

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.