the sale of human beings was restricted for the first time in 1808 A. D. by declaring a 'Rukka' (a declaration by the King having legal status). But before the Declaration of Eradication of Slavery in mid-April, 1925 A. D. (On the 1st day of Sambat 1982) the trade of human beings was alive as slavery. After this Declaration laws were also made according to the new situation. In part three of the 'Ain', the only law at that time, there were also provisions in regard to murder and

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the sale of humans (Jiu Masne Bechane ko). Those provisions not only declared trafficking in human beings illegal but also made it punishable. According to the provisions the buying and selling of humans in the name of slavery was prohibited. No one was allowed to buy slaves even from outside the Kingdom. Sending or taking human beings to foreign countries for the purpose of selling or forced and hazardous labour was restricted.

On the contrary, at the same time a lot of girls were entering inside the huge gates as maids. Most of the girls came from certain races living in certain parts of the country. One of their duties was to entertain their master. In addition some religious and social customs stipulated that the duty of the women of certain groups was to entertain the elite by any means.

After democratization of the country in 1950, people started to think about themselves in new ways. Individuals became conscious about their rights. New acts were enacted giving more rights to women. The Act of Country (Muluki Ain) was promulgated in 1963. In the eleventh chapter of the fourth part of this Act it stipulates that no one can sell any human being and can not take any human being outside the Kingdom with the intention of selling. But the problem of trafficking became worse. To tackle the problem more efficiently a new special act was enacted and promulgated in 1986.

More detail, concerning existing laws is given later.

III. CAUSES OF THE CRIME

Causes of the crime can generally be divided into three groups:

A. Social Causes

B. Economic Causes

C. Other Causes

A. Social Causes

Because of illiteracy and lack of awareness, the women and girls in remote areas and villages believe any stranger in a very short time's interaction. Offenders have identified the races and tribes where making physical relations with consent is not a big thing. But, the girls of such societies are not in the position to differentiate between sexual exploitation and physical relations with consent. And this helps the offenders to influence these innocents.

Family destruction is another cause that makes women want to leave their native place but at the same time they do not realize the person who is being their friend is going to ruin their life. The root cause of family destruction is polygamy. Sometimes it may happen by natural disaster.

This does not mean that our laws allow these practices. The people of such societies do not know about these laws. And even today they do not know that the laws of the country can manage their social behavior. Some people, who know, do not want to go that way.

According to the statistics published by the Police Headquarters of Kathmandu 90% of those trafficked are uneducated.

B. Economic Causes

Most of the women do not have access to economic activities. They are dependent on their guardians. The woman who wants to earn money herself can easily be misled by offenders.

Poverty and unemployment force the people to seek jobs in new places. Most victims of trafficking believed the person who told them that they would get a very nice job.

According to the statistics published by the Police Headquarters of Kathmandu, 60% are trafficked in temptation of work

On the other hand, unemployment with poverty is making people do anything for their livelihood. These days this offence is being committed in an organized way. Such organizations are using the unemployed people from poor families for this purpose.

C. Other Causes

There are two very wrong beliefs in some parts of society, even these days.

- (1) The first wrong belief is a religious one. In the Far Western part of the Kingdom people offer their daughter to the God. These children have to live in the temple. There is also another wrong thinking about these children that they cannot marry. Even educated and so-called modern young boys do not want to be married with such a girl. (I am not talking about the living Goddess, 'Kumari' and about Buddha she monks.) The society has accepted them as a prostitute. The organizations involved in trafficking easily convince their agent that by trafficking them they are not doing wrong.
- (2) In the same way there is a tribe that has been considered for centuries, that their job is to entertain people. In the name of entertainment they are also being used as prostitutes. In other words, it is not wrong to say that they are prostitutes made by culture. Except prostitution, they do not have another occupation. And the organizations apply the same theory to convince their agent for trafficking of these people. Because male prostitution is not in existence in the society the females are only the victims of this mal-culture.

(It is necessary to say that these two types of people are struggling to get rid of their religious and cultural malpractices.)

IV. ACCESS OF THE OFFENDER

The problem of trafficking is being more complicated day by day. Some years ago the crime was committed in a personal way. But these days it has developed as an organized crime. About three or four years ago it was reported in the news that one of the chiefs of such criminal organizations had come to a village chartering a helicopter. It is very shameful for me to mention here that the fellow was a Nepalese national and a female.

Investigations have revealed that these days offenders are completing their offence partially. Some of them go to villages, and look for persons whom they can influence. They use the appropriate means to influence. For example a person who is suffering from family destruction they offer to marry. For the person seeking their fortune they say that they can arrange an appropriate job. They assure the victim that they can help them and they really want to help them. They come back to the town with the victim where another group is waiting for them. They hand over the victim to this second group. The victim is told that these men are friends of the previous group and now this second group will take him/her to the said place. The second group takes the victim up to the border and hands him/her over to the third group, which takes them to the destination.

A few years ago, the destinations of offenders were only Indian cities. But these days they are also taking the victims to other countries.

For centuries, the border of Nepal with India has been open. That's why the victims are easily trafficked outside the country. Because of the open border sometimes victims are sent to a third country using Indian airports. As mentioned above, the victims are totally influenced by the offender, while crossing the border with India; they pretend to be close relatives. The victims themselves don't disclose the reality of the situation and don't give true information. They tell the guards at the checkpoint only the information they are taught to say. And very simply and by the very easiest way, offenders cross the international border between Nepal and India.

V. METHODS USED TO INFLUENCE THE VICTIMS

The offenders use different types of methods to influence the victim before committing the crime.

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A. In the Name of Employment

It is found that most of the victims trafficked are told they would be given a nice job. Very few of them were aware that they were going to India. Some were told that they were going to work in a circus. But others didn't know that they were being taken to India.

According to the statistics published by the Police Headquarters in Kathmandu, 60% are trafficked using this method.

B. Pseudo-Marriage

In this method the agent of the trafficker wins the victims affections first. Then he makes a marriage proposal that is very easily accepted. After marriage a husband has the right to take his spouse anywhere.

The statistics published by the Police Headquarters in Kathmandu shows that 25% of victims have been trafficked using this method.

C. Other Methods

Some victims have been trafficked by making them unconscious with drugs. Some have been taken for trade, and some for medical care. Some of them have gone with an agent who has told them he would take them to their relatives.

The statistics show that 15% have been trafficking using these methods.

VI. GOVERNMENT POLICIES TO CONTROL TRAFFICKING

The government has formulated policies to control trafficking.

Some of them are as follows:

1. A program for public awareness is to be launched.
2. Co-operation with NGOs and INGOs.
3. Efforts to control the problem will be made by bilateral and multilateral co-ordination with the international sector.
4. Appropriate steps will be taken to eliminate poverty and to promote employment for women.
5. A national co-ordination committee is to be established. Under this committee a district co-ordination committee will be established at the district level, which will work as a center for contact.
6. Trafficking will be controlled by conducting an employment program through informal and vocational education.

VII. REGIONAL EFFORTS TO CONTROL TRAFFICKING

The South Asian Association for Regional co-operation (SAARC), recognizing the seriousness of this subject, has drafted a treaty on this subject and opened it for ratification.

The provisions made by the treaty are as follows:

- i. The objective of the treaty is to release SAARC countries from being countries of origin, transit and destination of trafficking.
- ii. According to the treaty its member states are obliged to:

- (a) Define trafficking as a crime under their criminal law;
 - (b) Punish persons, who provide a place, or rent their building for buying and selling persons and invest knowingly in it; and
 - (c) Make punishable the act of provoking such crime.
- iii. After ratification the treaty member states shall:
- (a) Co-operate with each other in the investigation, prosecution, hearing and other matters of the crime under this treaty;
 - (b) Extradite the offender (or otherwise prosecute him);
 - (c) Make appropriate arrangements for the victims care and treatment before sending them back to their country of origin; and
 - (d) Establish a residential house and a protection house for the rehabilitation of the victims.

VIII. NATIONAL EFFORTS TO CONTROL THE PROBLEM

The Constitution of the Kingdom of Nepal 1990 in its Article 11 ascertains equal rights to Nepalese citizens without any discrimination on gender basis.

In the same way, Laws discriminating women are being amended. An amendment is under process in parliament to give equal economic rights to daughters. (During the period of training on 26th September, HM The King gave his royal assent to this Bill.) Just a few months ago the Supreme Court of Nepal gave its verdict in one case that women have the sole right over their body and even a husband cannot make physical relations with his wife without her consent.

Although, these efforts point towards the equal rights of women, it is clear that nearly all the victims of trafficking are females. And one of the causes of this problem, as mentioned above, is woman's inaccessibility to property. That is why more economic and social freedoms are being secured for females.

IX. THE ROLE OF NGOs AND INGOs

About ten organizations are active in this field. They have been focusing, mainly on two sectors: (a) Awareness and (b) Rehabilitation.

To make people aware they are using different means. Posters are very much being used for this purpose. Beyond this they go to the villages, consult with people and manage cultural shows. By all these means they teach the people the activities of the offenders and make them aware.

Under rehabilitation they have established hostels to house the rescued victims. Here they are trained in various vocational subjects, which help them to survive independently in the future.

One of these organizations is 'Maitee Nepal'. Not mentioning its contribution would be an injustice to it. Including the above-mentioned activities it has also established its branch offices on the transit points, which are mostly used to traffic, at the international border. They watch suspected people. They take information from the people whom they suspect. And they have been able to recognize the offenders various times.

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X. THE EXISTING LAWS

While giving a short historical background I have mentioned a series of laws concerning the subject. There are currently two laws in existence in parallel on this subject: (a) General law, and (b) The Special Act

A. General Law

There are some provisions on this matter in the Act of Country, 1963. The eleventh chapter of the fourth part of this Act deals with our subject. Number 1 of the chapter restricts the taking of human beings outside the country for the purpose of selling or trading in human beings. The buyer is also punished if found inside the country. The punishment is twenty years imprisonment. If the offender is arrested before he has made a sale the punishment is ten-years imprisonment.

Number 2 of the chapter does not allow anyone to deprive the guardianship of a minor or a lunatic without the consent of a guardian.

Number 3 of the chapter restricts servitude. Punishment is imprisonment from three to ten years. And the court can order the offender to give appropriate compensation to the victim.

B. The Special Act

While retaining the above legal provisions, but realizing that these provisions are unable to control trafficking in human beings, a special act was also promulgated on the same subject in 1986. This act is mainly concerned with three things:

- (a) Trading in human beings
- (b) Taking human beings to a foreign country with the intention of selling them
- (c) Forced prostitution

(It is necessary to mention here that all forms of prostitution are illegal in Nepal.)

The first two things are almost the same in both laws. But there are some special features in the Act.

1. Special Features of the Act

- (i) The first special feature of this Act is the extraterritorial jurisdiction of the Act. Any person who commits a crime under this act who is living outside of the country can also be prosecuted and sentenced according to this act.
- (ii) The second special feature of this Act is the affiliation of the court of origin from the beginning of investigation. According to this provision before starting the investigation the police, producing a complaint to the court, has to get an order for investigation from the nearest court of first instance. The person who wants to complain can make the complaint at any police station.
- (iii) The third special feature of this Act is the provision for the verification of the statement of the victim. If the person complaining is the victim of any offence according to this act, a written statement of that person must be taken in the presence of a public prosecutor by the investigative officer. And that statement must be verified from the nearest court of first instance within twenty-four hours. A judge of the court has an obligation to verify the statement.
- (iv) The last special feature of this act is the burden of proof is on the defendant. Generally the burden of proof is on the plaintiff. Section 25 of the Evidence Act, 1974 is very clear on this point. But this Act is an exception to the general provision.

These provisions oblige the offenders to prove the followings things:

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(a) If a complaint is registered with the police against them they have to prove the complaint is wrong.

(b) If there is a written statement of a victim verified by the court they have to prove the statement is not correct.

All of these provisions are made to give strong protection to the victim and to punish the offender. But the effect on the cases has not been satisfactory.

2. Results

Here are the comparative statistics of the disposed cases of trafficking in human beings for the last three years, published in the latest Annual Report of the Attorney General of the Kingdom of Nepal.

Here are the statistics of the cases decided by the original court:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	173	118	291	38	30	31	99	192	38.38
1999/00	192	129	321	66	49	51	166	155	39.76
2000/01	155	89	244	55	36	43	134	110	41.04

The statistics of the cases decided by the Court of Appeal are as follows:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	85	41	126	6	4	20	30	96	20.00
1999/00	96	138	234	26	59	69	155	79	17.42
2000/01	79	73	152	20	10	46	76	76	26.32

Here are the statistics of the cases decided by the Supreme Court:

Fiscal year	Cases Registered			Cases Decided				Remaining cases	% Won
	Carried over	Of this year	Total	Won	Partial win	Lost	Total		
1998/99	36	17	53	2	3	2	7	46	28.57
1999/00	46	13	59	3	2	4	9	50	33.33
2000/01	50	17	67	9	2	6	17	50	52.94

A special court has been hearing the cases under this special act since last year. (During the period of the training, jurisdiction over these cases was given to the District Court, as it was in the past.)

The punishments under the special act are as follows:

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- (a) On completion of the crime - ten to twenty years imprisonment.
- (b) Taking any person to another country with the intention of selling - five to ten years imprisonment.
- (c) Attempt of the offence / provoking or providing assistance to the offender - imprisonment up to five years.

Being fully conscious of the weakness of this act, a new act is being prepared. These days it is open for discussion in general. This new act gives the investigative officer the right to arrest offenders and search related places without a warrant. There are other new provisions in the forthcoming act. Some of them are as follows:

- (a) Compensation to victims,
- (b) Establishment of a rehabilitation centre,
- (c) Establishment of a co-ordination committee.

XI. PROBLEMS OF CONTROLLING THE OFFENCE

A lot of effort has been made to control the offence, but the problem has become more serious. There are many hurdles with every step towards controlling the problem. To describe the problems of each step clearly they are given under separate topics.

A. Problems in Detection

It is clear that without the help of people the problem cannot be solved. In the case of trafficking, the victims have not been able to recognize the offenders at first sight. After a few days the offender influences the victim and they believe him blindly. As mentioned earlier, in most of the cases victims cannot imagine what is going to happen. Therefore the offenders are able to cross the border with their victims without any difficulty.

B. Problems in the Investigation

Many offences are not reported. The victims who are rescued after a few years of victimization cannot recognize the offender. Many times they cannot give a clear picture of the offence. Sometimes they exaggerate the truth. When the victim fails to identify the offender the situation becomes worse. After hearing the news that the victim has been rescued the offender puts himself out of reach of the investigator. And most of the time the main offender is out of the country.

C. Problems in the Prosecution

At this stage there is always the problem of evidence/witness. Most witnesses do not feel safe from the offenders. Sometimes witnesses are under the influence of the offender.

As already mentioned, a written statement of the victims is verified by the judge at the very early stage of the investigation. The courts summon the victim as a witness. The defendant's lawyer pleads the right to cross-examine the witness of the opponent.

D. Problems in the Execution of the Judgement

It is very clear that if the offender is not caught the judgement cannot be executed.

XII. PROBABLE SOLUTIONS TO CONTROL THE PROBLEM

A. Awareness

The most important thing in this context is awareness. First, it is necessary to teach the people how the offenders are exploiting them. Second, they should be taught not to believe strangers until they have complete information about them. Third, females should be told about their economic as well as their legal rights. There is also a need to teach them to fight for their rights.

The work of NGOs and INGOs in this area is very enthusiastic. But still there are a lot of things to be done.

B. Opportunity for Work

It is clear that most of the persons are victimized in the name of employment. Most of them only want to earn enough money to survive. To introduce opportunities in the villages is necessary. If work is available in their village they will not need or be tempted to go elsewhere.

C. Clear Laws

The laws of each country should declare trafficking and smuggling a criminal offence. There should be a clear law of extradition. Amongst other things there must be a very clear provision in the domestic laws on the situation where a country does not want to extradite its national.

D. Border Control

The number of these offences can be minimized through good border administration. In regards to the problem of an open border like that between India and Nepal, a systematic recording system of travelers, with their complete information must be introduced.

E. International Co-operation

The nature of these crimes is clearly transnational. To control such offences mutual co-operation between the country of origin and the country of destination is necessary. And in the same way the country en route also has to be co-operative.

To obtain the goal, bilateral and multilateral efforts also need to be made on a regional basis.

TRAFFICKING IN WOMEN AND CHILDREN AND SMUGGLING OF MIGRANTS

*Narcisa H. Guevarra**

I. INTRODUCTION

This Country Report will touch mainly on the global phenomenon of smuggling and trafficking in human beings especially women and children who are the more vulnerable members of society. It will define trafficking in the context of international and domestic laws and practices in the Philippine setting. It will also attempt to explore the different approaches towards the minimization if not total eradication of trafficking and smuggling of humans within and across Philippine borders. Further, it will briefly discuss the development of laws affecting women and children as well as the continuing goal to achieve equality in gender of all Filipinos. Moreover, it will try to link gender-based inequality to the feminization of poverty and the high incidence of violations of rights of women and girl children that make them vulnerable to trafficking and human smuggling. Finally, it will attempt to underscore the implications of a wide gap between rich and poor countries on migration in general, and on human trafficking and smuggling.

II. DEVELOPMENT OF PHILIPPINE LAWS AFFECTING WOMEN AND CHILDREN

A. Historical Background

Historical studies on the role and status of Filipino women prior to colonial rule, showed that they enjoyed a significant position in the family and community. They held positions of power as chief of barangay or served as priestesses, and were allowed to engage in business and hold properties. During that time, the Filipino woman had never been forced to hide herself behind veils, to have bound feet, or walk several paces behind her male companion. The arrival of the Spaniards and the introduction of their Civil Code institutionalized the inequality between the sexes by the imposition of various restraints on women's behavior. She was subjected to her father, brother or husband's power not only with respect to property matters but also as to what actions she could take. The stereotyped role assigned to women as daughter, sister, wife and mother was the basis for legal measures placing them in a position subordinate to men. The American rule from 1898 to 1946, the Japanese occupation from 1941-1944 and the domination of Islamic religion in southern portions of the country shaped the development of Philippine law. Hence, Philippine law has become an unusual blend of local custom and the legal worlds of the civil law, common law, canon law, and Muslim law.

B. Towards Protection and Rights-Focused Legislation

The 1935 and 1973 Constitutions guaranteed women's right to vote, hold public office, to form associations not contrary to law, to express oral or written views on public issues, to peaceably assemble and to petition the government for redress of grievances.

Likewise the Philippine Legislatures has come a long way in upholding the rights of women and in promoting gender equality. Over the years, the role and status of Filipino women have been significantly upgraded by evolving gender responsive legislation. Among the landmark legislation are:

- R.A. No. 6725 entitled "An Act strengthening the prohibition of discrimination against women with respect to terms and conditions of employment";
- R.A. 7192, also known as "Women In Development and Nation Building Act" which provides the legal guarantee for equal rights and opportunity of women in the specified area;
- R.A.7877, also known as the "Anti-Sexual Harassment Act of 1995" which protects the dignity of women in the employment, education or training environment; and

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- R.A. No.7610 also known as the “Special Protection of Children Against Child Abuse, Exploitation and Discrimination Act” which focuses on minor prostitutes as victims rather than as offenders. It also penalizes the act of sexual intercourse with prostitutes.

III. ANALYTICAL FRAMEWORK OF HUMAN TRAFFICKING AND SMUGGLING

A. International Perspectives on Trafficking and Illegal Migration

Reports indicate that the number of migrants all over the world increased from 75 million to about 130 million from 1965 to 1995. Today, about 150 million migrants comprise 2.5% of the world population. Around 700,000 to 2,000,000 women and children are being trafficked each year while about one million child prostitutes in Asia are in danger of being further trafficked. At least 50% of illegal immigrants are assisted by smugglers. Highly profitable, trafficking and smuggling of migrants account for the third largest source of income for organized crime, next only to drugs and guns.

Many countries regard trafficked women as “undesirable and criminal aliens”, crossing borders illegally to take advantage of greener pastures elsewhere. This perspective is reflected in national legislation, particularly in receiving countries, that makes immigration more restrictive, thus obstructing the flow of migrants seeking to enter countries legitimately. Ironically, these restrictive immigration policies also tighten up border controls that often are used to harass vulnerable migrants, but have little effect on the traffickers¹.

B. Philippine Perspectives on Human Trafficking and Smuggling

1. Overseas Employment and/or Migration

The Philippine government considers overseas employment as a development strategy. This is reflective of its continuing effort to increase foreign exchange earnings necessary to keep the nation going. The Migrant Workers and Overseas Filipinos Act of 1995 mirrors this policy when it mandates the Department of Labor and Employment (DOLE) to formulate a comprehensive 5-year deregulation plan on recruitment activities.

The national coffers benefit enormously from income generated from overseas employment of Filipinos. From 1995 to 1999, 2,360,011 overseas Filipino workers contributed US\$ 59,002,750 or PhP 2.06 billion in membership fees to the Overseas Workers Welfare Fund (OWWA) alone. Additionally, the Philippine Overseas Employment Administration is estimated to have collected US\$83,702,000 from Filipinos it has deployed in 1999 alone, based on a US\$100 processing fee per worker. These figures do not include remittances through other channels, mostly informal, and the refunneling of resources of their families into the local economy.

Overseas Filipinos (Ofs) is the general category to describe Filipinos who are either temporarily or permanently living and working abroad. This also includes undocumented Filipinos, as well as brides or spouses of foreign nationals. The top regions of destination of undocumented Filipino migrants are America, Southeast Asia and the Pacific, Europe, and the Middle East. The top ten countries of destination of undocumented Filipinos are the United States, Singapore, Canada, Japan, Italy, United Kingdom, Saudi Arabia, Greece, Germany and France.

An estimate of 2,000 overseas contract workers are legally processed daily in the Philippines, and currently, women account for approximately 64% of all these legal migrants. According to a report submitted by the Commission on Filipinos Overseas, 7.41 million Filipinos are scattered in 187 countries and destinations around the world. Of this number, 1.62 million are irregulars and suspected victims of human smuggling and trafficking.

2. Push Factors for Migration

The Philippines is basically a sending country for smuggling and trafficking in human beings. This is owing to the fact that Filipinos prefer to work abroad in the hope of a brighter future for their family.

¹ Sex Trafficking and Reproductive Health: Links to Migration by Aida F. Santos with Dr. Janice Raymond

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The Asian economic crisis of the 1990s, coupled with severe environmental disasters (volcanic eruption and violent earthquakes) resulted in severe economic and social dislocation of sectors of the population. There was an increase in company closures, retrenchments and layoffs. The unemployment rate among young people (15-19 and 20-24 age groups) in both urban and rural areas served as one of the push factors for these people to continue leaving the country in search of the proverbial “greener pasture”.

Marrying foreign men was also seen as an opportunity by the women to change their lives economically. It became a social phenomenon in the early ‘90s as indicated by the fact that over 700,000 Filipinas were married and became fiancées to Australians, Germans, Taiwanese, and British nationals. In Australia, a total of 20,000 Filipino women are married to Aussie men, some 90% of whom came through the system of serial sponsorship. In 1995 up to 1996, hundreds of Filipino women were married in a mass ceremony to members of a religious organization called the “Moonies” a majority of which were South Korean men. In the United States, some 50,000 “mail-order” brides have been reported.

Female overseas migration has been increasing steadily for the past ten (10) years. Women comprise almost 60% of the total number of legally deployed workers, predominantly work in the low-paying service sector, and are mostly single and young, more than 50% whom belong to the age group 20-29.

Available literature on migration reveals the following findings on why there has been a steady increase of female overseas migration:

- official migration policies of the Philippine government in which recruitment of women is actively promoted through its various government units, with the collaboration of recruitment agencies;
- gender stereotyping of women in work situations which traditionally echo their roles as caregivers and “entertainers”, i.e., sex objects;
- growing poverty in the context of structural and adjustment programs that produce landlessness and impoverishment among rural populations, and push more women to join the labor force;
- rise in female-headed households, much of it due to the breakdown in traditional family structures and support systems;
- lack of opportunities for local employment that would allow women to explore better jobs, acquire greater skills, and obtain a more secure future;
- growing family dependence on women for income, especially among poorer households;
- the demand for female migrant workers in more developed countries;
- economic boom in destination countries;
- women’s expanding sense of financial/economic and personal autonomy, both in origin and destination countries;
- a growing number of women and men in destination countries relegate domestic hired help from abroad; and, normalization of prostitution and other activities in the sex industry such as stripping and pornography, often disguised as “entertainment” jobs in destination countries.

Based on these findings, the Coalition Against Trafficking in Women (2001) drew up at least six (6) factors which show women’s vulnerabilities that made trafficking and sexual exploitation an easy route for the recruiters using both legal and illegal means of going through the migration process:

- poverty and lack of economic opportunities;
- low level of education and lack of information about the process of recruitment;
- history of sexual abuse;
- familial pressure;
- sense of personal and economic autonomy of women; and
- alleged success stories of those who migrate for income abroad.

3. Trends and Highlights of Trafficking Cases

In a recent report presented by the Commission on Filipinos Overseas (CFO) the following statistics revealed the magnitude of the problem:

- 959 recorded cases of human trafficking (1992 - March 2001); 1999 accounted for 35% of the cases;
- Victims came from Region III (12.4%); NCR (8.4%); Region IV (8%);
- 65% of the victims were women; 25% of women victims were forced into prostitution;
- 53% were trafficked to the Asia Pacific region, 25% to the Middle East, and 19% to Europe;
- Almost 8% of cases involved intermarriages;
- Trafficking victims paid as much as \$8,500.00 to recruiters;
- 51% of victims were recruited by parties not related/nor known to them; and
- the government repatriated 38%.

IV. WAYS TO EFFECTIVELY TACKLE HUMAN TRAFFICKING AND SMUGGLING OF MIGRANTS

The recommendations presented by the Ateneo de Manila University Research Team under the Philippine-Belgian Project on Trafficking and by the Coalition Against Trafficking in Women (CATW) in its report entitled “Women in the International Migration Process: Patterns, Profiles and Health Consequence of Sexual Exploitation, the Philippine Country Report”, are incorporated in this Report and shall form part of my recommendations.

A. Adoption of the Recommendations under the Philippine-Belgian Pilot Project against Trafficking in Women

The summary of a Research Report by the Ateneo de Manila University Research Team revealed the following recommendations, to wit:

- Adoption of Clear Policies on Women In Migration.
- Redefinition of Trafficking in Women.
- Recognition of Trafficking in Women as a Violation of Human Rights.
- Stringent Measures on Recruitment/Employment Agencies.
- Strong Action Against Corruption.
- Legislation on Trafficking in Women.
- Legal Recognition of Migrant Workers in Host Countries.
- Bilateral Agreement for the Protection of Migrant Women Workers.
- Prosecution of Trafficking.
- Orientation and Training of Government Entities.
- Information Campaigns.
- Empowerment of Women Migrant Workers and their Families.

B. Adoption of the Recommendations under the “Women in the International Migration Process: Patterns, Profiles and Health Consequence of Sexual Exploitation, the Philippine Country Report”

Specific recommendations under the above-entitled report consist of:

1. Legal and Policy Reforms

These include the passage of an effective and comprehensive anti-trafficking law based on women’s human rights and using the new protocol on trafficking; the development of bilateral agreement with host countries for the protection of overseas Filipinos; enhancement of the witness protection program; an immediate review of the policy of overseas contract work as an economic alternative; inclusion of trafficking as a development agenda, as a specific concern under migration.

2. Enhanced Capability of Government to Address Sex Trafficking

This covers such issues as: for the government to upgrade its research and database on trafficking; for government and non-governmental organizations to conduct an effective awareness raising/public education in sex trafficking and illegal migration; the development of appropriate, timely and effective coordination among government agencies; the expansion of the coverage of protection and other social services to illegally recruited migrants; provision of appropriate community-based direct service and gender-sensitive training/capability building to service providers; strengthening GO-NGO private sector collaboration; education and sensitization on trafficking issues of the judiciary and law enforcement sectors.

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3. Implementation of Viable and Sustainable Psycho-social and Economic Programs as Preventive and Post-trafficking Strategies

The programs should include the implementation of viable and sustainable poverty-alleviation programs and income-generation activities that specifically target vulnerable groups; development of educational curricula that are packaged for the specific needs of young women and for those who are wanting to pursue an education in their adult years, both as a preventive and post-trafficking mechanism to wean away women from sexually exploitative income-generating activities; development of packages of services to trafficking survivors that are empowering and self-sustaining, including counseling, and the formation of support groups of survivors of sex trafficking.

C. Gender Mainstreaming in the Three Branches of the Government

Recognizing that laws are as good as their implementation, the Philippine government should aggressively implement its Gender and Development (GAD) policy to bring about a more cohesive and comprehensive transformation in government. The efforts the legislative branch has taken to transform laws should be complemented with a parallel enhancement of the mandates of the executive and judiciary branches of government and the reorientation of people within.

Gender-based inequality cripples the development of a country and affects women and girls. Large gender disparities in basic human rights, in resources and economic opportunities, and in political voice are inextricably linked to poverty (World Bank, 2001).

D. Proper Utilization of Limited Resources

With the limited budget for the implementation of laws providing rights and protection to women, children and Filipino overseas workers, the government should ensure that resources are properly utilized, and for this purpose, all existing programs and policies should be harmonized and coordinated to avoid overlap in their execution.

E. Strengthen International Cooperation

Information sharing, mutual legal assistance and efficient border control systems within and among countries are very vital in the success of the campaign against human trafficking and smuggling. For example, the Trilateral Agreement on Information Exchange and Establishment of Communication Procedures signed by the Philippines, Malaysia and Indonesia last May 2002 should be put into force.

F. Promote Legislative Advocacy

1. The Role of the Legislature

GAD sees the powerful role of the Philippine Congress in shifting society's perspective on and respect for human rights, social justice and equality. The legislature not only secures women's rights in the law and in the legal system. It is strategic in influencing any development process because it defines the roles of women and men. It also allocates and mobilizes State resources (by using the power of the purse) to attain the goals of gender equality.

Through its legislative priorities, structures, policies, and processes, the Philippine Congress has the greatest potential to create transformative laws. It is a forum wherein women's experiences are articulated and where imbalances and inequalities in society are corrected. Only a gender-sensitized Congress can really see the urgency of passing protective laws for women and children such as those that will criminalize human trafficking and smuggling, violence against women and other women-specific bills.

Legislators should be encouraged to attend legislator's workshop and learn the application of methodologies in the formulation of gender-responsive laws. The following questions will guide lawmakers in developing legislative proposals that specifically respond to women and gender concerns. These will also help refine the objectives and provisions of general bills and the amendments to be made on existing laws².

² Handbook on "How to be a Gender-Responsive Legislator"

For General Bills:

- Does the bill have underlying assumptions about women and men in terms of their conditions, capacity, etc.? Are those assumptions valid or are they gender-based?
- Will the proposed law equally benefit women and men? How and what ways? If no, what provisions can be included to ensure that women benefit as men do?
- Will it have a negative impact on the people? If yes, what measures can be integrated in the proposed law to minimize the potential differential negative impact of the proposal on women?
- What provisions can be integrated into the general bill to promote women's empowerment and enjoyment of their rights? What provisions can be integrated to move away from gender-based discriminations, if any?
- Is the language gender-sensitive? Does it subsume women under "men" and "people"? Is "men/man" used as a generic pronoun?

For Women-Specific bills:

- What gender-based assumptions underlie the definition of the problem?
- Does it assume certain stereotypes about women and men with respect to capacities, roles, rights, etc.?
- What are its assumptions about women's experience or situation? Are they valid for all women? Or are they true only for some women or groups of women?
- Does the bill contribute to the enhancement of women's rights? How? Does it promote women's status? How?
- Does the bill address the practical or strategic gender needs of women, or both? How?
- Has the bill undergone consultation with the affected sector (if the bill is sector specific)? Who were consulted? Are their inputs taken into consideration? How or in what manner are their inputs integrated into the bill?
- Does the bill promote gender equality and assist in transforming gender relations? How?
- Does the bill take cognizance of and adhere to international instruments on human rights?
- Are resources, materials or otherwise, available for the implementation of the bill once passed?

2. Constant Lobbying for the Passage of the Anti-Trafficking in Persons Act of 2002 (H.B. 4432)

(a) Legislative history of the bill

Various concerned agencies of the government as well as non-government organizations, including the civil society, have been clamoring for the immediate passage of the Anti-Trafficking in Persons bill.

Advocacy for the passage of the bill goes way back in the 9th Congress. In the 11th Congress, the bill passed the third reading at the House of Representatives and reached second reading at the Senate, but due to certain political developments and lack of material time to reach the bicameral level, the bill was not passed.

Having a woman President in the person of Her Excellency, President Gloria Macapagal Arroyo, the bill is expected to see a brighter future this 12th Congress. As a matter of fact, the House of Representatives has passed on 1st, 2nd and 3rd Reading of House Bill No. 4432³ entitled "An Act To Institute Policies To Eliminate Trafficking In Persons Especially Women And Minors, Establishing The Necessary Institutional Mechanisms For The Protection And Support Of Victims Of Trafficking, Providing Penalties Therefor, And for Other Purposes".

(b) Why is a law on trafficking necessary?

There is yet no specific law dealing with anti-trafficking, however, current laws which can be used to punish them include, among others:

- Migrant workers and Overseas Filipino Act. (RA8042)

³ See Annex re: Primer of the Anti-Trafficking in Persons Act of 2002

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- Mail Order Bride Law (RA6955)
- Special protection of Children against child abuse, exploitation and discrimination Act (RA 7610)
- Phil. Passport Act of 1996 (RA 8239)
- Art. 340 of the Revised penal Code on the Corruption of minors
- Art. 341 of the revised Penal code on White Slave Trade.

Trafficking is a form of violence and violation of women and children's human rights. A law penalizing acts constituting trafficking in women and minors is consistent with the respect for human rights and dignity, as well as protection to women against any form of exploitation and oppression. Unless a law is crafted which defines the crime and penalizes the same, provides protection to victims, establishes preventive programs and support for victims, trafficking will continue unabated. Specifically, the rationale for the immediate passage of the bill are as follows:

- To harmonize inter-agency efforts to address trafficking in persons;
- To strengthen prosecution and law enforcement efforts;
- To set up effective preventive, protection, prosecution and reintegration programs;
- To increase penalties for traffickers; and
- To fulfill international commitments.

APPENDIX

I. A PRIMER ON THE ANTI-TRAFFICKING ACT OF 2002 (H.B.No. 4432)

A. What is Trafficking under House Bill No. 4432?

The following elements shall constitute trafficking:

- It shall refer to acts constituting the recruitment, transportation, transfer or harbouring, or receipt of persons.

The recruitment, transportation or transfer may be done:

- through legal or illegal means
 - with or w/o the victims consent or knowledge; and
 - within or across national borders
- The recruitment, transfer or deployment often involves any of the following acts:
 - threat of or use of force
 - other forms of coercion
 - abduction
 - fraud
 - deception
 - abuse of power or of position
 - taking advantage of the vulnerability of the person
 - other forms of coercion
 - The purpose of the recruitment, transportation or transfer is for prostitution or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of an organ.

Unlike the simple smuggling of persons, the central feature that characterizes trafficking is the movement of women and minors for the purpose of placing them in modern slavery or servitude and sexual exploitation. Profiting from such exploitation of women and children is the traffickers.

Minors - refers to persons below 18 or those over but are unable to fully take care of themselves from abuse, neglect cruelty, exploitation or discrimination because of a physical or mental disability and condition.

Debt bondage - is the pledging of personal services or labor of a person indefinitely as security for a debt, when the length and nature of services is not clearly defined.

Forced labor and slavery like practices- refer to the extraction of work or services from any person by means of enticement, intimidation or threat, use of force or coercion, including deprivation of freedom, abuse of authority or moral ascendancy, debt-bondage or deception.

B. Can a Woman be Trafficked through Legal Channels?

Trafficking utilizing illegal channels is the usual method. This is done through various means. e.g. illegal recruitment, abduction or kidnapping and leaving the country through the backdoor. The Coalition against Trafficking in Women has identified Pagadian City Zamboanga City, Bungaw, Malaysia as one of the regular routes of illegal traffickers. Trafficking however, can also be done through legal mechanisms. There are cases of licensed recruitment agencies serving as fronts for sex trafficking. All the woman's papers are processed legally. However, it is also the usual practice of such agencies to deceive the woman re: the kind of work they will actually be entering and jobs promised are different from the actual work awaiting the woman in the receiving country. In order to facilitate the entry of woman to receiving countries with strict visa requirements, traffickers use valid documents such as passports and employment contracts in collaboration with their foreign principals. Documented workers may also fall prey to traffickers at the job site.

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They are lured through promises of higher earnings.

- well known cases include woman who arrive with entertainment visas only to find themselves forced into sex work. This is the usual cases among entertainers bound for Japan.
- Other cases involve migrant workers who arrive in the country of destination and find themselves forced into exploitative situations without the option to leave due to the confiscation of their travel document by their foreign employer.
- Traffickers also transport woman using tourist visas. The no visa policy among member-countries of the ASEAN has also made it easy to enter these countries. In many cases, these countries serve as jump off points for Filipinos who leave the country as tourists but end up as bonded labor at their destination.

C. How does House Bill No. 4432 or the Anti-Trafficking Bill Seek to Address This Problem?

The Anti-Trafficking Bill (House Bill No. 4432) aims to punish those who engage in trafficking while ensuring that victims are protected. The bill will institute mechanisms to enable victims to establish a new life for themselves through counseling and livelihood programs.

Generating awareness on the issue of trafficking and educating people is a key component to prevent Filipino women and children from becoming future victims of traffickers.

The bill, if enacted into law will create an Inter-Agency Council Against Trafficking to coordinate government efforts on the problem.

D. What are the Acts which Constitute the Crime of Trafficking under the Bill?

1. Acts of Trafficking

The illegal acts covered by the Anti-Trafficking Bill broadly reflects the complexity of the issue. The bill seeks to impose the penalty of reclusion temporal in its medium period to reclusion perpetua and fine of not less than P1,000,000 pesos nor more than P2,000,000 pesos against those who:

- recruit a person for the purpose of prostitution or forced labor and slavery-like practices under any pretext of lawful domestic or overseas employment;
- offer or contract marriage with women and minors for purposes of offering, selling, or trading him or her to engage in prostitution, or to subject him or her to forced labor or slavery-like practices;
- introduce or match for a fee, profit, or any other material or economic consideration, any Filipino woman to a foreign national for marriage under a mail order bride scheme as provided under Republic Act No. 6955, otherwise known as the “Mail-Order Bride Law”, for prostitution or forced labor or slavery-like practices;
- entice, encourage, persuade a person by fraud or by deceit, coercion, intimidation, or by abuse of any position of confidence or authority, or having legal charge, including use of parental, sibling and other authority by family relationship to engage in prostitution or forced labor or slavery-like practices;
- maintain or hire a person to engage in prostitution under the pretext of tours and travel plans to the Philippines;
- recruit persons especially women and minors to engage in prostitution with military forces;
- through promises, threats, violence or any device or scheme, to procure, induce, persuade, entice a person to engage in prostitution or to work in a club, place of entertainment or establishment having reasonable cause to believe that such club, place of entertainment or establishment is used for any such purpose;
- recruit through fraud, coercion, violence or deception a child aged fifteen (15) years and below, to engage in armed activities here and abroad;
- adopt or facilitate the adoption of Filipino minors pursuant to Republic Act No. 8043, otherwise known as the “Inter-Country Adoption Act of 1995”, or employ other similar practices for purposes of forced labor and slavery-like practices or prostitution;
- send persons abroad under the guise of training or apprenticeship, for prostitution, forced labor or slavery-like practices; and

- recruit a person or adopt a minor, whether through domestic or inter-country adoption or through any other acts as enumerated above, with the end in view of removal or sale of the body organs of the recruited person or adopted minor.

2. Other Punishable Acts

It likewise seeks to penalize by prison mayor in its medium period to reclusion temporal in its minimum period and a fine of not less than P500,000 but not more than P 1,000,000 pesos those who:

- undertake tours and travel plans consisting of tourism packages or activities utilizing and offering persons for prostitution.
- lease or sublease any dwelling house with reasonable ground to believe that the lessee/sub-lessee will use it for prostitution, forced labor and slavery-like practices.
- produce, print and issue or distribute unissued, tampered or fake counseling certificates, registration stickers and certificates of any government agency which issues these certificates and stickers as proof of compliance with government regulatory and pre-departure requirements.
- advertise, publish, print or distribute or cause the advertisement, publication, printing, broadcasting or distribution of any brochure, flyer or any propaganda material, including through information technology, like the internet, that promotes trafficking in persons through marriage or other similar relationships with foreign nationals.
- assist in the conduct of misrepresentation or fraud for purposes of facilitating the acquisition of clearances and necessary exit documents from government agencies that are mandated to provide pre-departure registration and services for departing persons.
- facilitate, assist and help in the exit and entry from or to the country at airports and seaports, of persons who are in possession of unissued, tampered or fake documents.
- confiscate the passport, travel documents and other personal documents of victims of trafficking to prevent them from leaving the country or seeking redress from the government or appropriate agencies.

3. Other Penalties

- Permanent revocation and cancellation of the Securities and Exchange Commission registration and license to operate the agency, club or establishment.
- Deportation after serving the sentence in the case of a foreigner.
- Suspension or removal from office in the case of a government officer or employee without prejudice to their criminal liability as provided for in A and B above.

E. What Support Mechanisms are Provided for the Victims?

A law on trafficking is not complete without provisions for helping and supporting trafficked victims. The bill directs the government to establish and implement counseling programs for victims of trafficking. These include the provision of temporary shelters, financial support and legal assistance. Regardless of their legal status in the receiving country, victims of trafficking may avail of the Legal Assistance Fund provided for under the Migrant Workers Act. They are also entitled to avail of the services provided by the Overseas Filipino Resource Centers in foreign countries. The Department of Foreign Affairs and the Overseas Workers Welfare Administration take responsibility for the victims' repatriation to the country.

The bill also provides for the legal protection of victims, who, under the bill cannot be imprisoned or detained for crimes committed directly related to the acts of trafficking enumerated above or in obedience to the orders by the traffickers in relation thereto. Likewise, they enjoy entitlement under the Witness Protection Program and are entitled to damages that may be pronounced by the judge against the traffickers in case of conviction. Finally, the victims have the right to confidentiality at any stage of the investigation, prosecution and trial of a complaint against traffickers.

F. What are the Programs that Address Trafficking in Persons under the Bill?

In order to successfully stop trafficking, we need to institute mechanisms to prevent the victimization of our women and children. The important thing is to provide them relevant information and increase their awareness of the dangers of trafficking. Under the bill, the government must

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establish and implement counselling and other programs for victims of trafficking, forced labor and prostitution. For this purpose, the following agencies are mandated to implement the following:

- a) The Department of Foreign Affairs shall make available its resources and facilities overseas for victims of trafficking regardless of their manner of entry to the receiving country, and explore means to further enhance its assistance in eliminating trafficking activities through closer networking with government agencies in the country and overseas.
- b) The Department of Social Welfare and Development shall implement rehabilitative and protective programs for victims of trafficking. It shall provide temporary shelter to victims of trafficking and develop a system for accreditation among non government organizations, local government units and people's organizations for purposes of establishing centers and programs for intervention in various levels of the community.
- c) The Department of Labor and Employment shall in close coordination with POEA, ensure the strict implementation of, and compliance with, rules and regulations and guidelines relative to the employment of women, locally and overseas. It shall likewise monitor, document and report cases of trafficking in persons especially women and minors, involving labor recruiters and recommend the filing of appropriate sanctions to the Department of Justice.
- d) The Department of Tourism shall formulate preventive measures and enforce them to stop sex tourism packages which contribute to the increase in the trafficking in persons.
- e) The Department of Education and the Commission on Higher Education shall integrate in the subject on social studies core messages on migration and trafficking in elementary, secondary and tertiary levels with emphasis on their implications and social costs to persons and country.
- f) The Department of Justice shall conduct investigations and initiate the filing of complaints involving trafficking in persons as defined in this Act and shall ensure the prosecution of guilty parties and establish a mechanism for free legal assistance for victims of trafficking. Such mechanism must include coordination with DSWD, the Integrated Bar of the Philippines and other NGOs and volunteer groups.
- g) The Department of Health shall make available its resources and facilities in providing confidential health care of victims of trafficking.
- h) The Department of Interior and Local Government shall institute a systematic information and prevention campaign and likewise maintain a data bank for the effective monitoring, documentation and prosecution of cases on trafficking in persons.
- i) The Local Government Units or LGUs shall monitor and document cases of trafficking in persons in their areas of jurisdiction, effect the cancellation of licensees of establishments which violate the provisions of this Act and ensure effective prosecution of such cases. They shall also undertake an information campaign against trafficking in persons through the establishment of the Migrants Advisory and Information Network (MAIN) desks in municipalities or provinces in coordination with DILG, PIA, the CFO, the NGOs and other concerned agencies. They shall encourage and support community based initiatives which addresses the trafficking in persons.
- j) The Commission on Filipinos Overseas (CFO) shall establish and implement a pre-marriage, on-site and pre-departure counseling program for women on intermarriages as authorized under its existing mandate and structure. For this purpose, it shall establish a network of service providers from the national government, LGUs, civic and private organizations, and other community workers for purposes of providing accessible pre-marriage counseling services to the public. This network shall be developed and operationalized through a system of accreditation to be undertaken by CFO. It shall establish the necessary guidelines, rules and regulations for this purpose. It shall continue to conduct guidance and counseling services as a pre-departure requirement, and as a pre-requisite to the issuance of passports to Filipino fiancées and spouses of foreign nationals. It shall

develop and implement guidance and counseling services locally and abroad, through an expanded system of representation in order to adequately prepare Filipino spouses of foreign nationals for their settlement and integration overseas and extend necessary intervention to Filipinos in intermarriages in times of distress.

- k) The Commission on Human Rights shall conduct advocacy and training programs relating to anti-trafficking, monitor the flow of cases during trial and grant financial assistance to victims of trafficking.
- l) The National Commission on the Role of Filipino Women shall actively participate and coordinate the formulation and monitoring of policies addressing the issue of trafficking in women and minors in its policy documents as well as its special concerns. It shall likewise advocate for the inclusion of the issue of trafficking in persons especially women and minors in both its local and international advocacy for women's issues.
- m) The Bureau of Immigration (BI) shall ensure compliance by the Filipino fiancées and spouses of foreign nationals traveling abroad to assume permanent residency with the guidance and counseling requirement as provided in this Act. It shall strictly adopt measures for the apprehension of suspected traffickers both at the place of arrival and departure.
- n) The National Bureau of Investigation (NBI) shall conduct surveillance, monitor and investigate recruiters, travel agencies, hotels and other establishments suspected to be engaged in trafficking in women and minors in accordance with the DSWD, the BI, LGUs and NGOs and take appropriate measures in the prosecution of the violators.
- o) The Philippine Overseas Employment Administration shall formulate and implement a system of providing legal and financial assistance to victims of trafficking who are undocumented in addition to its original mandate.
- p) The Philippine Center for Transnational Crimes shall establish a central database for information on criminal methodologies, arrests and convictions of persons or entities involved in trafficking in persons including strategic research for the formulation of individual and collective strategies for its prevention and detection. It shall set up its co-ordination and cooperation with the International Police Organization (INTERPOL) in the elimination of transnational trafficking.
- q) The Overseas Workers Welfare Administration shall assist in the information and advocacy campaign to eliminate trafficking in persons especially women and minors at the OFW Committees here and abroad. It shall likewise assist in the documentation of trafficking cases particularly among OFWs and ensure the provision of the necessary reintegration package of services; i.e. repatriation, counseling, livelihood and legal services, among others.

G. What are the Functions of the Inter-Agency Council against Trafficking?

The Inter-agency Council shall formulate a comprehensive program to suppress the trafficking in women and minors. It will ensure that the intent of the law is fully implemented. In this regard, it shall coordinate all the programs and projects of the various agencies mentioned above. It will also spearhead the conduct of a massive information campaign on the issue. It can recommend the filing of cases against those who will violate the law. It shall also take the lead in formulating a re-integration program for the victims.

The Council shall be composed of the heads of the agencies above-mentioned, and three representatives from NGOs who shall be nominated by the government agency representatives of the Council for appointment by the President. It shall be jointly chaired by the Department of Social Welfare and Development (DSWD) and the Department of Foreign Affairs (DFA).

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE TRAFFICKING IN HUMAN BEINGS AND SMUGGLING OF MIGRANTS IN THAILAND

*Pongson Kongtreekaew**

I. INTRODUCTION

For as long as there have been people there has been migration. People have always sought to move to better lives, many have had little option when faced with violence, terror or economic doom to seek a new life. For a large number of people, somewhere else looks better.

The International Organization for Migration (IOM) World Report 2000 shows that there are more than 150 million migrants, more than half of whom live in developing countries. The number is expected to be around 230 million by the year 2050.

- Year 2000 = 150 million migrants
- Year 2050 = 230 million migrants

It is estimated that more than 50% of illegal immigrants globally are now being assisted by smugglers.

Trafficking and smuggling of human beings has increased throughout the world, owing to the globalization process and other factors. The problem has increased in both size and seriousness by the growing involvement of organized criminal groups. The trafficking and smuggling of migrants by these organized criminal groups cause the following:

- Disrupt immigration policies
- Lead to human rights abuse
- Increase crime and the spread of diseases
- Creates a new form of slavery

Domestic efforts to improve the capacity to match the competence of criminals may be limited, normally by the following factors:

- Limited resources
- Red tape management
- Corruption

However, domestic efforts are generally concentrated within national borders. Regional and international co-operation is needed to address the transnational elements of organized criminal groups.

II. DEFINITIONS

There are various definitions of people trafficking and smuggling but the following are the definitions that are used in this paper.

A. Trafficking in Persons

“Trafficking in persons” shall mean 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

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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 purpose of exploitation.

Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery, servitude or the removal of organs.

Child shall mean any person under eighteen years of age.

(Article 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, UN Convention against Transnational Organization Crime, 2000.)

Trafficking is normally concerned with the recruitment, transportation or receipt of persons through deception or coercion for the purposes of prostitution, other sexual exploitation or forced labor.

Examples of the purposes of trafficking include, but are not limited to, the following:

- a) Prostitution*
- b) domestic work including forced domestic labor*
- c) illegal labor*
- d) bonded labor*
- e) servile marriage*
- f) false adoption*
- g) sex tourism and entertainment*
- h) pornography*
- i) begging*
- j) use in criminal activities*

(Suggested by the Conference on Illegal Labor Movement and Trafficking in Women and Children, held in Bangkok, 25-28 November 1997)

B. Smuggling of Migrants

“Smuggling of migrants” shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident.

(Article 3 of the Protocol against the Smuggling of Migrants by Land, Sea and Air, UN Convention against Transnational Organized Crime, 2000.)

Smuggling is clearly concerned with the manner in which a person enters a country, and with the involvement of third parties who assist them to achieve entry but are not involved in prostitution, labor etc.

C. Organized Criminal Group

“Organized criminal group” shall mean a structured group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with this Convention, in order to obtain, directly or indirectly, a financial or other material benefit.

(Article 2 of the UN Convention Against Transnational Organized Crime, 2000.)

III. THAILAND'S TRAFFICKING PROBLEMS

Trafficking that causes problems can be separated into two categories based on the final purposes of exploitation. One type is the trafficking for labor exploitation and the other is for sexual exploitation.

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A. Trafficking for Labor Exploitation

1. Thai Labor

Thailand has been both the sending and receiving state in trafficking of labor. During the last two decades the exploitation of that labor to the Middle East countries, Japan, Taiwan, Hong Kong, Singapore, Brunei and other countries has been one of the most important national income sectors. The amount of money sent back to Thailand by Thai workers abroad in 1995 was 42,250 million baht (approximately US \$1,690 million)

Table 1. Labor Trafficked from Thailand.

From	Destination	Purpose	How
1. Thailand	- Middle East - Japan - Taiwan - Hong Kong - Singapore - Brunei	- Labor - Worker	- By airplane - With passport

Some of those workers were legally sent, while many were deceived and exploited. The living conditions of these workers were normally poor. Men were trafficked to work abroad for higher salaries than they could get at home. Many were exploited by their employers. In many cases their wages were fraudulently cheated either by their exporting agents or the employers. The worst were those who had mortgaged or sold their land to pay for the trafficking fee and were sent only to be stranded in a foreign land without jobs and means of living.

The notion of “a lot of money awaiting overseas” was the tempting bait for women to follow men to work too. Some women who worked as domestic servants were under the risk of sexual abuse or harassment. The conditions of working and exploitation are normally the same as for men.

The Thai Government is trying to solve Thai labor problems, by reshuffling the high ranking officials in the Ministry of Labor, looking for new labor markets and making more agreements with the countries that need labor.

2. Foreign Labor

At the same time, the economic development in Thailand had been more advanced than the Northern and North-Eastern neighbors. This economic gap created an influx of labor into Thailand. Some migrant workers, particularly those from Bangladesh and Myanmar, were trafficked through Thailand to Malaysia and Singapore using Thailand as the transit point.

Other migrants who were trafficked to Thailand are Cambodian and Laos. Almost all of these groups enter Thailand at the borders of the North, East and West. Most people enter the country without passports or correct documents. Some of these migrants intend to travel to third countries.

Table 2. Labor Trafficked into Thailand.

From	Destination	Purpose	How
1. Myanmar 2. Cambodia 3. Laos	- Thailand	- Labor	- Cross the border - Without passport

The migrants from China, India, Pakistan, Nepal and other countries enter Thailand by airplane, use legitimate passports, and stay past the period allowed by the law to become illegal workers. A lot of these migrants will probably travel to a third country for the purpose of illegal work.

Table 3. Labor Trafficked into Thailand.

From	Destination	Purpose	How
1. China 2. India 3. Pakistan 4. Nepal 5. Others	- Thailand	- Labor - Travel to a third country	- By airplane - With passport

Most of the migrant workers from the borders were illegally brought into Thailand. It was impossible to know precisely how many illegal cross-border migrant workers are in Thailand.

The Thai Immigration Bureau estimated that 700,000 illegal migrant were in Thailand before mid 1996, while the estimation from other sources put the number at 1,000,000 - 1,200,000.

Table 4. Number of Illegal Migrant Workers in Thailand.

Official Estimation	Non - Official Estimation
700,000 persons	1,000,000-1,200,000 persons

The plight of these illegal migrant workers in Thailand is obvious. They were unpaid or paid lower than the minimum wage. Some have to work for long hours or had to do dangerous work without protection. Some are cheated or paid less than promised and the worst is that they could not turn to Government officials for help due to their illegal status.

These illegal immigrant workers also committed crimes and spread some new diseases to the Thai people. In order to control the number of illegal migrant workers, the demand for cheap labor has forced the Thai cabinet to allow employers to register their Myanmar, Laos and Cambodian illegal employees, with the Labor and Public Welfare Ministry.

The policy allowed workers that had entered Thailand before 25 June 1997 with the purpose of working, to stay in Thailand temporarily subject to some occupational and geographic restrictions (43 provinces including Bangkok). There was also a grace period of 2 years. The employers were required to register and follow procedures within the designated period of 90 days. The policy of registering illegal workers, helps the Thai government officials to control the foreign workers and prevent their exploitation, to some extent.

The other form of labor exploitation for women and children is begging. Most of them are Cambodian and exploited by organized crime syndicate. They were lured, or willing to be brought into Thailand to work as beggars. Some have to pay traffickers for trafficking them. When they are in Thailand they cannot work on their own but have to work under the control of agents who provide them with shelter and protection.

According to research, most of the agents were Vietnamese who lived in Thailand. The victims were charged for shelter and had to give a major share of their earning from begging each day to agents. If they resisted or tried to work independently, they might be beaten or arrested by officials according to the arrangement of the agents.

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The number of foreign child beggars in Thailand is estimated at 1,060, 25 % of which are girls. About 95% of the 530 foreigners arrested between 1 October 1996 and 31 July 1997 were Cambodian, 5% were Burmese.

Foreign Child Beggars in Thailand

- Total number 1,060 persons
- 75% boys 25% girls
- 95% Cambodian 5% Burmese

The other type of trafficking in Thailand is in child workers. These children normally work in small factories such as candy or toy factories etc. A lot of them work as domestic servants, in garages or in agricultural jobs. Most of the working conditions are not dangerous, but there are some inappropriate working conditions. It was estimated that 194,180 foreign child workers enter Thailand illegally, 70% of them were boys.e.

Foreign Child Workers in Thailand

- Total number 194,180 persons
- 70% boys 30% girls

According to the Immigration Division, the number of foreign immigrants from ten countries, arrested by the Thai Police in 1999-2001 were as follows:

Table 5. Number of Illegal Immigrants in Thailand

Nationality	Sex	1999	2000	2001
1. Burmese	Male	32,334	32,334	35,323
	Female	24,165	24,165	23,818
	Total	56,499	56,499	59,141
2. Cambodian	Male	4,561	8,166	11,234
	Female	2,317	7,157	4,961
	Total	6,878	15,323	16,195
3. Laotian	Male	1,038	1,412	1,079
	Female	1,251	1,736	1,634
	Total	2,289	3,148	2,713
4. Chinese	Male	353	329	216
	Female	148	164	123
	Total	501	493	339
5. Nepalese	Male	35	32	197
	Female	-	1	22
	Total	35	33	219
6. Indian	Male	54	75	109
	Female	2	-	3
	Total	56	75	112
7. Pakistani	Male	69	57	73
	Female	-	3	2
	Total	69	60	75
8. Sri Lankan	Male	16	73	13
	Female	-	49	1
	Total	16	212	14

Table 5. Number of Illegal Immigrants in Thailand

Nationality	Sex	1999	2000	2001
9. Nigerian	Male	4	4	26
	Female	-	-	-
	Total	4	4	26
10. Bangladeshi	Male	17	8	10
	Female	-	-	-
	Total	17	8	10

B. Trafficking for Sexual Exploitation

It appears that trafficked women come from almost all over the world. Some well known countries concerned with the trafficking for sexual exploitation are as follows.

Table 6. The World Situation of Women Trafficking.

Country	Region / Continent
- Ghana - Nigeria - Morocco	Africa
- Brazil - Columbia	Latin America
- Dominican Republic	Caribbean
- Philippines - Thailand	Asia

In Southeast Asia, Mekong sub-region, the countries having problems of trafficking in women and children are Cambodia, China (Yunnan), Laos, Myanmar, Thailand and Vietnam.

The sex industry in Thailand is rampant and has become a big illegal business.

The number of prostitutes (including males and children) is not known exactly. The only official survey is the figure of the Public Health Ministry. The latest report of 1996 revealed that there were 66,196 prostitutes, working in 7,318 commercial sex service places throughout the country of which 1,945 prostitutes were male. Nevertheless, the most accepted figure by many government agencies and NGOs, is 200,000 prostitutes in Thailand. It is believed that 36,000-40,000 of them are children..

Number of Prostitutes in Thailand

- Official Survey 66,196 persons
- Estimation 200,000 persons
- Children 15 - 20 %
- Children 36,000-40,000 persons

Trafficking is one of the most profitable illegal businesses. It generates a huge income for the exploiters. An informal estimation of money illegally generated by the sex workers in Thailand in 1995, using the figure of 150,000 to 200,000 prostitutes as the basis for estimation, is between 45-60 billion baht (approximately US \$ 1.8-2.4 billion, using the exchange rate at the time of estimation).

Young Thai women and girls mostly from poor rural areas of northern and northeastern part of Thailand are the main targets for traffickers. This includes the offspring of minority hill tribe villagers.

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Traffickers approach the parents of a child and give them an amount of money in exchange for their daughter to 'work' in a restaurant, factory, shop etc.

They usually demand that the parents sign their names in a disguised loan contract for the money given. When the time comes these girls are brought to work in disguised places of prostitution in Bangkok or other towns and they are forced or lured into prostitution.

1. Trafficking Abroad from Thailand

Many of the victims of trafficking, mostly women from rural areas of Thailand, gave their consent to be trafficked in order to get better pay in other countries. These women know what kind of work they had to do and most of them agreed to pay back the inflated cost set by the traffickers. Some paid back the debt by sleeping with a number of customers. What most of them did not know in advance was that they had to be detained in brothels until their debt had been fully paid. They could not resist because their passports were taken away by the traffickers.

Some women were cheated although they had slept with the required number of customers but they were not freed because the traffickers had added the untold cost mounted during the time they had worked in the brothels. Many were resold to other brothels. The benefit that the traffickers gained for each woman was abundant.

Benefit = 10 times the investment

A Trafficked woman testified in a Thai court that she had to pay the traffickers back by sleeping with 400 customers within three months, if she could not attract 400 customers to use her service within that period the number would be increased to 500 customers. Each customer was charged US \$ 130 for 45 minutes. An amount of \$100 went to the trafficker while the other \$30 went to the brothel owner. Therefore, the trafficker received the sum of \$40,000 within three months or \$50,000 if the women could not sleep with 400 customers within three months.

Trafficker receives

- within 3 months = US \$ 40,000
- more than 3 months = US \$ 50,000

This same phenomenon happened to the Thai women who were trafficked to Japan, Germany, Australia and other countries. It is not exactly known how many other countries that these women were trafficked to. The countries are believed to be France, United States, Taiwan, Hong Kong, Singapore and Malaysia.

Table 7. Women Trafficked from Thailand.

From	Destination	Purpose	How
Thailand	- Japan - Germany - Australia - France - United States - Taiwan - Hong Kong - Singapore - Malaysia	- Sex services	- By airplane - With passport

Additionally, a lot of trafficked women were detained and forced to work as prostitutes in many countries without being paid. The worst was the situation when the women had nearly paid all the debt for coming overseas to the trafficker, then she was sold to another trafficker or brothel owner and the process of paying back the debt had to restart again. Although the women realized they were being cheated, there was little they could do but to accept it.

In many cases, those women did not consent to work as prostitutes but believed that they would have good jobs and chances to travel abroad. The women knew that they were illegal labor immigrants with only a tourist visa. After they realized that they were to work as prostitutes, it was too late to turn back. A lot of women arrested in many countries were not voluntary.

Take Japan for example, the recent ratio of women deceived and forced to work as prostituted to the women who consent to be prostituted was estimated to be 20:80 nowadays.

Deceived and forced : Consent = 20 : 80

The number of Thai women trafficked to other countries is not exactly known. However, 761 women contacted the Ministry of Foreign Affairs in 2001, for help and asked to be sent back home. It is believed that a great number of these suffering women are the victims of trafficking.

The statistics of female illegal workers from Japan shows that there are many Thai women being repatriated back to Thailand in each year. More than 90% of these women, according to Japanese officials' investigation, are believed to be prostitutes.

Table 8. Women Repatriated from Japan

Year	1999	2000	2001
Male illegal workers	1667	1460	1122
Female illegal workers	2259	2442	1678
Total	3926	3902	2800

The Thai Government is highly concerned with prostitution. Many campaigns and educational programs are being provided by many government agencies and NGOs to reduce the new generation of prostitution. Education programs in the northern part of the country can reduce a great number of the new prostitutes. These people have the chance for an education and have opportunities to get jobs such as in the factories.

The situation of trafficking Thai prostitutes is becoming less but it is not altogether eradicated. As Thai children become more difficult to recruit, the traffickers are now turning to foreign children.

2. Trafficking into Thailand from Abroad

The first transnational trafficking case that Thailand handled in 1990 involved 150 children and women from Myanmar. They were forced into prostitution in the brothels of Rayong province in the South of Thailand. The brothels were raided, the women and children rescued and efforts were made to assist them. Even though they illegally entered Thailand, they were entitled to be treated as victims rather than offenders.

The special treatments given to the children and women at that time were:

- Shelter and rehabilitation service provided at the Women's Home under the supervision of the Development of Public Welfare instead of being detained at the Immigration Detention Center. The services include health care, vocational training and consulting sessions.

- Identification for repatriation was undertaken by the Myanmar Ambassador to Thailand.

- A request was made by the Thai Government to have high-ranking officials of Myanmar to receive the victims at the border and to ensure that they would be provided with an appropriate social integration program.

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It was apparent during the process that many agencies had to be involved in all these undertaking e.g. police officers, immigration officers, social workers, health personnel, NGO staff, as well as the embassy and the Ministry of Foreign Affairs. Effective coordination was evidently crucial.

The practices used at that time have become the principal for the Thai authority to help women and children ever since.

During this decade a great number of foreign women were recruited to work in the sex industry in Thailand which include not only those from the Mekong sub-region but also those from Russia and Eastern Europe. Women from Shan State and minority people from the northwestern borders were the largest group.

Many of them decided to use the traffickers because of the complex arrangements and the traffickers influence with authorities particularly in crossing borders and travel within the country which required passing several checkpoints. Women trafficked from Yunnan, South China, had to cross borders two times, the Chinese-Myanmar border and Myanmar-Thai border before coming into the Kingdom.

However, it was considered to be quite easy for the traffickers to persuade or lure young women from the neighboring countries into the commercial sex business in Thailand. The supply of foreign women is still abundant.

Most foreign prostitutes in Thailand are from Myanmar, and an estimated 10,000 Burmese women and children are entering prostitution in Thailand yearly. The next largest source of foreign prostitutes in Thailand is Yunnan.

Other groups of trafficked women are from Laos, Vietnam and Cambodia. These groups are generally lured into the sex industry from border provinces, which are easy to enter Thailand from.

Table 9. Foreign Women Trafficked to Thailand.

From	Destination	Purpose	How
- Myanmar - Yunnan (China) - Laos - Vietnam	Thailand	- Sex services	- Cross the border - Without passport
- Russia - East Europe			- Airplane - With passport

Altogether, Thailand is estimated to have 16,426 foreign prostitutes from Mekong sub-region countries, 30% of whom are children under 18; but 75% of them became prostitutes when they were under 18.

Prostitutes from the Mekong Sub-region

- foreign prostitutes	16,426 persons
- children under 18	30 %

It is estimated that between 1990 and 1997, 80,000 women and children were trafficked along the Thai-Myanmar border to work in the sex industry.

IV. ROOT CAUSES OF TRAFFICKING AND SMUGGLING

The root causes of trafficking and smuggling within the country, and cross border trafficking are very much the same. There are some contributing factors specific to some areas but normally these factors are the same in many countries:

A. Poverty

Poverty is the most popular contribution factor cited by many. Extreme poverty and unemployment are the most common reason for the trafficked victims both male and female.

B. Improvement of Earnings and Living Standards

This factor is the reason for illegal immigrants particularly those who have more skill, more education, or want to travel to the third country.

C. Culture

Culture and social values have strong influences on most of the Mekong sub-region, Southeast Asia people. In some regions it is believed that it is the duty of daughters to sacrifice themselves for the well being of the family.

Consumerism and materialism are also very important values that become push-factors for migration.

D. Agents

Agents or brokers are the push-factor especially for the female to work in the sex industry or labor. There are abundance of agents nearly everywhere. Some of the respected people in the villages are also agents because of the huge profits that can be made.

Apart from those ordinary agents, organized crime syndicates have jumped on the bandwagon to ensure they have their share of the profit. Without efficient suppression, the agents can be recruited to work for the syndicates or connected to the transnational organized crime.

E. Other Factors

- Escape from the conflict of war.
- Gender discrimination.
- Fake passport services.

V. LAWS RELATING TO TRAFFICKING AND SMUGGLING

The laws, which are related to trafficking and smuggling of human beings in Thailand, are as follows:

A. The Prostitution Prevention and Suppression Act

The work to combat trafficking in Thailand has evolved since the late 1980's with the revision of a law: The Prostitution Prevention and Suppression Act of 1960 which had been used for 36 years.

The enactment of the revised laws began in 1996. The new laws facilitate effective actions to solve the trafficking problems.

1. The Former Prostitution Suppression Act (1960)

The former Act was enacted with the intention of outlawing all forms of prostitution, which used to be legal under license from authority before 1960. The purpose of the Act was to punish prostitutes (more severely than the procurers).

- *A prostitute arrested might be faced with imprisonment for not more than 3 to 6 months or fined 1,000 - 2,000 baht.*

In addition, she might be detained in a closed rehabilitation center for another 2 years.

(While the maximum punishment for a procurer was 3 months imprisonment and a fine not more than 1,000 baht with no rehabilitation requirement).

- *An owner of a place for prostitution might face up to a 1 year jail term.*

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2. The Prostitution Prevention and Suppression Act (1996)

The main concept of the Prostitution Prevention and Suppression Act 1996 is that prostitutes are victims of poverty, social problems and organized crime. Therefore, the Act concentrates on punishing procurers, brothel owners, pimps, customers and parents who sold their offsprings for prostitution. With this concept, the punishment for prostitution is greatly reduced. On the contrary, the punishment of the exploiters is greatly increased.

- *Prostitutes are prohibited from causing a nuisance to the public by overtly and shamelessly soliciting or imposing themselves on people.*
- *Maximum punishment is a fine not more than 1,000 baht.*
- *They are not allowed to gather in a place of prostitution and they are also barred from advertising themselves for prostitution.*

Maximum punishment is 1 month imprisonment and a fine not more than 1,000 baht with rehabilitation depending on her agreement.

- *A procurer or trafficker is punishable with imprisonment from 1 to 20 years.*
- *An owner, manager or pimp is liable to be imprisoned from 3 to 20 years.*
- *Anyone who detains another person for prostitution will be punished with 1 to 20 years, life imprisonment or the death penalty.*
- *Customers who buy sex from children under eighteen years old will be imprisoned from 1 to 6 years.*
- *Parents who sell their child to a procurer or customer for prostitution are liable to imprisonment of 4 to 20 years and their guardianship may be revoked by a court's order.*

B. The Prevention and Suppression of Trafficking in Women and Children Act (1997)

This is the specific law expected to deal with trafficking. The Act on the Trafficking of Women and Girls was enacted in 1928 and is still in use. It has been updated to be more efficient.

The Act stipulates that the conspiracy to commit an offense regarding trafficking in women and children is a crime which is to enable the undertaking of legal proceedings from the start. The aider of any offense will be punished as severely as the principal offender.

- *The penalty for traffickers is imprisonment from 1 to 20 years, life imprisonment or the death penalty.*
- *The officials have wider authority to stop and confine suspected victims for questioning that can interrupt the trafficking process.*
- *Official are authorized to search various places, not only vehicles, to facilitate the prevention, suppression and assistance to those victims.*
- *The court is empowered to take deposition of a victim's testimony soon after she is rescued from the offender.*

C. The Immigrant Act

This law has been used since 1969. According to this Act, any foreigner who does not enter into Thailand through an immigration control point, with a valid passport and visa, is considered an illegal immigrant.

- *An illegal immigrant might face an offense punishment with not more than 2 years imprisonment and a fine not exceeding 20,000 baht.*
- *An Immigration authority can prohibit any person, who is suspected of coming to sell labor, be a prostitute, traffic women, children or narcotics, from entering into Thailand.*

If these illegal immigrants are found out later on, the authority can order such persons to leave the Kingdom.

D. The Penal Code

The modern Penal Code of Thailand has been effective since 1957. Some of the laws, which are related to human trafficking problems, are as follows:

- *Rape is punishable by 4 years imprisonment if the age of consent is over fifteen years.*
- *In case the victim of rape is dead the punishment is the death penalty or life imprisonment.*
- *Anyone who procures, seduces or leads away a woman for an indecent act in order to gratify the sexual desire of another person is punishable with 1-20 years imprisonment.*

If the victim is a girl under 18, 15 or 13 the penalty is heavier depending on the age of the victim.

- *A pimp is liable to be punished with 7-20 years imprisonment.*

E. The Constitutional Law

The Constitutional law of Thailand 1997, has some articles that are relevant to trafficking and smuggling. These articles are as follows:

Article 30

Persons shall be equal under the law and shall be equally protected in the enforcement of the law.

The discrimination to any person because of the difference in his/her origin or place of birth, race, language, gender, age, physical condition or health, status of the person, economic or social status, religious beliefs, education, or political belief not contrary to the provisions in this Constitution, shall be prohibited.

The Constitution guarantees that all persons will be treated equally under the law no matter whether they are a Thai citizen or an illegal immigrant.

Article 43

Persons shall have an equal right to receive basic education for not less than 12 years, which the State has the duty to adequately and satisfactorily provide.

Article 43 provides that the State has the duty to raise the compulsory education length from the present nine years to twelve years. The long compulsory education, it is hoped, will prevent the risk groups of children from being trafficked when they are very young. It is hoped that higher education and more opportunity to get better jobs will help them.

Children of illegal immigrants also have the same right to education as well.

Article 53

Children and juveniles have the right to be protected by the State from being abused.

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Children and juveniles who do not have custodians shall be raised and provided education by the State according to the provision of laws.

Article 53 states that it is the duty of the State to protect all children and juveniles (under 18 years old) both Thai and foreigners from being abused. According to Thai law, children and Juveniles are people, less than 18 years old.

The abuse is not specified, therefore it means abuse in all forms, which includes labor, sexual, commercial gain, etc.

VI. REGIONAL CO-OPERATION

Smuggling and trafficking problems are very difficult for a country to deal with. Co-operation within the region is very important to prevent and tackle smuggling and trafficking. For Thailand, the co-operation activities within the region are as follows:

A. Thai-Lao PDR

The governments of Lao PDR and Thailand discussed the formalization migration movements for labor in 1997. Both governments have become stricter in regards to allowing children to cross the border

The Lao PDR proposed the Technical Cooperation Committee to solve the illegal migration problem in 1997. Lao laborers to Thailand, can be arranged by a formal agreement between the two countries. Children under 18 will be prohibited from working abroad except for light domestic work.

B. Thai-Yunnan

The police Department of Thailand and Yunnan developed a repatriation programme for Yunnanese women who are trafficked to be prostitutes in Thailand. Thai authorities and NGOs will inform the Chinese embassy or consulate whenever they counter trafficked victims from China. The Chinese authorities then will provide and support the repatriation, health services and reintegration of the victims into their home villages, schools, workplaces etc.

C. Vietnam-Cambodia

The department of Prevention and Control of Social Evils in Ho Chi Minn City and the Center for Protection of Children in Cambodia had a meeting to combat trafficking in women and children in 1997. Both countries discussed the conditions of Vietnamese child prostitutes in Cambodia, repatriation and other collaboration matters.

D. ASEAN countries

Association of Southeast Asia Nation (ASEAN) had a workshop on trafficking in women and children in Thailand, June 2002. The member countries of ASEAN*¹ comprise Brunei, Cambodia, Indonesia, Lao, Malaysia, Singapore, Thailand, Myanmar and Vietnam. The workshop considered and adopted an agenda concerning trafficking of women and children as follows:

- Information exchange
- Legal matters
- Law enforcement matters
- Training
- Institutional capacity-building
- Extra-regional co-operation
- Assistance to and protection of victims

¹ ASEAN <http://www.asean.or.id>

VII. ENFORCEMENT

Enforcement is one of the main problems in the suppression of trafficking and, thus, is needed to be explored. The effectiveness of law enforcement for the suppression of human trafficking in Thailand depends very much upon the active roles of the police. The reason is that, according to the Criminal Procedure Code, only the police can initiate a case. The Immigration Bureau, which has the responsibility to control all border passages, is also under the Police Department.

The law enforcement in Thailand which play a tough role in preventing trafficking and smuggling of human beings consist of:

- Immigration Police
- Police Stations
- Crime Suppression Division
- Highway Police Division

The administration of Criminal Justice in Thailand depends on the following:

- Police
- Attorneys
- Courts
- Corrections

A. Immigration Control of Thailand

The Police Department and Immigration Division are currently carrying out the following:

1. Establishing a Committee

Establishing a committee to control and solve illegal immigration. The purpose is to control the migrant labor and have more concrete ways of solving the problem.

2. Establishing Illegal Migrant Control Centers

Establishing Illegal Migrant Control Centers in order to wait for repatriation in specific areas and entrance points, making it convenient in control and repatriation. The various centers are located at:

- Mae Sai, Chiengrai
- Mae Sod, Tak
- Sangkaburi, Kanchanaburi
- Aranyapratet, Sakaew

3. Setting up Check Points

These are check points along the Thai border routes to control immigrants from foreign countries.

- Mae Sai route, Chiengrai
- Mae Sod route, Tak
- Tong Pa-Pum route, Kanchanaburi
- Aranyapratet route, Sakaew

B. The Weak Points of Police Administration

Some weak points of the Thai police administration in trafficking and smuggling problems are as follows:

1. The Limited Resources

The Police Department has limited manpower and expertise in dealing with trafficking. Such limited resources, force police to select crimes they believe should be handled first.

Police in Thailand also have a limited budget and equipment to deal with complicated cases or organized crimes. When one member of the organized crime racket is arrested, influence and money

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will be spent. On the other side, police officers are working with a lack of budget and support in the long run.

A lack of resources in the long run also causes red tape management and corruption in some areas, which are the obstacles of Criminal Justice.

- Lack of manpower
- Lack of budget and equipment
- Red tape and corruption

2. Lack of Witnesses

Trafficking is one of the crimes that are difficult to deal with. Most victims or witnesses are so vulnerable that they do not want to participate in the legal process and are not willing to give a statement or testimony. Things become more difficult when the victim is an alien woman or child who cannot speak Thai or English. Most of them want to go back home as soon as possible.

The long process of a criminal case, the lack of resources to keep the victim or witness for a long time, results in many cases going to trial without any witnesses or culminating in an unsatisfactory result.

In addition, a witness protection program is not available in Thailand yet.

3. Lack of Strong Policy

The Police Department's high-ranking officers always concentrate on, the spot-light crime, the crimes that newspapers are interested in or the Government declares as the policy, such as murder, robbery or drugs etc.

A lot of resources have been invested in order to deal with amphetamines, which are categorized in the same class as heroin, and is the first priority for the Thai Government. Other crimes are given less attention including trafficking.

The trafficking problem might seem not to be urgent. The majority of police officers still do not realize the seriousness of trafficking or smuggling and do not act continuously or properly.

Changing their attitudes requires more education or training for senior officers. Establishing a specific career path and developing expertise for police officers, working in this field can bring improvement.

- Training and education for police
- Career path and expertise

4. Lack of Co-operation

A lack of co-operation among countries regarding crime suppression is another factor. While the authority of an individual country cannot extend across the border, the organized crime syndicates are not limited.

Co-operation between authorities of sending and receiving countries is vital. Officers of each country should know what procedure they could carry out and to whom they could contact to achieve the objectives. A computerized database to collect information on trafficking in relevant countries should be installed and shared together. Teamwork among countries concerning the problems should improve the effectiveness to deal with transnational organization crime.

It is also necessary to improve co-operation among many agencies, namely the police, NGOs, the State Attorney, Department of Justice, the Interior ministry and concerned organizations in Thailand.

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Setting up a special police force in each country to support the international mission is important. The team must be alert to investigate, search for evidence or arrest criminals when a request is made from member countries.

Conclusion of co-operation problems:

- Co-operation multilaterally
- Co-operation bilaterally between sending and receiving countries
- Co-operation among organizations in the country
- Special police force for co-operation with the international mission .

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APPENDIX

The Number of Cases for Procurers or Traffickers in Women to be Prostitutes in Thailand

Year	Number of Offenders	Finished
1999	15	12
2000	26	13
2001	40	35

The Number of Illegal Immigrants Entering Thailand

Year	Number of Offenders	Finished
1998	85,641	68,907
1999	51,105	37,516
2000	29,580	22,983
2001	32,895	25,355
2002	33,898	27,547

Number of police stations in Thailand	1,446
Police officers in Thailand	212,696
Immigration police officers	3,109
Highway police officers	2,100
Population of Thailand	61,400,000

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GROUP 1

TRAFFICKING IN HUMAN BEINGS, ESPECIALLY WOMEN AND CHILDREN

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I. INTRODUCTION

One of the most difficult realities facing persons trafficked into forced labor, slavery, or servitude is the propensity of governments worldwide to treat trafficked persons as criminals or unwanted undocumented workers rather than as rights-bearing human beings. Appropriate responses respectful of human rights in law, policy, and practice are inadequate worldwide. Once victims manage to free themselves, or are freed by others from their captors, they are often re-victimized by governments in destination countries. Many countries do not have effective policies designed to combat trafficking in human beings. They concede that their legislation does not provide up-to-date regulations to deal with such trafficking, particularly activities carried out by transnational criminal organization.

National policies do not provide the effective tools with which to dismantle organized crime structures and their transnational alliances, to cut their profit margins and to counteract attempts to diversify supply. Investigators of the higher levels of management of organized criminal groups involved in trafficking in human beings often lack the necessary linkages to strategies against corruption and bribery. Legal provisions, including procedural laws, penal codes and regulations for police vary greatly among jurisdictions, thereby allowing the creation of a safe haven for traffickers.

This paper was made with a vision to prevent and combat trafficking in human beings, especially women and children. To realize this vision was the concomitant mission to present, identify, analyze and examine the following areas of trafficking:

1. World situation
2. Root causes
3. Modus Operandi
4. Forms of exploitation
5. Problems and solutions in detection, investigation, prosecution, trial and punishment
6. Legislation issues
7. Cooperation among domestic agencies
8. Conclusion

The information and data in this paper were mostly taken from the individual presentation papers of the 122nd international training course participants, the lectures of the visiting experts and the ad hoc lectures.

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II. DEFINITION OF TERMS

1. Trafficking in Persons

“Trafficking in Persons” shall mean 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 purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or practices similar to slavery, servitude or the removal of organs. (Art.3 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially women and children).

2. Organized Criminal Group

“Organized Criminal Group” shall mean a structure group of three or more persons, existing for a period of time and acting in concert with the aim of committing one or more serious crimes or offences established in accordance with the convention, in order to obtain, directly or indirectly, a financial or other material benefit. (Art.2 (a) U.N. Convention against Transnational Organized Crime 2000).

3. Structured Group

“Structured Group” shall mean a group that is not randomly formed for the immediate commission of an offence and does not need to have formally defined roles for its members, continuity of its membership or a developed structure. (Art.2 (c) U.N. Convention against Transnational Organized Crime 2000)

III. WORLD SITUATION

According to the International Organization of Migration (IOM) there are currently 20 to 40 million irregular migrants in the world of a stock of 130 million international migrants¹. At any one time 4 million illegal migrants are on the move. According to the U.S. Department of State, over the past year, at least 700,000, and possibly as many as four million men, women and children worldwide were bought, sold, transported and held against their will in slave-like conditions². The traditional trafficking source regions are: Asia, Africa and the Caribbean. South East Asia constitutes one third of the global trafficking trade with about 200,000-225,000 women and children trafficked annually. The 1999 IOM report identified the top three source countries of irregular migration worldwide namely: the People’s Republic of China, Philippines and Myanmar³.

On the other hand, millions of youth are victims of child trafficking in South Asia (Mekong Area) and West Africa where trafficking networks are secret and informal in nature and detection is extremely difficult. In the ECOWAS (Economic Community of West African States) region, open borders promote free trade and it is difficult to distinguish whether migration is illegal, criminal, or legitimate family cross-border migration⁴.

In the European Union, the Central and Eastern European countries represent a rapid increase of trafficking in women and children with Eastern Europe comprising two thirds of the half a million illegal sex workers. It also constituted the largest proportion of the 300,000 trafficked women promised with jobs as waitresses, etc. but are currently working as prostitutes in Western Europe. The United Kingdom reported an increase of Chinese illegal entrant to over 600 per month. Vienna in 1995 likewise registered an increase in trafficking to six times more than in 1990⁵.

The United States, which is also used as a transit country by traffickers estimated that of about 50,000 women and children who are trafficked annually, 60% originate from South-East Asia. In Latin

¹ International Organization For Migration(IOM) 1998 “Trafficking Get High Level Attention” #18:<http://www.iom.in/January> 1999

² The trafficking in persons report (TIP report) released by the United States government in June 2002

³ IOM op.cit.

⁴ The Immigration and Naturalization Service (INS) FY 2002 Monthly Statistical Report, June,2002

⁵ Mr.Hamish McCulloch (Visiting Expert)

America, the countries of Brazil, Colombia, the Dominican Republic, and Ecuador are mostly affected by trafficking in women for sexual exploitation and potentially women from Argentina, Peru and Venezuela. Colombia and Spain are the most frequent destination countries of the victims⁶.

IV. ROOT CAUSES OF TRAFFICKING IN HUMAN BEINGS

Trafficking in human beings is not drawn by only one source but various factors cause the tragic trafficking chain. Trafficking in persons is not a new phenomenon but the recent growth seems to be facilitated by increased globalization and modern communication techniques. Liberalization of trade, progress of transportation, opening up of borders and improvement of communication infrastructure, such as the Internet and mobile phones have enabled trafficking to be executed easily. Moreover, global economic disparity, disruption of traditional livelihoods and the expansion of the sex industry has contributed to the growing trafficking in persons.

A. Push Factors and Pull Factors

Except for poverty, the root causes of trafficking vary from country to country and it can be classified as: the push factor (that which drives a resident of one country to go to another country) and the pull factor (that which draws one country to invite or accept migrants from another country).

1. Push Factors

Common push factors are as follows:

- poverty
- lack of education prospects
- chronic unemployment
- the low status of women and girls in society and in the economy
- lack of economic opportunities
- political instability
- traditional social and cultural practices
- corruption
- others (militarism, civil unrest, internal armed conflict and natural disasters)

The above circumstances are brought about when victims seek a better life or enhanced economic opportunities for themselves and their family, but as a result, they make themselves victims of trafficking. In many cases of human trafficking, victims have little knowledge about the tragedy of trafficking because they are from poor villages, from minority races or some remote places. In such regions, we may see examples of some parents entrusting their children to more affluent friends or relatives, other parents sell their children not only for the money but also in the hope that their children will escape a situation of poverty. In areas where culture and social values have strong influence, people naturally think it is the duty of daughters to sacrifice themselves for the well being of the family.

2. Pull Factors

Common pull factors are as follows:

- high demand from the sex industry
- high profit for traffickers
- lenient punishment
- inefficient law enforcement
- deficient laws
- corruption
- value of customers

The expansion of the sex industry is the biggest pull factor of trafficking in human beings especially women and children. Profit in trafficking of human beings tend to be bigger and penalties have also

⁶ Mr.Hamish McCulloch op.cit.

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been relatively lenient with lower risks, so that many transnational organized crime groups have viewed these acts as attractive business ventures. In addition, people can be used repeatedly like commodities, and the victims may be re-sold by traffickers. In other words, trafficking in persons does not require a large capital investment but traffickers get a high profit.

Trafficking in children is increasing because of the fear of HIV/AIDS. There is the general belief that children are free from such disease.

B. Opportunities for Corruption in the Trafficking Chain

In some countries, corruption contributes to the problem of trafficking. Corruption is generally described as the misuse of a public or private position for private benefit. Corruption may be both a push factor and a pull factor.

Corruption practices may involve the police, customs officers, visa officers or embassy staff, border control, immigration services, local officials, intelligence and security services, armed forces and the influence of the private sector (travel agencies, airlines, transportation sector, financial institutions, banks).

Their acts may range from passivity like ignoring, turning a blind eye to trafficking, or actively participating in or even organizing trafficking in person, that is, from a violation of duty, to corruption or organized crime. For example, officers or leaders of districts are complicit in looking for likely women and children; or they forge necessary documents to receive pecuniary benefits and undue advantage.

V. MODUS OPERANDI

“Modus Operandi” means the method of operating trafficking in human beings. The modus operandi employed by the traffickers is divided into 4 stages: Recruitment, Transportation, Use of force, and Exploitation.

A. Recruitment

As regards the sending countries, the following modus operandi are employed by the traffickers.

1. Tricked to go

- False promises of work abroad

In the majority of the cases, false promises of work abroad involve work in childcare, housekeeping, waitress and the hotel or entertainment industries. On rare occasions the women know or suspect that they will be involved in prostitution but are not aware of the slave-like conditions in which they will find themselves.

- False marriage

In the case of false-marriage, the trafficker wins the victims affections first. Then he makes a marriage proposal that is very easily accepted. After marriage the husband gets the right to take his spouse anywhere. In Nepal, 25% of cases have been trafficked in this method.

2. Forced to Go

- Kidnapping/Abduction

In some countries, kidnapping and abduction have been employed although in a small number of cases only.

3. Consented to Go

In some countries such as Thailand, victims from rural areas give their consent to be trafficked to get better pay in other countries despite their knowledge of the kind of work they have to do and most of them agree to pay back the inflated cost fixed by the traffickers. What they do not know is that they will be detained in brothels until their debt has been fully paid.

In other instances however, consent is given due to the low level of education and poverty, but they do not fully understand the real intention of the traffickers. There are also cases where the parents themselves give their consent.

B. Transportation

1. Illegal at the Border

- Using forged passport

In cases of entry checks, forged passports are used and false representations as to purposes of stay are given in order to get landing permission.

Types of forged passports include: (a) false photographs; (b) the alteration of identity; (c) entering a false page of identity; and (d) substituting the inside pages. In addition, there are cases where a foreigner obtains landing permission by using the genuine passport of another and pretends to be that other person.

- False application for visa status

In many cases, traffickers make the victims state false information about their activities after landing into the receiving countries to enable them to get a visa, as follows:

- (a) It is the tendency to use a promise for false-marriage. In this case, the trafficker mediates an offer of marriage with a foreigner and a partner who is a national of the receiving country, and makes him / her get a spouse visa status.
- (b) Many foreigners who enter the destination countries with entertainment visas to supposedly perform at bars or cabarets, do not actually perform at all, but are unlawfully forced to directly entertain customers, prostitute or perform miscellaneous administrations.

- Sneaking at the border

Sneaking is a way to cross the border without an immigration check, and without notice by the immigration officer, such as migrants from Mexico to the U.S.A, from Lao to Thailand. In addition, some pass through the immigration booth at the airport by sinking down out of sight, and in the case of sneaking at sea, stowaways pass the immigration check at the seaport by hiding in the container of the ship.

2. Illegal After the Border

- Overstay

Many foreigners have entered the country on tourist, student, spouse and entertainment visas. Then they stay beyond the terms of their visas and their stay becomes illegal.

- Non-permitted labor

Many foreigners have entered the country on tourist visas and started working without permission from the authorities or changing their visa status as required.

3. Legal Entrance

Legal entrance can be done in many ways. In some countries, people can cross the border without being checked, like in Nepal and India. In this case, they can cross the border and are still considered to be legal.

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C. Use of Force / Coercion

1. Retention of Passports / Identity Documents

Retention of passports / identity documents, are often used to force the women into prostitution, controlling them and keeping them from fleeing or going to the police. This usually happens among women who enter the destination country as potential tourists.

2. Threats and the Use of Violence

Threats and the use of violence are mainly directed at the woman. Occasionally, it extends to her family abroad. The threats often involve physical violence when it concerns the family, or upon being turned over to the police, the women are told that they will be beaten and raped before they are repatriated to their country of origin.

3. Captivity

In the August 2002 issue of *Time* magazine, it was reported that in Tonduchan, South Korea, Filipino and Russian women were sold into sexual slavery in nightclubs after being tricked that they were going to be bartenders or waitresses. But once they got there, they were locked up and forced into prostitution, allowed only to go out for 3 minutes to make a phone call, otherwise they had to pay a penalty.

4. Deception

- False knowledge

Traffickers give false information to victims, such as “even if you escape, you will be apprehended by the police and you cannot return to your mother country” etc.

D. Exploitation

1. Debt Bondage

Upon arrival the women are told that they owe a certain amount of money for their entry, etc. and must work to reimburse the debt.

2. Extortion

Traffickers call the family of the victims in their home country and demand large sums of money as payment. If they will not give it, traffickers threaten to kill or rape the victims. The family can hear the victim’s screaming over the telephone.

3. Hard Working Conditions

Victims of trafficking work illegally in the “three D - jobs” - dirty, difficult, and dangerous.

4. Selling Victims to New Agent

Without their knowledge, victims of trafficking are sold twice or more times to several agents, hence, there seems to be no end in paying their debts.

VI. FORMS OF EXPLOITATION

Trafficking is one of the most profitable illegal businesses. It generates huge income for the traffickers / exploiters. The two most common forms of exploitation are:

A. Sexual Exploitation (prostitution, sex tourism, pornography, etc.)

Regardless of strict law enforcement, prostitution still exists in nightclubs, hotels, guesthouses and restaurants, which operate late until midnight or until dawn.

A lot of trafficked women are detained and forced to work as prostitutes in many countries without being paid. The worst situation is when the women have nearly paid all their debt for coming overseas to the trafficker, only to find out that they are sold again to another trafficker or brothel owner and the process of paying back the debt restarts again.

In Nepal, the process of trafficking of girls and women has been evolving since traditional times. Long ago, girls were brought from different parts of the country to serve as attendants and cooks in the palaces and wealthy homes of Katmandu. Many of them were used as objects of recreation and sexual pleasure. Although in a different form, this process continues to this day as girls and women from Nepal villages are trafficked to cities in India and elsewhere to work as prostitutes and laborers.

As regards sex tourism, Indonesia has become the target for child sex tourism and the networks of international pedophilia has spread in many countries.

Pornography is viewed through the Internet as a means of sexual exploitation especially of women and children.

B. Labor Exploitation (illegal labor, bonded labor, etc.)

Many people are trafficked to work abroad for higher salaries than they could get in their home country, and most of them are exploited by their employers. In many cases their wages are fraudulently cheated either by their exporting agents or their employers. The worst are those who have mortgaged or sold their land to pay for the trafficking fee but are sent to destination countries only to be stranded in a foreign land without jobs or a means of living.

In Lao, in 1994, four illegal agents were arrested for recruiting people in Vientiane. In one case, an illegal agent went to the villages of Bokeo province and offered money to the ethnic minority families in exchange for their children's labor in factories, or as servants and as waitresses. The children ended up in Chiang Rai Province, Thailand. Officials in Savannakhet province reported that more than 15,000 of their youth mostly young girls under 15 years of age sought employment in Thailand in 1995.

C. Others (begging, false adoption, organ trafficking etc.)

In Thailand, one of the forms of labor exploitation for women and children is begging. Most of them are Cambodian and are exploited by organized crime syndicates. They are lured, but are also willing to be brought to Thailand to work as beggars. Some have to pay the traffickers for the trafficking management. While in Thailand they have to work under the control of agents who provide them with shelter and protection.

In Indonesia, many Indonesian pregnant women have been trafficked to go abroad. After they give birth to their babies in the destination country, the babies are sold by the agent to the prospective or adopting parents.

In Russia, there were more than 700 cases of stolen hearts and livers. Criminals took the organs from the corpses of those who have no relatives to bury them. In Argentina, criminals took the eyes of dead people after faking death reports.

VII. PROBLEMS AND SOLUTIONS IN DETECTION, INVESTIGATION, PROSECUTION, TRIAL AND PUNISHMENT

A. Problems of Detection, Investigation and Prosecution of Trafficking in Women and Children

1. The lack of Information from the Victims

It is difficult to detect, investigate and prosecute the trafficking in women and children.

In many cases, women victims of trafficking believe that they will get good jobs and high salaries in destination countries, therefore they do not think of themselves as a "victim". On the other hand, most child victims of trafficking have no idea where to request help. Victims of trafficking cannot be expected to declare their damage to the police or other law enforcement agencies (herein after called "law enforcement") in source / sending countries.

The situation of victims of trafficking must, to a certain extent, be respected in destination countries; they are often scared of reprisals against themselves and their families. In most cases they

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are residing illegally in destination countries, so they also face punishment or deportation, and have little trust in law enforcement. Whenever law enforcement detect trafficking cases, the victims of trafficking are reluctant to talk about the criminal organizations.

2. The Complexity of Modus Operandi

The Modus Operandi employed in trafficking of women and children involves expertise and comes in various forms. That's why it is difficult to detect them at the time of departure from source countries or upon entrance to destination countries.

3. The Problem of Corruption

In some cases, the corrupt staff of law enforcement, especially the police and the immigration bureau, are involved in trafficking. Hence, it becomes more difficult to detect, investigate and prosecute the offenders.

4. The Lack of Knowledge on the Part of Law Enforcement About the Problem of the Trafficking in Women and Children

In some countries, law enforcement officials have little knowledge about the problem of trafficking in women and children and they treat the victims not as the victims but as offenders.

5. The Leniency of Laws that Punish a Trafficker

In many countries, the man-power of law enforcement is limited. So if the law punishes traffickers leniently, law enforcement would rather investigate and prosecute other offenders who commit more severe crimes like rape than the traffickers.

6. Involvement of Many Organized Criminal Groups in the Trafficking Process

In many countries, law enforcement believes that organized criminal groups participate in trafficking cases and it is difficult to detect them because many groups, of which relationships are hard to prove, are involved in the trafficking process. In some cases, it is possible to detect the organized criminal group that exploits the victims of trafficking in destination countries. But it is difficult for law enforcement in destination countries to detect the other organized criminal groups who were involved in the invitation or transportation process.

B. The Countermeasures to Solve the Problems of Detection, Investigation, and Prosecution

1. On the Part of the Victims

- The lack of information from the victims

The main strategy is to conduct public information campaigns which would encourage victims to give information to law enforcement in destination countries.

- Non-punishment of the victims

If the victims of trafficking are not punished in destination countries, law enforcement can easily extract information from the victims. However, the victims of trafficking in women and children, especially women, are often illegally residing or are engaged in illegal work in destination countries. Therefore, each country must develop appropriate means, in accordance with its basic principles, to avoid punishing the victims of trafficking, such as "immunity" or "prosecutorial discretion".

- Providing the victims of trafficking with a permanent or temporary residence status in destination countries

It is probably an effective way to get evidence from the victims of trafficking to provide them with a permanent residence status, but it might not be acceptable for many countries. However, we must consider providing them with temporary residence status at least during the criminal proceedings or process, for their protection and assistance.

- Provide suitable protection and assistance to the victims of trafficking

The victims of trafficking have little trust in the law enforcement of the destination countries, so it is necessary to provide them with protection and assistance like medical care, home care, language and legal assistance not only from the government agencies but also from the NGOs. In this way they can be cured, assisted and persuaded to talk about their ordeal to the law enforcement. NGOs can play an important role in the persuasion.

- Developing effective means to get the statements of the victims

It is difficult to get a statement from a victim of trafficking as evidence to punish traffickers, because the victims do not want to appear before investigators and before the court repeatedly, and they also may not want to be faced with any pressures, especially in court. Besides they may also want to go back to their home country as soon as possible. Therefore, developing effective means to get the statements of the victims that would reduce their burden, and would be admissible as evidence in court, is important. Such means should of course be, in accordance with the basic principles of the criminal procedure of the respective countries.

In Japan, pre-trial statements are, in principle, inadmissible in court. However, when there is cause to believe that a victim of trafficking who has voluntarily furnished information at the interview by a public prosecutor may be subjected to pressures to withdraw or change such statements in testimony at the trafficker's trial, the public prosecutor may request the judge to interrogate a victim as a witness before the first date fixed for the trafficker's trial. And a document that contains a statement of a victim given before a judge may be used as evidence at the trafficker's trial under certain conditions. For example, a victim cannot appear or testify on the date for the trafficker's trial because she is staying outside of Japan.

2. For Modus Operandi Complexity

It is necessary to train law enforcement to deal with skillful and various Modus Operandi.

3. For Corruption

There is a need to educate the staff of law enforcement on the problems of corruption, severe penalties and betterment of working conditions.

4. For the Lack of Knowledge About the Problem of Trafficking in Women and Children

The staff of law enforcement should be indoctrinated with the problem of trafficking in women and children.

5. For the Leniency of Laws

The enactment of a law to punish the traffickers severely enough as other vicious criminals must be established in each country.

6. For the Organized Criminal Groups

Quick exchange of information about organized criminal groups that participate in the trafficking process among source, transit and destination countries is indispensable. And we must consider the introduction of a "Special Task Force" that will specially focus on the investigation of trafficking in women and children and / or smuggling in each country, especially in a high scale problem country. The task force will be the information center collecting records of traffickers, agents, offenders and related criminals, and also exchange information with other countries. The task force will also be the expert at detecting, investigating and performing sophisticated operations to suppress trafficking of women and children. Officers in the special task force should have the language ability to communicate with other countries, especially with the destination or origin country of the trafficking. Equipment and readiness to succeed in the mission should also be provided. The task force in each country should be alert to cooperate and have the capability to support the international mission. The team should have the ability to investigate, search for evidence or arrest criminals when a request is made from member countries.

C. Problems and Solutions in Trial and Punishment

1. Problems

As described above, criminal cases involving human trafficking are usually transnational organized crimes, so it is important to make clear the position and role of the defendant to decide the appropriate sentence. However, if a criminal case is disclosed, the whole truth of it is not necessarily made clear, especially if the head of the criminal organization is difficult to identify. Moreover, defendants often deny indicted facts, especially conspiracy or the “*mens rea*” of the crime, or insist on an alibi.

In those cases, statements of accomplices and victims are very important evidence. However, if they are afraid of the defendant, they may neither be able to come to the court nor tell anything about him for fear of retaliation. If a statement is made against the defendant, the deponent must be able to state this without undue influence, and he/she should be protected both inside and outside of the court.

2. Suggested Solutions

- (i) Voluntary testimony of the witness could not be obtained due to absence of Witness Protection Programs as suggested by the U.N.
 - Establishing procedures for the physical protection of the witnesses and their relatives in criminal proceedings, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons.
 - Providing evidentiary rules to permit witness testimony to be given in a manner that ensures the safety of the witness, such as permitting testimony to be given through the use of communications technology such as video links or other adequate means.

The Convention additionally provides for the assistance and protection of victims. It states that: each State Party shall, subject to its domestic law, enable views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defense.

- (ii) The importance of protecting the identity of trafficking victims facing retaliation from traffickers, in accordance with the Protocol which requires States to protect the identity and privacy of victims including the confidentiality of the legal proceedings is not recognized.

In addition, The Protocol says that each State Party shall ensure that its domestic legal or administrative system contains measures that provide to victims of trafficking in persons, in appropriate cases:

- Information on relevant court and administrative proceedings;
 - Assistance to enable their views and concerns to be presented and considered at appropriate stages of criminal proceedings against offenders, in a manner not prejudicial to the rights of the defense.
- (iii) Those provisions do not contain any legal obligations, and it is not so easy to implement these provisions of the Convention and the Protocol because legislative changes are necessary in States. However, States should endeavor to do so.

In Japan, the privacy and identity of a victim is protected. To reduce the mental burden of a witness / victim, the following provisions of the code of criminal procedure should be adopted.

- An attendant of the witness may be present
- The setting up of a screen which separates the witness and the accused or spectators
- A video linked method of examination, wherein the witness is in a separate room from the court and testifies to the questioner inside the court room through a screen / sound; this is a measure which The UN Convention suggests. From June 2001 when this method became usable to September 2002, 23 cases of using the video links have been reported in the Tokyo District Court.

- (iv) Many countries do not have a special law against trafficking, so prosecutors use various kinds of laws, such as criminal law, immigration control law, anti-prostitution law and so on, to prosecute traffickers. The problem is, those laws are not supposed to punish severe trafficking cases by a transnational organization, so defendants who committed serious crimes will not necessarily receive heavy sentences.

Trafficking of women and children is an inhumane crime committed against the weak, which violates their fundamental human rights. Therefore, appropriate punishment should be imposed in order to effectively prevent such crimes.

- (v) Many countries have the problem of delays in their criminal procedure that is: investigation, prosecution and trial. A long procedure makes it more difficult to uncover the real facts in criminal cases, and diminishes the general deterrent effect of punishment. Moreover, it will continue to burden trafficking victims with their trauma for a long time if they have to testify their cases in court after a long interval. Consequently, we must make every effort to implement the principle of speedy criminal procedure.

VIII. LEGISLATION ISSUES

Trafficking is a multi-dimensional issue. The legislation issue can be tackled as both a criminal and a human rights issue.

A. Trafficking as a Criminal Issue

The role of the criminal justice system and criminal law is decisive and necessary. That is why the International Community has adopted two instruments to tackle trafficking, namely:

- The United Nations Convention against Transnational Organized Crimes; and the
- The United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children, supplementing the UN Protocol above mentioned adopted by the UN General Assembly in November 2000.

The principle is as follows: States must first be a party to the Convention in order to become a party to the Protocol. As of 15 August 2002, there were 106 signatories to the Protocol and 14 ratifications. The Protocol will enter into force if 40 members ratify it. Moreover, while some countries have domestic laws related to trafficking (which can be amended, however), others do not have any. In order to prosecute and punish the traffickers or assist victims, these countries can apply some non-specific laws such as:

- Criminal Code
- Immigration Law
- Law related to human rights
- Law related to money laundering
- Victim compensation law
- Labor Law

And yet, from a penal viewpoint, trafficking must be criminalized. This approach involves legislative reforms and the introduction of more stringent laws. This policy also aims at intensifying training and cooperation of law enforcement officials for the effectiveness of the criminal system. But, achieving this goal should not bring about insensitivity towards the victims of trafficking. For, in some instances the victims' security and protection are placed in a subordinate position to the interests of prosecution and trial. The protocol has achieved those goals and made some requirements of the states.

Thus, the countries that have not yet enacted domestic laws relating to trafficking can do so by including the following provisions:

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1. Adequate Provisions of the Law to Address the Special Needs of Victims

States shall incorporate additional relevant provisions which are both gender and child sensitive in terms of education, housing and care.

2. Protection of the Victim as Well as His/Her Relatives

States shall ensure the safety of the victims, not just those who are witnesses at a trial. To the extent possible, States shall not reveal the identity of victims in connection with trials. Access to this kind of information should be limited to persons such as law enforcement officials.

3. Guarantee of the Right of Victims to Compensation

First the offender must provide compensation. In case of impossibility, States shall consider providing compensation by establishing funds financed partly by the confiscated assets, profits made by the convicted party or fines paid.

B. Trafficking as a Human Rights Issue

On the assumption that any person, even an offender has basic human rights and fundamental freedoms, trafficking in persons itself is seen as a serious violation of human rights. Thus, states as the protectors of human rights of the people living in their territory are held responsible for the fight against trafficking. All the measures to tackle the phenomenon, as well as measures to support and assist the victims, are guided by this principle.

The strength of the protocol and national laws lie in the fact that they provide requirements for legal measures, through combining human rights and law enforcement. The enactment of domestic law shall make a balance between the two approaches.

IX. COOPERATION AMONG DOMESTIC AGENCIES

“Domestic agencies cooperation” may involve the government or non-government organization (NGO) within a country, by using formal and informal cooperation, for the purpose of preventing or tackling the trafficking of women and children. Domestic cooperation is an important measure to prevent and tackle trafficking but many countries still have the following problems:

- Lack of cooperation among agencies; and
- No clear roles and responsibilities among domestic agencies.

The cooperation should have good planning and management such as, a good focal contact point, clear strategy and good monitoring. The cooperation should aim to prevent and tackle the problems, even if the final result may not happen in the country itself.

The cooperation in a country may comply with the UN convention framework for direction and guidance.

A. The Purpose of the Cooperation

The cooperation among internal agencies shall aim at the following purpose:

- To prevent and combat trafficking in persons, paying particular attention to women and children; and
- To protect and assist the victims of trafficking with full respect for their human rights.

B. Grouping the Agencies in the Same Area

There are many agencies in a country, which are involved in trafficking problems, but they focus on different areas. The grouping up of relevant agencies in the same area to work together can bring more efficiency in the prevention and tackling of the problems. The idea of grouping should be as follows for example:

- Among the police, immigration, coast guard, public prosecutors and judges etc.
Improve the working method to be faster or have a “Fast Track” system.

- Among the Ministry of Education, Foreign Affair, Interior and Labor, NGOs, legislation system, communities etc.

Providing awareness information for women and children.

- Among the Ministry of Health, Interior, NGOs, social workers etc.

Health care, home care services, vocational training programs.

C. The Result of Cooperation

The cooperation may focus on the outcome of trafficking. Trafficking involves the following issues:

- Migration problem: the cooperation should focus on the prevention of illegal immigrants.
- Criminal problem: the cooperation should focus on finding the real criminals such as the traffickers and not punishing the trafficked women or children.
- Human rights problem: the cooperation should focus on treating the suffering people as victims.
- Labor problem: the cooperation should focus on finding jobs for workers in their own countries or other countries.
- Health problem: the cooperation should focus on giving health care to victims.

X. CONCLUSION

There are many solutions on how to prevent and tackle the trafficking of women and children in this paper. However, it is considered that some special countermeasures should be designed to combat this problem. These countermeasures were extracted from the whole idea but the measures we thought were best and possible to attain in solving the problem of trafficking among countries are as follows:

A. Speedy Criminal Procedure

Delay in criminal procedure, particularly in investigation, prosecution and trial is a big problem in many countries. Considering that trafficking is a serious crime which infringes the human rights of the victims, it is imperative that a speedy criminal procedure should be adopted to effectively prevent such crimes.

B. Effective Means to Get the Statements of the Victims

Adopting more effective ways to get statements from the victims that is admissible in court as evidence against the traffickers is important. It will also reduce the pressure and burden of the victims. These systems must of course be in consonance with the basic principles of the criminal procedure of the respective countries.

C. Witness Protection Program

Unless victims can testify without undue influence, the true facts of the case could never be made clear. In many countries, victims and/or witnesses find it hard to tell practically anything inside the courtroom, nor even come to the court for fear of retaliation. Therefore, a Witness Protection Program is very important to ensure the victim's and/or witness' safety and reduce their mental burden.

D. Special Task Force in Law Enforcement

The problem on how to tackle the trafficking of women and children is very difficult and complicated. It is therefore recommended that a large scale special task force be set up in every country. The task force will serve as the records information center and an exchange information center to other countries. It should be equipped with expertise in detection and investigation; have proficiency in language; equipment; the readiness to accomplish the mission successfully and the capability to support an international mission. The creation of a special task force will make effective the suppression of international crime especially the network of trafficking women and children.

GROUP 2

THE EFFECTIVE ADMINISTRATION OF CRIMINAL JUSTICE TO TACKLE THE SMUGGLING OF MIGRANTS

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I. INTRODUCTION

The 122nd International Training Course on Crime Prevention and the Treatment of Offenders with the theme ‘The Effective Administration of Criminal Justice on Trafficking in Human Beings and Smugglings of Migrants’ aims to bring into the foreground the current global situation on human trafficking and smuggling of migrants - their causes, magnitude, impact, as well as the problems involved in the detection, investigation and prosecution of offenses relative thereto. It also aims to explore and develop effective ways to tackle this problem based on the experiences and policy systems of the countries affected by this global phenomenon. Our group was composed of participants from China, Indonesia, Japan, Nepal, the Philippines and Thailand and has been assigned to analyze the causes of human smuggling, the *modus operandi* being used in its commission, the involvement of criminal groups in its execution, and the problems as mentioned earlier. We also discussed the existing countermeasures used to combat human smuggling in any form.

In analyzing the profile of human smuggling, our discussions were focused on concerns and challenges facing the participating countries. It is interesting to note that despite differences in cultural, economic and social backgrounds, common objectives such as combating human smuggling bond these countries together - to learn from each other and to develop a high sense of commitment for international cooperation.

II. CURRENT SITUATION ON HUMAN SMUGGLING

A. International Migration

According to the International Organization for Migration¹ (IOM), about 160 million people were living outside their country of birth in year 2000. This number is continuously growing every year. While more than half (55%) of the international migrants remain in the same geographical region as their country of origin, about 45% are absorbed by a small number of developed countries. Men constitute 52.5% of the total international migrants, women being 47.5%. Asia has the largest number of international migrants followed by European and North American regions.

B. Illegal Migration and Human Smuggling

Legal migration when difficult to undertake induces people to seek alternative methods, usually illegal ones. When illegal migration is resorted to, it becomes a fertile ground for certain crimes such as

¹ Farooq Azam(2002), Chief of Mission/Regional Representative International Organization for Migration Bangkok, The Global Challenge of Human Trafficking and Smuggling, The 122nd International Training course of UNAFEI

human smuggling. Stated differently, human smuggling breeds illegal migration when methods used by smugglers become highly organized that detection is nearly impossible.

In the 1999 IOM report, China, the Philippines, Indonesia and Myanmar are listed as the top four countries with the largest number of illegal migrants in the world.

It is believed that illegal migration continues unabated because of the existence of organized criminal groups assisting the illegal movement of people. Existing literature shows that hundreds of thousands of people are smuggled every year, 50% of them being assisted by organized crime groups².

C. Economics of Human Smuggling

Human smuggling is a lucrative business that generates about US\$ 7 billion annually in profits for organized crime groups. The profitability of this illegal activity is attributed to the lower risk of detection, prosecution, and arrest attached to it and the great demand for smuggling services.

On the other hand, smuggled persons face a high risk of economic difficulty. Most of them even sell or mortgage their properties to pay the smuggling fees ranging from US\$ 10,000 - 30,000. Aside from being ineligible for welfare, medical benefits or other government services, they are also vulnerable to economic abuse from employers who often take advantage of their illegal status by giving them lower salaries.

On the part of the receiving country, smuggled persons are seen as a threat to jobs, a drain on overburdened social services and a threat to cultural traditions. One government has complained, "There is a limit to how many newcomers can be absorbed, and the rate at which they can be assimilated into the existing system".

D. Smuggling Routes

People being smuggled go to great lengths to conceal their route and the individuals or organizations responsible for their travel. Generally, the route used by human smugglers varies from country to country depending on the geographical proximity between the sending country and the receiving country. The existence or non-existence of effective countermeasures necessary for the detection of irregular migration likewise determines the smuggling route.

For the purposes of this Group Report, discussions about smuggling routes were focused on the eleven (11) participating countries and their category in order to draw a closer look at the problem.

China is a sending, a receiving, and a transit country of illegal migrants. Many Chinese sneak out of the borders mostly with the assistance of smugglers into Japan, South Korea, Thailand, Singapore, U.S.A, The United Kingdom, Italy and France. Conversely, it receives illegal migrants from Pakistan, North Korea, Bangladesh, Sri Lanka, Mongolia, and Russia. Similarly, it is being used as a transit point by illegal migrants from neighboring countries seeking illegal entry to other countries in the Asia Pacific region.

Thailand is a receiving, a sending and a transit country. As a receiving country, it is a destination for illegal migrants from Myanmar, Cambodia, Laos, China, India, Pakistan and Nepal whose number is estimated at around 1,000,000 - 1,200,000. As a sending country, Thailand has emerged as one of the top sources of migrants looking for a better life in countries like Japan, Singapore, Brunei, Australia and U.S.A. And as a transit country, it receives migrants from China, India, Pakistan and Nepal bound for Europe, America, Australia, New Zealand and Malaysia.

Malaysia is both a receiving and a transit country. As a receiving country, it is estimated that 800,000 to 1,000,000 illegal migrants mainly from Indonesia and the Philippines are living there. As a transit country, its porous borders permit the entry of illegal migrants from other Asian countries who are destined for Australia, Singapore and Saudi Arabia.

² Commission on Filipinos Overseas

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Japan is a receiving country only. Since the time of the “bubble economy”, a lot of people from China, the Philippines, Thailand, Pakistan, South Korea and Bangladesh have entered illegally in Japan. It is believed that the influx of these illegal migrants would not have been possible without the assistance of organized crime groups such as “Snake Heads” and Japanese gangsters, among others. Due to the burst of the bubble economy, the total number of deported migrants has decreased. On the other hand, though the number of the collective stowaways once fell in the latter half of 1999, it has begun to increase again in the latter half of 2000.

Cote d’Ivoire is only a receiving country of illegal migrants from Burkina Faso, Mali, Liberia, Togo, Benin and Guinea. Porous land borders and economic disparity made it possible for illegal migration to thrive in this tiny but economically developed country of Cote d’Ivoire.

The Philippines is mainly a sending country. The top ten countries of destination of undocumented Filipinos are the United States, Singapore, Canada, Japan, Italy, the United Kingdom, Saudi Arabia, Greece, Germany and France.

Laos is mainly a sending country like the Philippines. The presence of a common border and the relative proximity between Laos and Thailand make the latter accessible even to common Laotians who travel on feet, by car, or by small boat.

Among the participating countries, Egypt and Indonesia are the transit points of migrants bound for another country. People from Sudan, Nigeria and Kenya are using Egypt to go to various parts of Europe. In the same way, people from various Asian countries use Indonesia to go to Australia, Singapore, Malaysia and Arab countries.

Moreover, it is worth mentioning that Nepal has rare cases of human smuggling, while Egypt and Venezuela seem not to have any problem with human smuggling at all although some literature indicates the likelihood of the existence of this illegal activity in these two countries in view of the effects of globalization and the covert nature of smuggling operations.

Finally, it is still indubitable that highly developed countries remain the most favorite destinations of illegal migrants. U.S.A, Italy, United Kingdom, France, Canada, and Australia, top the list.

E. Causes of Human Smuggling

Despite vigorous efforts of every country to control illegal entry of migrants, the number of people illegally moving from one country to another in search of the proverbial “greener pasture” increases every year. Several factors, which have been identified by all the participants, are classified into push and pull factors.

Push Factors:	Pull Factors:
<ul style="list-style-type: none">- Poverty- Lack of job opportunity- Disappearance of traditional livelihood- Lack of education- Low status of women- Break down in traditional family and support system- Abundance of smugglers or go-betweens- Alleged success stories or exaggerated accounts of those who migrated- Civil unrest- Internal armed conflict- Natural disasters	<ul style="list-style-type: none">- Higher salaries- Better job opportunity- Modern society- Porous borders- Existence of organized means of migration- Existence of ethnic groups

III. MODUS OPERANDI

A. Modus Operandi

The modus operandi used by organized criminal groups varies depending on the migration system and control of a country. The tighter and more restrictive the system, the more sophisticated or complex the modus operandi may become. From the point of view of the participating countries the modus operandi may be classified into two categories: (1) by deceiving immigration officers (2) by avoiding immigration checkpoints.

1. By Deceiving Immigration Officers

Illegal migrants employ deception techniques upon immigration officers to obtain entry to one country by air, by land, or by sea, and in an attempt to acquire status of residence. The means used, especially in the case of travel by air, are as follows:

- (i) Use of forged documents
- (ii) Misrepresentation of identity
- (iii) Abuse of tourist or any other legal visas
- (iv) Use of stolen passports and blank visas

Forgery of travel documents is the most commonly used modus operandi all over the world. The main methods of forgery are photo-substitution, bio-date-page substitution and date-page alteration. The use of these methods requires more sophisticated ways to avoid suspicion of irregularity of documents from immigration officers.

Abuse of tourist or any other legal visas is difficult to establish, as the immigration authority may not know at once the real purpose of entry because the passports and visas appear to be legal although the intended use may be different. In Indonesia for instance, illegal migrants are disguised as entertainers, fiances, students or businessmen. In the Philippines, obtaining an entertainment visa is the most common method.

2. By Avoiding Immigration Checkpoints

- (i) Transportation by sea or river

Vessels carrying illegal migrants avoid seaports and use coastlines to conceal their embarkation in various places within a country. The size and structure of ships vary depending on the methods of transportation. Some illegal migrants are hidden in a locked container or transported using structurally designed ships. Others are carried by large ships and eventually transferred to small rubber boats on the high seas. Smugglers use these methods to transport illegal migrants from China to Japan, and from the Philippines and Indonesia to Malaysia. In Laos however, illegal migrants need not cross the sea to enter Thailand. They cross the Mekong River separating the two countries by means of small boats.

- (ii) Transportation by land

For countries with shared land borders, it is not easy to prevent the influx and efflux of illegal migrants. Illegal migrants can easily come to the destination country by crossing the border on foot or by car. Border crossing is widely used by illegal migrants from Myanmar, Cambodia and Laos to Thailand, from Thailand to Malaysia, from North Korea, Laos, Russia, etc. to China. Several organized criminal groups are reportedly behind this illegal activity.

B. Involvement of Criminals or Organized Criminal Groups in Smuggling.

Human smugglers are said to be behind the illegal movement of people either through the immigration checkpoints or through the borders or seacoasts. For example, in Japan, human smugglers that include, among others, "Snake Heads" use sophisticated modus operandi to carry out their operations. Their functions can be divided into three parts: "Inviting Snake Heads" as recruiter, "Carrying Snake Heads" as transporter, and "Receiving Snake Heads" as receiver. Lately, local gangsters are collaborating with "Snake Heads" by acting as receivers of illegal migrants on the high seas. Even though the authorities concerned can catch the tail of such a group, they cannot go after the "head" either because the captured offender does not confess to anything or the smuggling trail is so

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complex that finding the lead is almost impossible. Law enforcers may be aware of the existence of these groups but they may not possibly know the whole picture of the smuggling operations.

Changing methods or improving technology of people smuggling as a response to legislative and law enforcement activities is the principal reason why these criminal networks survive. Alarming, organized criminal groups are now showing an increasing sophistication in the hope of moving a larger number of people at higher profits.

**IV. PROBLEMS OF DETECTION, INVESTIGATION, PROSECUTION AND PUNISHMENT OF
THE CRIME OF HUMAN SMUGGLING**

A. Problems of Detection of Smuggled Migrants

1. Problems of Detection of Illegal Migrants at the Immigration Checkpoints

- (i) Lack of equipment to detect forged documents.
Some countries do not use high-tech equipment, such as scanners, due to budgetary constraints since the delivery of basic services is still their top priority.
- (ii) Lack of security features of documents such as passports or visas.
- (iii) Lack of information exchange between the sending country and the receiving country on the changes made in their passports, visas and other immigration requirements.
Some countries still consider this information as confidential and national security matters.
- (iv) Increasing mobility and sophistication of smugglers. The organized criminals groups are usually “one step ahead of the government” and they tend to change the modus operandi as quickly as the governments take countermeasures to eliminate them.

2. Problems of the Detection of Smuggling of Migrants by Crossing the Borders

- (i) Lack of manpower for guarding or patrolling the borders and coastlines. Some countries have not enough people to man their borders and coastlines for financial reasons.
- (ii) Porous borders or the presence of numerous entry points. Some countries have very long coastlines such as Japan, the Philippines, Indonesia and Malaysia and still others share land borders. Thus, it is impossible to guard or patrol the entire coastlines and borders.
- (iii) Lack of hi-tech facilities such as infrared noctovision equipment.

B. Problems of Investigation and Prosecution of the Crime of Human Smuggling

Unlike the international criminal community, our law enforcers and prosecutors observe both the geographical and jurisdictional boundaries set by the countries in the conduct of their investigations or prosecutions of crimes. The following are some problems relative thereto:

- (i) Sophisticated means of smuggling make it very hard for investigators and prosecutors to unfold the identity of the offenders.
The use of pyramid structures of hierarchy and the creation of “criminal cells or networks” in various countries, each with specific functions, make the “brain of the organization” almost invisible.
- (ii) Lack of effective system of information exchange among various agencies involved in countering human smuggling.
Some cases of human smuggling are not effectively investigated or prosecuted because the information gathered by various agencies involved in addressing this problem are not well coordinated.
- (iii) Lack of cooperation from the illegal immigrants.
This problem occurs because of the following conditions:

- (a) Illegal migrants are aware that their entry to one country is illegal and therefore punishable under its immigration laws. Hence, they will not likely to come out in the open and give information on how they were smuggled for fear of prosecution.
- (b) Some smuggled migrants even if they are already being exploited are unlikely to call the police for fear of revenge from the smugglers.
- (c) Some smuggled migrants do not trust the police for fear of physical harm the latter might inflict against them.
- (iv) Lack of an efficient information exchange system of both the sending and the receiving countries that will facilitate the sharing of vital information on the criminal records or dossiers of organized criminal groups.
Limits may be placed on the intelligence that countries are willing to share.
- (v) Lack of evidence, real or oral testimony.
As for human smuggling cases, the planning, conspiracy, preparation, recruitment, procuring of commission fees, transportation of migrants, illegal entry to another country, receiving migrants and other criminal acts are normally committed over several countries. Evidence of human smuggling cases inevitably lies in many countries. It causes difficulties for criminal justice officials to gather evidence expeditiously and effectively over several different criminal jurisdictions. Moreover, evidence gathered overseas might have some problems of admissibility and/or credibility at trial in some countries. Thus, the investigations and prosecutions of human smuggling cases face serious problems in gathering evidence.
- (vi) Existing laws against human smuggling are inadequate as they are still more focused on the migrant than on the smugglers.
- (vii) Lack of a sense of urgency on the part of law enforcers to dig deeper into smuggling cases.
This may be due to the fact that they are more concerned about solving crimes politically considered as more serious and pressing such as murder, kidnapping, terrorism, drug trafficking, etc.
- (viii) Lack of technical knowledge on how to use the international cooperation tools such as informal or formal mutual legal assistance.
- (ix) Absence or lack of systematic criminal procedures for taking testimony expeditiously.
In the Japanese criminal justice system, a judge may examine a witness even before the first trial date in order to secure the essential testimony. So a court can obtain a testimony from a witness who is a smuggled migrant and is scheduled to be deported to his/her country of origin in order to prosecute the smugglers. However, most of the developing countries do not incorporate such a system in their criminal justice procedure.
- (x) Limited language proficiency of the investigators in the course of the investigation of smuggled migrants.
This becomes a problem because some smuggled migrants do not speak major languages.
- (xi) Difficulty in acquiring jurisdiction over the offender, accomplices, and witnesses, due to the transnational nature of crime.
- (xii) Lack of judges and prosecutors and clogged dockets.
In the Philippines, 45% of courts have no judges and 25% of prosecutorial positions are still vacant because there were no takers. Low salaries and heavy tasks involved in prosecution and trial are said to be the reasons for the vacancies. Venezuela and Laos also have these problems.

C. Problems with the Punishment of the Crime of Human Smuggling

- (i) Low penalty for illegal migrants
Some countries raise concerns about the low penalty for illegal migrants. However, we were not able to reach an agreement that heavier punishments of illegal migrants would solve the issue of smuggling. We consider it possible that educative measures for illegal migrants can stem the tide, despite the fact that smuggling may leverage on low penalty for illegal migrants.
- (ii) Existing laws against human smuggling are inadequate as they are still more focused on the migrant than on the smugglers.

D. Problems of Corruption

Corruption is a disruptive factor in the implementation of immigration policies. While it is deeply connected with the economic, social and cultural environment of a country, major causes are as follows:

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- (i) Opportunities, which depend on the extent of civil servants' involvement in the administration of the agency.
- (ii) Salaries, as poorly paid civil servants succumb more easily to petty corruption.
- (iii) Policing, i.e., the probability of detection and punishment. How likely will a corrupt official be caught and punished for being corrupt?

VI. COUNTERMEASURES

A. Countermeasures against the Problem of Detection

1. At Immigration Checkpoints

- (i) Improvement of technology for travel documents
Various countries now have improved the quality of passports and visas to prevent forgery or falsification. Microform marks are used in China, Cote d'Ivoire, Egypt, Thailand and Japan. Rainbow printing is used in China, Cote d'Ivoire, Egypt, Laos, the Philippines and Thailand. Laser printing is used in China, Cote d'Ivoire, Egypt, Philippines, Thailand and Japan. Intaglio printing is used in China, Egypt, Indonesia, the Philippines and Japan. Just recently, the United States of America announced that it will soon implement a visa card system where fingerprints, handprints and other physical identification marks are used to protect the integrity of the system.
- (ii) Training for Immigration Officers/Inspectors
Participating countries conduct regular training for their immigration inspectors to improve their knowledge and inspecting skills. (e.g. how to identify fraudulent documents).
- (iii) Movement Alert Lists
Some countries, mostly developed ones, (e.g. Australia) have developed a computer database that stores details about people and travel documents of immigration concern. The "movement alert lists" enable immigration officers to track down the people going in and out of their jurisdiction and analyze this information in making decisions.

2. Against Border Crossing

- (i) Strict patrol of the borders and coastlines. Strict patrol of the borders and coastlines is an effective way to crack down on human smuggling.
- (ii) Use of hotlines to report suspicious arrival of smuggled people. It is very difficult to combat human smuggling without the participation of the local community especially in areas where human smuggling is known to exist. Encouraging them to report to the police about any suspicious movements of foreigners in their area will help law enforcers in making the surveillance. For this purpose, hotlines maybe provided by the government to facilitate the dispatch of vital information on these matters.

B. Countermeasures against the Problem of Investigation, Prosecution and Punishment of the Crime of Human Smuggling

1. Imposition of Penalties

Almost all countries have immigration and other laws to punish illegal migration. These serve as a deterrent against illegal migrants seeking entry into a country. In the case of the organized criminal groups, there is yet a special law to be enacted to specifically deal with them, although their criminal acts may be punished under several domestic laws such as the immigration law, the penal law and so forth. Accomplices who transport illegal migrants and those who harbor them are also criminally liable.

C. General Countermeasures

1. Establishment of Information Exchange Among Government Agencies

Some countries have developed an information exchange system that serves as a link between and among the agencies concerned with human smuggling or illegal migration. This is useful to facilitate receipt and transfer of information regarding the movement of people into and outside of their territory. For instance, in China, they have a special unit composed of representatives from several departments

such as from the airline companies, customs, quarantine, and public security to ensure that people coming in and out of the country have valid travel documents. In the Philippines, there is a “Shared Government Information System” that stores information on a database on the movement of Filipinos. It also has an agency with a database on transnational organized crimes such as terrorism, human trafficking and smuggling, drug trafficking, etc. The organization is called the Philippine Center for Transnational Organized Crimes.

2. Enlistment of Non-government Organizations in the Combat against Human Smuggling

In some countries like the Philippines, Thailand and the Nepal, non-government organizations are actively participating and cooperating with the respective governments in their fight against all forms of exploitation including human smuggling. Most victims of organized criminal groups prefer to avail the services of the NGOs than those of the government. They trust NGOs more than the government authorities, especially the police.

3. International Cooperation

Most of the countries are signatories to several UN Conventions and Protocols relative to smuggling of migrants. Aside from this, some of them have other bilateral or multilateral agreements. For instance, the Philippines, Malaysia and Indonesia have the so-called “Trilateral Agreement on Information Exchange and Establishment of Communication Procedures”. The Japanese Coast Guards and the Ministry of Public Security of China have an agreement to exchange information about illegal migrants. The Japanese Coast Guard also collaborates with the Japan National Police Agency to discover suspicious boats. These three agencies have established an information exchange network and hold meetings to discuss certain issues relating to smuggling. Presently, coastguard authorities of both countries are conducting a strict patrol around their seacoasts.

It must be pointed out that informal and formal mutual legal assistance is also available to help in the prosecution of criminal cases. However, some countries do not have an extradition treaty, or formal mutual legal assistance. In such a case, the informal one may be helpful.

4. Enhancing the Awareness of the People

Some countries, such as the Philippines, China, Indonesia and Nepal use mass media and/or non-government organizations to educate their people about the ill-effects of human smuggling.

VII. IMMIGRATION POLICY

Immigration policy means the general principles of immigration by which a government is guided in its management of its public affairs, specifically of immigration concerns. It is impressed with political interest of a State on matters of who may or may not enter its territory or jurisdiction. For instance, some countries utilize immigration policy for a specific purpose either political as to influence election results or economic, in terms of human investment.

According to some sources, an immigration policy may be classified into a discourage policy or an encourage policy. A discourage policy is said to be unfavorable to the migrants while an encourage policy is quite liberal and tends to welcome the entry of migrants.

In Japan, there was an amendment of the Immigration Control and Refugee Recognition Act in December 1989. According to article 73-2, a person is liable for criminal responsibility for the followings acts:

- a) Engaging an alien in illegal work in relation to business activities.
- b) Placing an alien under his control for the purpose of having the alien engage in illegal work.
- c) Repeatedly mediating either the procurement of an alien to engage in illegal work or the act specified in the preceeding item.

And there is also an amendment of the Immigration Control and Refugee recognition Act 1999 to criminalize an illegal stay after illegal entry. The provision came into force on 18 February 2000. In term of smuggling, for Japan, their immigration policy is characterized by these acts.

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The United States of America gave permanent residence status to 1,064,318 persons in the year 2000 under Title 18 of the United States Code Section 1181 (a) (b) (c). For this act, we might assume that The United States of America utilizes an encourage immigration policy. However, the United States of America also has a specific law against smuggled migrants, specifically under Section 1324 (a) Title 18 United States Code. And the United States of America also works hard to suppress the entry of smuggled migrants at the border by conducting strict border control of land and seacoasts. Thus, to assume the immigration policy of the United States of America is an encourage policy might lead to a misunderstanding of the issues. In this case, it is also easy to categorize the immigration policy of the United States of America.

VIII. LEGISLATIVE ISSUES

A. Criminalization of Smuggling of Migrants

The Protocol against the Smugglings of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, aims to prevent illegal migrants and punish their procurers. The criminalization of smuggling acts under article 6 of the protocol can be divided into 4 parts as follows:

1. Criminalization of the Following Acts of Smuggling of Migrants

- (i) producing, procuring, providing or processing a fraudulent travel or identity document for the purpose of smugglings of migrants
- (ii) enabling a person to remain illegally in the state.

2. Measures to Reinforce the Criminalization of the Acts Mentioned in (1) above
such as:

- (i) attempting to commit the acts
- (ii) participating as an accomplice
- (iii) organizing or directing other persons to commit the offenses mentioned in (1) above.

3. Providing for Aggravating Circumstances.(see page 22)

4. Recognition of Domestic Law

The protocol recognizes the right of every country to punish illegal migrants and smugglers under its domestic law.

B. Domestic law

The protocol recommends each state party to adopt such legislative measures, as a general principle but, in reality, the adoption of such measures is not an easy task. It may be noted that some countries have existing legislation on the matter, although it may be partly in conformity with the Protocol. This legislation may be classified into two types: specific provisions of law and non-specific provisions of law:

1. Specific Provisions of Law

The following countries have specific provisions of law against human smuggling:

In China, the Standing Committee of the National People's Congress adopted the "Complementary Regulation on Stringent Punishment Against the Crimes of Organizing and Escorting Others Across the State and Regional Borders" in March 1994. In October 1997, penal sanctions for organizers, escorts and illegal immigrants were specified in the Criminal Law of the People's Republic of China.

In Malaysia, its Immigration Act provides that the act of smuggling migrants, producing fraudulent travel or identity documents or an attempt to commit the said acts and the act of organizing or directing other persons to commit the same acts are punishable.

In Japan, any person who has transported collective stowaways or has prepared vessels for criminal use or has received illegal migrants is criminally liable pursuant to the "Immigration Control and Refugee Recognition Act".

In the Philippines, Section 46 of the Philippine Immigration Act of 1940 provides that “Any individual who shall bring into or land in the Philippines or conceal, harbor, employ, or give comfort to any alien not duly admitted by any immigration office or not lawfully entitled to enter or reside within the Philippines under the terms of the immigration laws, or attempts, conspires with, or aids another to commit any such act, and any alien who enters the Philippines without inspection and admission by the immigration officials, or obtains entry into the Philippines by willful, false, or misleading misrepresentations or willful concealment of a material fact, shall be guilty of an offense”. Moreover, the said law provides that the fines imposed on smugglers or procurers of illegal migrants shall constitute a lien against the vessel or aircraft, provided that, the court has discretion to order the forfeiture of the vessel or aircraft. It provides for the punishment of the pilot, master, agent, owner, and consignee in charge of the vessel or aircraft.

Under Section 1324(a) Title 18 of the United States Code (USA), the law provides that it shall be unlawful for any person to bring an alien into or attempts to bring or transport or move or attempt to move or transport an alien into the United States other than through a designated port of entry regardless of whether such alien has been authorized to enter or not or to conceal, harbor, shield or attempt to shield such alien in any place from detection or encourage or induce an alien to come or enter in the United States, or engage or aid or abet in any conspiracy to commit any of the proceedings acts. Likewise, any person who, during the 12-month period, hired aliens consisting of 10 persons for employment shall be criminally liable.

Likewise, Section 1324 (b) of the same Code provides for the forfeiture of criminal assets including vessels, vehicles or aircraft used in the commission of the crime.

It is safe to assume that the above-mentioned countries have specific laws directly dealing with the crime of human smuggling in accordance with the Protocol.

2. Non-specific Provisions of Law

There are some countries that have no specific law on the subject. Instead, they use other domestic laws that may be applicable under the circumstances. These domestic laws consist of the Penal Code, the Immigration Act and other special laws on migration. For instance, the provisions in the Penal Code of some countries refer to the act of forgery or producing fraudulent documents.

Moreover, the general principles of criminal law as provided in the Penal Code of some countries concerning the criminal liability of the principals, accessories and accomplices, the stages of the commission of the crime (attempted, frustrated and consummated) and the presence of the aggravating circumstances, as mentioned in the Protocol article 6(3), such as endangering the lives or safety of the smuggled persons or placing them in inhumane or degrading conditions are also being applied.

The countries using the provisions of their Penal Code are Cote d’Ivoire, Laos, Nepal, Thailand, Japan and the Philippines.

C. Treatment of the Smuggled Migrants

1. Present Status of Migrants

According to article 5 on criminal liability of migrants of the Protocol, it states that “except as otherwise stated herein, migrants shall not become liable to criminal prosecution for the fact of having been the object of conduct set forth in article 6 of this Protocol”.

Some countries argue that smuggled migrants are considered victims when exploited by the smugglers. Still, others believe that these illegal migrants are offenders regardless of whether they are exploited or not. Except for some socialist countries, most sending countries do not treat them as offenders except when they have used forged passports and visas.

An analysis of the existing legislation on immigration indicates that there is no distinction between smuggled migrants and illegal migrants. Thus, Indonesia, Cote d’Ivoire, Egypt, Malaysia, the Philippines, Thailand and Japan can punish illegal migrants whether smuggled or not for violating

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their respective immigration laws. Nepal and Venezuela have no law on the matter. The legislation seems to indicate that smuggled migrants are not considered as victims but offenders.

D. Repatriation and Protection of Smuggled Migrants

1. Protection Before Repatriation (In the Receiving Country)

Article 16 of the Protocol provides that ratifying states shall take steps, consistent with their obligation under international law, including legislation if necessary, to preserve and protect the rights of persons who have been “the object of smuggling”. More specifically, illegal migrants have the right to life and the right not to be subjected to torture or other cruel, inhumane or degrading treatment or punishment. Concerned authorities should also protect migrants from violence by smugglers and take into account the special needs of women and children in implementing these measures, especially during their detention. All participating countries (except for countries which have no data available) adopt the measure to punish illegal migrants for violation of immigration and other laws, and to deport them to their country of origin. Of these countries, Malaysia, Philippines and Thailand adopt from time to time, measures to legalize illegal migrants.

Additionally, in Thailand, the Thai government allows employers to register and hire their Myanmar, Laos and Cambodian illegal employees. And illegal migrants can get special permission to work for two years as long as they live and work in a specific area in Thailand. However, compared with the total number of illegal workers, only one-tenth is registered.

Malaysia granted amnesty to legalize illegal migrants’ stay in the country a few years ago.

2. Repatriation to the Sending Country or Country of Origin

According to Article 18-3 of the Protocol, a ratifying state shall verify whether a person who has been an object of smuggling is its national or has the right of permanent residence in its territory. The ratifying state of which an illegal migrant is a national or in which he/she has the right of permanent residence shall agree to issue such travel documents or other authorization to enable illegal migrants to return to the country of origin.

3. Protection After Repatriation (In the Country of Origin)

In some cases, smuggled persons who have been deported to their country of origin may seek to be smuggled again. Each country needs to fight the causes of smuggling and protect these persons from being smuggled again through education and so on.

The Participating countries have different ways of treating their smuggled nationals. For instance, China may give some financial support in certain cases to its nationals who are objects of smuggling. It also gives legal counseling to its repatriated nationals.

IX. RECOMMENDATIONS

The following are the recommendations of the Group:

A. On the Problems of Detection, Investigation, Prosecution and Punishment of the Crime of Human Smuggling

- 1. Promotion of High Technology for Passports or Visas to Prevent Forgery of Documents**
- 2. Develop or Promote the Use of Advanced Technology for the Detection of Forged Documents**
- 3. Strengthening of International Cooperation and Exchange of Information Between and Among Countries**

All countries must be encouraged to form bilateral agreements, especially between the sending and the receiving country on information exchange, extradition and mutual legal assistance.

4. Improving Coastguard, Customs and Navy Capabilities and Tightening of Border Control

There is also a need to improve coastguard, customs and navy capabilities to detect, pursue, intercept and search boats carrying unauthorized arrivals. Special training, both local and overseas may be provided to the officers concerned. For countries with shared land borders, it is necessary to adopt measures that will effectively control the entry and exit of people.

5. Creation of Special Task Forces against Human Smuggling

The creation of special task forces, which should function as a records information center and facilitate an exchange of information. They should also be staffed by experts in all the relevant fields. This will also address the problem of sectionalism because members of the task forces will be coming from the agencies involved in the detection, investigation and prosecution of human smuggling cases.

6. Develop a System for Peoples' Participation in the Combat against Human Smuggling

The use of hotlines to report suspicious arrival of smuggled people especially in hot spot areas should be encouraged. People living in areas where human smuggling activities are believed to be happening are the very first ones to know about such activities.

7. Conduct Special Training for Investigators, Prosecutors, Judges and Other Concerned Government Officials

Investigators, prosecutors and other concerned government officials should be properly trained in how to develop and use the international tools for gathering information and mutual legal assistance. Countries having a "Speedy Trial Act" (e.g. the Philippines) should fully observe and implement the same.

8. Strengthening of the System of Information and Exchange between and among the Agencies Concerned with Human Smuggling

Each country should develop a systematic and effective system of coordination between and among relevant agencies concerned with immigration, coastguard, police, prosecution service etc.

9. Secure Witnesses (Illegal Migrants) to Punish Smugglers Effectively

(i) Before trial

We cannot obtain cooperation from a witness (illegal migrants) if there is a fear of prosecution for being the object of smuggling. Of course, if you can decriminalize the present illegal migration, the problem can be solved. However it is not realistic. As long as the illegal migrants face the possibility of being prosecuted in our system, we may employ suspension of prosecution. That is, giving discretionary power to the prosecutors, he/she can decide not to indict the illegal migrants and remove the fear on the part of illegal migrants in order to get their cooperation.

(ii) At trial

The competent authority may grant special permission to stay for the illegal migrants who will be witnesses at the trial of the smugglers.

10. Enactment of Legislative Measures against Human Smuggling

Existing legislation on illegal migration are still focused on the migrants and not the smugglers. There is a need to enact a law that will specifically deal with human smuggling. Such law should criminalize acts mentioned in Article 6 of the Protocol. Additionally, some provisions may be included in the Act such as the following:

- (i) seizure or sale or destruction of their boats and other criminal assets connected with human smuggling;
- (ii) vessels in international waters can be boarded and searched if suspected of being involved in human smuggling;
- (iii) criminal liability of crew members of ships and boats;
- (iv) criminal liability of business establishments employing smuggled migrants;
- (v) informer's rewards system (if the country can afford it) ; and
- (vi) witness protection program (if smuggled migrants receive serious threats from smugglers in the course of the investigation or prosecution).

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11. Intensify the Information and Education Campaigns

- (i) Dissemination of publicity materials by the receiving countries.

It would be of great help if receiving countries would distribute publicity materials throughout human smuggling source countries as well as transit countries to warn people of the risks associated with trying to enter their countries illegally and the penalties smugglers face. Receiving countries must send a clear message that they do not tolerate illegal arrivals and must develop a system of stopping people who have effective protection overseas from gaining onshore protection in their countries.

- (ii) By the government of the sending countries.

The mass media (i.e. radio, television and newspapers) are effective and powerful tools for disseminating information and educating people about the danger of illegal migration such as:

- (a) the danger of being detected and prosecuted in the destination country;
- (b) the danger to their lives and limbs during the transportation of illegal migrants; and
- (c) the danger of being exploited while in the destination country;

B. Prevention of Human Smuggling by Giving Protection to the Object of Smuggling

1. Moral Support

Every country, whether sending or receiving illegal migrants, should take some measures to facilitate, without undue or unreasonable delay, the verification of the smuggled person's identity and to issue travel documents necessary for their return to the country of origin. By doing this, their period of detention will be shortened and they will be encouraged by this show of moral support.

2. Medical Assistance

Every State should avoid the use of torture or other cruel, inhumane or degrading treatment and punishment upon illegal migrants or their family. It shall also provide some medical treatment and care when they are suffering from any disease.

3. Financial Support

States should allocate funds for the support of the repatriated illegal migrants and for their re-education. For this purpose, the government authority and NGOs should collaborate with each other to ensure that the repatriated migrants get some livelihood in order to prevent them from being smuggled again.

C. On the Problem of Corruption

Since corruption is a multi-faceted issue, some practical solutions may be offered to help solve the problem. Each country should continuously develop anti-corruption strategies and understand the logic of corruption control.

1. Reducing Opportunities For Corruption

2. Increasing the Costs of Corrupt Behavior

The costs of corrupt behavior can be increased by making it a high-risk, low-reward activity by punishing the guilty and exposing them to the media

3. Reduce Temptation to be Corrupt by Paying Civil Servants Adequate Salaries

X. CONCLUSION

Globalization has brought the world closer and enabled people to span nations. It has created organized criminal groups that prey upon those who easily succumb to the lure of migration brought about by the interplay of pull and push factors. These criminal groups transcend borders and use the very same infrastructure and technology that facilitates transportation and communication. Unfortunately, the existing legislation is still more focused on illegal migrants than on smugglers. But regardless of whether smuggled migrants are considered offenders or objects of smuggling, they are

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entitled to human rights and protection from all forms of abuse. It is about time to bring them to justice. But the responsibility in this area does not rest on one country alone. All countries must work together with full coordination in the international and domestic spheres.

GROUP 3

INTERNATIONAL COOPERATION AGAINST HUMAN TRAFFICKING AND SMUGGLING OF MIGRANTS

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I. INTRODUCTION

Recent IOM (International Organization of Migration) research revealed that there are an estimated 15 to 30 million illegal migrants in the world. Of this total, the United States Department of Justice estimates that at least 700,000 women and children are trafficked across borders each year. The enormous scale of human trafficking and smuggling of migrants around the globe requires cooperative efforts to solve this issue. These efforts need cooperation and assistance at bilateral and multilateral levels among various countries, and also between governments and NGOs. Destination countries must work with transit and source countries not only to prevent human trafficking and smuggling of migrants but also to help those victims back to their home community.

II. EXCHANGE OF INFORMATION AND LEGAL ASSISTANCE

Human trafficking and smuggling of migrants is generally defined as a crime that requires international exchange of information and assistance. When you seek information and assistance from abroad, the nature of the information and legal assistance will determine whether it should be informally or formally obtained.

A. Informal Channel

Informal exchange of information and assistance will be appropriate when compulsory process is not required and is generally achieved through law enforcement representatives stationed overseas and international organizations such as Interpol. The information available by this informal route may include criminal and police records, birth and death records, family registrations, residence information, vehicle and vessel registrations, travel movement records, company registrations, etc.

The advantage of this informal method is that it can be requested quickly and is directed to the authority that can provide the information and assistance. The disadvantage is that the information and assistance obtained in this way is limited in its nature and the product may not be in a form that can be used in court proceedings in the requesting county.

1. Personal Channel

Exchange of information and assistance can be carried out between law enforcement agencies of the requesting and the requested country. This is sometimes referred to as the “police-to-police, prosecutor-to-prosecutor” assistance. It is not usually predicated on a specific treaty or international agreement,

but rather carried out on the basis of goodwill, mutual respect or shared interest in combating crime. Personal relationships established through international seminars and law enforcement training programs would be quite instrumental in obtaining information and assistance. This method is also called the old-boys network, capable of providing the speediest of all responses but limited by the fact that it depends entirely upon the cultivation of contacts in foreign law enforcement agencies.

2. Legal Attache

Legal attaches stationed at embassies, consular officers in charge of security assigned at consulates and liaison officers dispatched from law enforcement agencies to counterpart agencies abroad play an important role in this kind of assistance. For example, the U.S. has dispatched FBI agents at its embassies in 52 countries under the Legal Attache Program that helps foster good will and legal assistance with their counterparts in the assigned nation. Japan also has police attaches and security officers posted at its embassies and consulates in foreign countries. They carry the titles of either 1st or 2nd Secretary at the embassy, or Consul at the Japanese consulate. They act as a liaison between Japanese police and law enforcement agencies of their assigned country.

As a rule, when requests for exchange of information and assistance are made through these attache, consular officers and liaison officers, the response is obtained much faster and more practical in use than that available through Interpol. Therefore, in terms of processing a request for assistance, this method seems to be much more effective.

3. Interpol

Major vehicle for advancing the police-to-police cooperation is the International Criminal Police Organization, or ICPO-Interpol. Interpol is situated in France's Lyon, and currently has 181 member countries including Afghanistan and East Timor, newly admitted at the October-2002 General Assembly in Cameroon. This organization provides technical tools for sending/receiving requests between law enforcement agencies of different countries through their National Central Bureaus - NCBs, which serve as a conduit for the secure transmission of information and intelligence concerning criminal investigation. Interpol can guarantee that the requests get transmitted via its communication systems, but cannot promise that the requested country surely makes a response to the requesting country, or that the quality of the response is up to their expectations. Furthermore, Interpol's Constitution has no provision to punish those countries which do not respond to any request from foreign countries. That means the assistance relies solely on the generosity and goodwill of the law enforcement of the requested country.

B. Formal Channel

Formal exchange of information and legal assistance is generally sought for the obtaining of evidence of a crime that has been committed. It is carried out under legislation and bilateral or multilateral treaty. Formal exchange of information and legal assistance involves compulsory process and affects privacy interests. It includes matters such as extradition, seizure of materials by search warrant, the taking of witness depositions, restraint and confiscation of the proceeds of crime. The advantage of this assistance is that it permits the requesting country to have law enforcement action carried out in another country, and to obtain evidence for a prosecution. Most countries with laws and treaties for international cooperation have a central authority to coordinate requests to and from the country. This is essential to ensure appropriate and prompt attention for requests of assistance.

The basic instruments of formal international cooperation are as follows:

- (i) Letters Rogatory
- (ii) Mutual Legal Assistance
- (iii) Extradition

1. Letters Rogatory

There are many instances in which the law enforcement agency of the requested county can do little without obtaining a court order. In these cases, the law enforcement agency needs the assistance from a judge. This letter is a request from a court in one country to a court in another country in which the

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former asks the latter to use the requested state's judicial power to assist the requesting court. As an international practice, the letter is transmitted through the diplomatic channel.

The request for information and evidence almost always originates from the law enforcement agency, and is authenticated by the competent national court in the requesting country. Then, it passes on to the embassy of the requested country through the foreign ministry. The embassy hands it over to the competent judicial authorities of the requested country, generally through the foreign ministry. Once the request has been fulfilled, the chain is reversed.

A direct request may also be possible under some treaties in case of emergency. For example, Article 15(1) of the 1959 Council of Europe Convention allows the judicial authority of the requesting country to send the letter of request directly to the competent judicial authority of the requested country. Article 18(13) of the Palermo Convention (the United Nations Convention against Transnational Organized Crime) allows the possibility that, in an urgent case and when the countries in question agree, the request can be made through the International Criminal Police Organization, if possible.

2. Mutual Legal Assistance (MLA)

A law enforcement agent cannot be allowed, in general, to conduct an investigation in another country. This is based on the principle that nobody can infringe upon the sovereignty of another country. Hence, we need a legal framework of mutual assistance and cooperation. However, it depends very much on the policy of the countries concerned. The purpose of mutual legal assistance is to get a foreign country to assist in the judicial process of the requesting country. Generally speaking, mutual legal assistance is based on bilateral or multilateral treaties. The broad definition of mutual legal assistance includes not only providing evidence, which is defined as a narrow sense of mutual legal assistance, but also extraditing a fugitive and executing punishment for his/her crime. In this section, we discuss mutual legal assistance in narrower terms.

Mutual legal assistance can be requested for any of the following purposes:

- (i) Executing searches and seizures, and freezing
- (ii) Taking evidence or statements from persons
- (iii) Effecting a temporary transfer of persons in custody to appear as a witness
- (iv) Hearing of witnesses or experts by means of video conference
- (v) Effecting service of judicial documents
- (vi) Examining objects and sites
- (vii) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records
- (viii) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes
- (ix) Facilitating the personal appearance of a witness
- (x) Providing information, evidentiary items and expert evaluation
- (xi) Any other type of assistance that is not contrary to the domestic law of the requested country

Judicial authorities of requesting countries issue a request for mutual legal assistance. Mutual legal assistance is performed with regard to those crimes that are punishable in the requesting country at the time of the request. Mutual legal assistance is carried out based on international comity, international treaties and international administrative agreements. Therefore, the conditions for mutual legal assistance differ from case to case.

In general, conditions for mutual legal assistance have been considered similar to those for extradition. Recently, however, the theory that the principle of mutual assistance should be separated from those of extradition is gaining support. Accordingly, the conditions for mutual legal assistance can be studied in a different manner from those for extradition.

(i) Dual criminality

Most countries require dual criminality as a prerequisite for responding to a mutual legal assistance request. This condition comes from the idea that it is not appropriate to surrender a

fugitive for an act which does not constitute any crime in the requested country, and that the requested country would not cooperate concerning the crime which is not punishable in the country. But recently the theory that dual criminality should not be required is becoming more acceptable. This theory is based on the idea that evidence should be not only helpful for investigators but also beneficial to offenders. For example, the 1959 Council of Europe Convention on Mutual Assistance in Criminal Matters fundamentally does not require dual criminality in requesting mutual legal assistance.

(ii) Reciprocity

Reciprocity is regarded as one of the most important principles that cover international relations. On the other hand, some disputants insist that reciprocity should not be required in mutual legal assistance, which is different from extradition. This theory is grounded on the idea that mutual legal assistance should be carried out when there is a possibility that evidence might be favorable to the offender by any chance.

(iii) Non-political offence

In order to grant a mutual legal assistance request, a predicate offense should not be a political offence. However, there is a tendency that the recent multilateral conventions aimed at suppressing certain types of crimes such as drug trafficking and terrorism against diplomats explicitly exclude these acts from political offenses.

(iv) Rule of specialty

Some legislation on mutual legal assistance adopts the rule of specialty. This rule requires that the requesting country must not transmit or use the information for investigations, prosecutions or judicial proceedings other than those stated in the request. However, this rule does not prevent an amendment of the charges relating to the cases. If the facts of the case require reassessment, supplementary requests must be sent to the requested country as soon as possible.

One of the most regularly voiced complaints of this method is that it can take a long time. It takes time to draft a request which complies with the requested country's laws and procedures, for the request to be processed and forwarded to the appropriate authority responsible for processing it and then for execution of the request. Most jurisdictions require dispatch or receipt of requests through the diplomatic channel and this can cause several months to elapse before the request reaches the appropriate handling officer. Upon receipt, the request may not meet the minimum legal requirements of the government to whom it is sent, in which case there can be further exchanges between the two jurisdictions before the necessary information is handed over and the request can proceed.

The more formal and complex the process becomes, the greater delay is likely to occur. This is crucial to both the investigator and the prosecutor. If the evidence is required immediately for prosecution, any delay could provide the suspect with the opportunity to leave the jurisdiction.

A difference in criminal procedures from country to country can also cause problems. This is particularly apparent between civil- and common-law countries. For example, in European civil law countries the investigating magistrate oversees the investigation, and has wide powers to summon witnesses, order production of documents, and generally follow whatever course of investigation is appropriate. This may prompt the investigator and the prosecutor to conduct an investigation generally on the magistrate's behalf. But common law based countries may only permit the carrying out of certain specific tasks which must be itemized in the request and may not allow the granting of a mandate to carry out and follow a general line of inquiry. This could mean, for example, that if information came to hand that was relevant but was not covered in the original request the common law based country might have to pass the particulars back to civil law based country and ask them to make a supplementary request seeking this evidence. This may create even more delay.

3. Extradition

The purpose of extradition is to get a foreign country to send a fugitive to the requesting country, so that he/she can be placed on trial, or so that any punishment imposed can be carried out. Extradition is

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the process of forcible transfer of a person either charged or convicted from one country to another. There are two ways in making an extradition request; namely, by international comity or by bilateral/multilateral treaty.

An extradition request from one country to another between which there is no extradition treaty is based upon mutual respect and goodwill. Some countries may grant an extradition request without an extradition treaty as long as the request meets the requirements stipulated in a domestic extradition law. These countries are referred to as “Treaty Non-prerequisite Countries” which include Japan, China, South Korea, Pakistan, Vietnam, etc.

When the requesting country wants to get one its own nationals from the requested country immediately, a common practice is to freeze or nullify their passport, thus making the passport invalid. As a result, he/she becomes subject to deportation. In South Korea, for example, Article 11 of the Passport Act says that any person who commits a crime after the issuance of the passport must return it within a certain specified period. Japan has almost the same provision in Article 19 of the Passport Law. However, careful consideration must be paid in executing this method. As a prerequisite of this method, there must be such legal provision in the requesting country and the consent must be obtained from the requested country to proceed with the deportation.

If an extradition request is made between the member countries of the bilateral/multilateral treaty, the request must be honored by the requested country. Otherwise the requested country would be in violation of its international obligation. Countries which require an extradition treaty to honor such a request are classified as “Treaty Prerequisite Countries” which include Malaysia, Singapore, Sri Lanka, the Philippines, the United States, etc.

Universally accepted principles state that each country can enjoy sovereign equality and territorial integrity. Each country should not intervene in the domestic affairs of other countries. These principles are clearly noted in the following conventions:

- (i) United Nations Convention Against Transnational Organized Crime (2000)
- (ii) Rome Statute of the International Criminal Court (1998)
- (iii) United Nations Model Treaty on Extradition (1990)
- (iv) European Convention of Extradition (1957)

Some practical problems exist in extradition procedures. Included in the above-mentioned conventions are the dual criminality requirement, the political offense exception and the refusal to extradite nationals. In addition, the death penalty issue and the unfair trial issue are factors on which the extradition may be refused. Since the dual criminality and the political offense issue have already been mentioned in the preceding sub-paragraph, the remaining issues are described below:

(1) Non-Extradition of Nationals

With regard to extradition of their own citizens, most countries have traditionally been of the opinion that such extradition is not possible. Some countries have even incorporated such a prohibition into their constitution. Furthermore, the principle of the non-extradition of nationals is often expressly provided for in treaties. The U.N. Model Treaty on Extradition, Article 4 (a) enables a requested country to refuse extradition of its nationals. The rationale for such a view is a mixture of the obligation of a country to protect its citizens, the lack of confidence in the fairness of foreign legal proceedings, the disadvantages that defendants face when defending themselves in a foreign legal system, and the disadvantages of being in custody in a foreign country.

However, it is a matter of course that right must be realized and a criminal offender must be brought to justice. The U.N. Model Treaty on Extradition and TOC Convention stipulate that if extradition is refused on this ground, the requested country must prosecute him/her at the request of the requesting country. This principle is referred to as “Extradite or Prosecute” or “aut dedere aut judicare.” Therefore, each Member country must have a criminal law that punishes offenders who have committed crime in foreign countries. In Singapore, for example,

Article 3 of its Penal Code says “Any person liable by law to be tried for an offense committed beyond the limits of Singapore, shall be dealt with according to the provisions of this Code for any act committed beyond Singapore, in the same manner as if such act had been committed within Singapore.”

(2) Death Penalty

Article 4 (d) of the above mentioned model treaty provides an optional ground for refusing extradition. This arises when the offense for which extradition is requested carries the death penalty under the law of the requesting, unless the requesting country undertakes not to impose the death penalty or not to carry it out if it is imposed. While some countries have capital punishment, others have abolished capital punishment. It can generally be observed that the latter countries tend to refuse extradition of fugitive offenders to the former based on the ground that capital punishment may possibly be imposed.

(3) Danger of Persecution or Unfair Trial

Article 3 (f) of the model treaty gives as a mandatory ground for refusal the possibility that the person in question would be subjected to torture or cruel, inhuman or degrading treatment or punishment, or the absence of the minimum guarantees in criminal proceedings. Democratic countries have been increasingly reluctant to extend full cooperation to countries which do not share the same democratic values, for example on the grounds that the political organization of the latter countries is undemocratic, or because their judicial system does not afford sufficient protection to the prosecuted or convicted individual.

III. RECOMMENDATION ON INTERNATIONAL COOPERATION

A. Governmental Cooperation

Human trafficking and smuggling of migrants is a multi-dimensional issue that encompasses migration, labor, criminal, and human rights aspects. Therefore, it must be tackled at all these dimensions. The transnational character also means that source, transit and destination countries must work together to effectively deal with this issue, thus demanding bilateral/multilateral/international assistance.

The United Nation’s two Protocols; namely, the Protocol against the Smuggling of Migrants by Land, Air and Sea; and the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, respectively supplementing the United Nations Convention against Transnational Organized Crime; are a set of strong instruments to address human trafficking and smuggling of migrants. However, the Smuggling Protocol has been signed so far by 106 countries and ratified only by 14 countries, and the Trafficking Protocol signed by 102 countries and ratified by 13 countries. The two Protocols will enter into force when forty Member States have ratified them respectively.

In order to eradicate human trafficking and smuggling of migrants from the globe, the above-mentioned two UN Protocols must be ratified and put into effect as soon as possible. Each Member country should take necessary measures to meet the ratification requirements. But in reality, it will take some time until the two Protocols come into effect. In the meantime, the world is confronted daily with human trafficking and smuggling of migrants. Therefore, international efforts must be taken to tackle the problems in hand without delay.

The following are recommendable efforts that government agencies and their personnel should take for international cooperation against human trafficking and smuggling of migrants:

1. Creation of Common Standards

Through bilateral, multilateral and international conferences and training opportunities, each country should develop norms and standards. Thereafter, it can review, strengthen or establish domestic laws against human trafficking and smuggling of migrants; set internationally common standards in the anti-smuggling and trafficking laws; and create practical measures and tools for international cooperation in investigation and prosecution. Those laws must criminalize activities

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which aid or abet the human trafficking and smuggling of migrants; and put sanctions on those who profit from those transnational activities.

2. Assets Confiscation

Each country should pass the necessary legislation to create instruments to seize and confiscate assets and profits from human trafficking and smuggling of migrants. These assets must include vehicles, boats, passports, ID and other travel documents used in human trafficking and smuggling of migrants. In negotiation of the asset confiscation agreements with other countries, the confiscation of those assets upon conviction for the crime must be included.

3. Direct Contact Network

As mentioned already, for information exchange with law enforcement agencies of foreign countries in general, ICPO and diplomatic channels are theoretically available. However, both channels require much red tape and need a lengthy time. Consequently, the vital information is not timely. In terms of information exchange in the case of human trafficking and smuggling of migrants in particular, not only police and public prosecutors but also immigration, customs, labor, health-and-welfare and medical authorities will be involved. Therefore, expanding direct contacts with different agencies in domestic and foreign countries is essential. The establishment of an informal network of contact points at each agency in different countries exclusively for human trafficking and smuggling of migrants will be quite helpful. In order to cope with an increasing number of smuggled migrants from China to Japan, the Public Security Ministry of China, Japanese Coast Guard and Japanese Police have established a direct contact network.

4. Moderate Rule Application

Human trafficking and smuggling of migrants has become global business making a huge profit for international organized crime syndicates. It is also characterized by its clandestine nature, because these cases are likely to remain significantly unreported crimes. In addition, trafficking exposes victims to sexual exploitation, forced labor, slavery-like practices, servitude or the removal of organs. In this sense, it is considered to be one of the most heinous criminal offenses all over the globe that demand international cooperation including extradition and mutual legal assistance.

Nevertheless, as prerequisites for extradition and mutual legal assistance, almost all countries require dual criminality, assurance of reciprocity, non-political offense as a predicate offense and that they are non-nationals of their own countries. In addition, a country which has abolished capital punishment would not allow the extradition of a suspect or defendant who may be subject to a death penalty in the requesting country. If these requirements are strictly applied to a human trafficking and smuggling case, for instance, the negotiation of extradition and mutual legal assistance will become very difficult and may not be materialized. In order to breakthrough these barriers, there will have to be a more moderate application of the rules regarding extradition and mutual legal assistance to handle a human trafficking and smuggling of migrants case.

5. Victims Protection

Women and children, the main victims of trafficking, must be most protected from the human rights perspective. Unfortunately however, many source, transit and destination countries have not defined trafficking as a violation of human rights yet. Therefore, they are not held responsible for the fight against trafficking in women and children. The lack of legal obligation of governments to work towards eliminating trafficking still exists in many countries. Hereby, each country must legislate an anti-trafficking law which strictly controls trafficking in women and children. This law also should guarantee the witness protection, the mental and physical treatment of the victims, and the provision of appropriate accommodations to the victims in destination countries, and the victims' safe transfer to their home countries if they so wish. It will be necessary to set up an international inspection team, probably in the United Nations, to assure that each country is really safeguarding human rights and fulfilling the obligation to protect the victims.

6. Technical Assistance

Provision of technical and training assistance to other countries is also important. Destination countries should encourage source and transit countries to carry out public awareness campaigns

concerning the risks of smuggling and trafficking; the tragic lives of the victims; the actual situations of labor and sexual exploitation; deceitful strategies of traffickers and smugglers, etc. In this context, destination countries should send training and campaign experts in this field to source countries.

Furthermore, national travel and identity documents such as passports and landing permits must be highly secured against forgery, and the form of these documents should be unified worldwide, and they should be made machine readable like MRP (Machine Readable Passport) and MRV (Machine Readable Visa). In addition, the transfer of investigative methods such as undercover operations and electronic surveillance should be promoted. Those countries in possession of advanced technologies and skills must transfer such expertise to the countries in need through official channels.

7. Establishment of Regional Organization

Transnational crimes such as human trafficking and smuggling of migrants urge transnational cooperation between the legal authorities at home and abroad. Human trafficking and smuggling of migrants, particularly in Asia, is taking place mostly among neighboring countries. (e.g., women trafficking between Nepal and India, illegal immigration between the Philippines and Malaysia and between Indonesia and Australia, smuggling of migrants between China and Japan, etc.) Currently, various efforts have already been made in Asia through regional bodies such as ASEANAPol, PacRIM¹ and ICAO². However, there exists much diversion regarding the justice system in Asian countries, this makes legal assistance and cooperation difficult in this region.

To break this stalemate, a new innovative vision should be developed. One idea is to set up ASIANJUST, an Asian version of EUROJUST³ established by the EU in 1999 consisting of prosecutors in 15 countries with the purpose of smooth mutual legal assistance and cooperation for effective investigation and prosecution. This ASIANJUST must not be a mere information exchange organization but should be empowered to help coordinate the investigation and prosecution of transnational organized crime including serious human trafficking and smuggling of migrants. First and foremost, governments in the region should organize a preparatory committee for founding ASIANJUST.

B. Non-Governmental Cooperation

Human trafficking and smuggling of migrants cases are serious crimes that have resulted in modern-day slavery, which cannot be resolved by legislature and law enforcement only. It needs concerted, well-coordinated efforts among the world community to combat this crime that is carried out by organized crime groups that transcend national borders. We must prove to the criminal world that we will never let them get away with such crimes. The non-governmental organizations can contribute greatly towards international cooperation against these crimes to support the relevant legal processes that will bring the traffickers and smugglers to justice.

There are many Non-Governmental bodies in each country that would not hesitate to assist such efforts to prevent human trafficking and smuggling of migrants, and to cooperate or give assistance to the trafficked or smuggled victims. This would include Women/Child Aid or Welfare Organizations or the various Human's Rights Organizations. Their work would complement provisions of the law and where the related laws have not been enacted, these organizations can act as pressure groups to encourage the governments and increase awareness of the community to such crimes within their society.

The areas of cooperation for these NGOs can be itemized as follows:

- (i) Exchange of information
- (ii) Enhancing awareness
- (iii) Support activities for victims

¹ Pacific Rim Immigration Intelligence Officers Conference

² International Civil Aviation Organization

³ See: <http://www.statewatch.org/news/2002/feb/02Aeurojust.htm>

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1. Exchange of Information

It is well known that victims feel freer to approach NGOs and pass information regarding their plight and also relating to the perpetrators. NGOs may pass this information to the police or other NGOs. This sort of information can also be systematically collected and used as a monitoring mechanism or to be used as research data as well as input for some training/awareness programs.

2. Enhancing Awareness

This involves training or education programs which can be in the form of conferences, seminars or workshops, etc., for the public officials who should be aware of the seriousness of the crimes involved and the degree of suffering experienced by the victims. When they investigate, prosecute or judge cases of traffickers, smugglers or other offences, they will be sensitive enough to provide the necessary help or protection the victims greatly need.

Awareness programs for the public may include talks and distribution of free pamphlets or flyers to the public and potential victims in undeveloped areas in source, transit and destination countries, putting emphasis on the fact that trafficked women and children are crime victims. The flyers should also include information on how/where the victims can seek help, what rights are protected for them, how to identify suspicious characters who might be traffickers or smugglers. In addition, the flyers should inform the public on how to pass the information on to the authorities or the NGOs.

3. Support Activities For Victims

NGOs can encourage politicians and legislators in their countries to enact laws to provide protection and support to trafficked victims. The witness protection program is one way to bring traffickers to justice. Laws could provide such victims with temporary residence and protection. In this, the NGOs could mobilize and garner the necessary funds to provide shelter, medical and counseling services to the victims. Cooperation between NGOs of different countries may be needed for victims' rehabilitation process which takes a long time. Training of occupational skills is much needed that would assist the victims to become self-sufficient. Most governments do not have the resources to assist victims to such an extent. NGOs can work with United Nations Agencies to achieve these objectives.

The Ministerial Conference on People Smuggling, Trafficking In Persons and Related Transnational Crime in Bali, 2002, urged the international community to assist source countries to address the root causes of illegal movement of peoples by providing among others, developmental assistance to improve the economic and social status of women in those countries. For example, in Afghanistan, the UN Food Agency set up bakeries that provide some jobs as well as food to some of the poorest families or provide aid packages containing tools and seeds for them to rebuild their lives. NGOs can work together with such UN agencies to provide such help and even assist in giving basic education. Of course, NGOs also have to increase fund-raising efforts by encouraging contributions from corporations, foundations and individuals to finance the said activities apart from getting funds from governmental and UN grants.

IV. CONCLUSION

Problems emerging from rapid globalization are posing challenges to the criminal justice system of the individual countries and the world as a whole. The challenges like human trafficking and smuggling of migrants operate beyond the boundaries of individual countries. The globalization process with its policy of liberalization with regard to communication, transportation and transfer has opened greater opportunities for the evil forces involved in this criminality. The existence of the present strict MLA and extradition framework, judicial boundaries, geographical limitation in the investigation and prosecution are no match for the kind of international crimes that are being committed today. The need for cooperation among people involved in the criminal justice system in various countries is great. International efforts towards the elimination of human trafficking and smuggling of migrants should be further enhanced. At the same time, efforts at the national level to develop appropriate measures to safeguard the human rights of the trafficked victims should be continued. For these reasons, we would like to say again that the U.N. TOC Convention and its two Protocols must be ratified and put into effect in order to eradicate human trafficking and smuggling of migrants from the globe. To this end, each Member country should take necessary measures to meet the ratification requirements as soon as possible.

APPENDIX

COMMEMORATIVE PHOTOGRAPH

• 122nd International Training Course

UNAFEI

The 122nd International Training Course



THE 122ND INTERNATIONAL TRAINING COURSE (UNAFEI, 2 SEPTEMBER-25 OCTOBER 2002)

Left to Right:

Above:

Mr. Azam (Pakistan), Ms. Ollus (Finland), Mr. Hoffman (U.S.A.), Dr. Mehta (India), Mr. Gana (Philippines), Dr. Rosero (Ecuador), Prof. Tachi

4th Row:

Mr. Takagi (Chief), Mr. Ihara (Staff), Mr. Koyama (Staff), Mr. Kai (Staff), Mr. Nakayama (Staff), Mr. Tanaka (Staff), Ms. Nagaoka (Staff), Ms. Masaki (Staff), Ms. Matsushita (Staff), Ms. Tsubouchi (Staff), Ms. Yamamoto (JICA), Ms. Hayashi (Staff)

3rd Row:

Mr. Koike (Staff), Mr. Sato (Japan), Mr. Asano (Japan), Mr. Nagao (Japan), Mr. Shiohara (Japan), Mr. Kongtreekaew (Thailand), Mr. Onodera (Japan), Ms. Shiraki (Japan), Mr. Okada (Japan), Mr. Takahashi (Japan), Mr. Uchiyama (Japan), Mr. Morita (Japan)

2nd Row:

Ms. Yoshida (Staff), Mr. Miyamoto (Japan), Mr. Xaysana (Laos), Mr. Wahdan (Egypt), Ms. Paderanga (Philippines), Mr. Becerra (Venezuela), Mr. Kafana (Ivory Coast), Ms. Basir (Malaysia), Ms. Guevarra (Philippines), Mr. Man (China), Mr. Yodpayung (Thailand), Mr. Paudel (Nepal), Mr. Syarief (Indonesia), Mr. Sidabutar (Indonesia)

1st Row:

Mr. Eratt (L.A.), Mr. Ezura (Staff), Prof. Someda, Prof. Takasu, Prof. Kuwayama, Deputy Director Akane, Director Sakai, Mr. McCulloch (U.K.), Prof. Miura, Prof. Tanabe, Prof. Teramura, Prof. Kakihara, Mr. Fukushima (Staff)

